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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th April, 2018
Pronounced on:30th May, 2018

\+ **CRL.A. 1444/2013**

JABBAR ..... Appellant

Through: Mr. B.S. Chowdhary and Ms.Sneh Lata Rana, Advocates
Appellant is present in JC

versus

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State
SI Sunil Kumar, PS Begumpur, Delhi

CORAM:
HON'BLE MR. JUSTICE S.P.GARG
HON'BLE MR. JUSTICE C.HARI SHANKAR

% JUDGMENT

C. HARI SHANKAR, J.

1. The impugned judgement, dated 26th September, 2013, passed by the learned Additional Sessions Judge (hereinafter referred to as "the learned ASJ") finds the appellant Jabbar guilty of sodomising and, thereby, committing "aggravated penetrative sexual assault" on, a 6-year-old boy (who shall be referred to, hereinafter, as 'S') and, accordingly, convicts him under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act"). *Vide* order, dated 28th September, 2013, passed as

a sequel thereto, the learned ASJ has sentenced the appellant to undergo imprisonment for life, along with fine of ₹ 5000/– with default rigorous imprisonment of 6 months. The benefit of Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C.") has been extended to the appellant.

2. The appellant appeals, thereagainst.

The Facts and the Evidence

Statements of parents of the victim

3. We may pitch the starting point, for the recital of the facts in the present case, as the statement of Noor Jahan Begum, the mother of the victim 'S', who deposed, during trial, as PW-3. Her deposition reads thus:

> "**On SA**
>
> I have three children i.e. two boys and one daughter. My elder son is aged about 17-18 years and daughter is 10 years old. The victim child is my youngest child, who is 6 years old. I am residing on the above mentioned address with my family. We are permanent residents of District Purniya, Bihar. Prior to 6 months from today at about 10:00-10:30 p.m., my son i.e. the victim child went for laterine near the house. After about one hour, I saw that my son was coming while crying. I saw the accused, present in the Court today (witness has correctly identified the accused), was with my son who on seeing me ran away from there. I made inquiries from my son, who told me that accused Jabbar took him to jungle and did wrong act with him from his backside. My husband called the police by dialling 100 number. Police took my son, my husband and myself to SGM Hospital where

medical examination of my son was conducted. My statement was recorded by the police.

XXXXXX By Sh. Rajnish Kumar Antil, learned amicus curiae for accused.

My statement was recorded by the police at the time when my son was brought from the hospital to the PS. I have stated in my statement to the police that I saw accused Jabbar coming with my son at that time and who, on seeing me, ran away from the spot. Confronted with statement Ex. PW-3/DA where it is not so recorded.

It is wrong to suggest that my son had told me about the incident after coming back to my house. I do not recollect if I told to police that after coming home, my son had told me about the incident. The house of accused is situated at a distance of about 3-4 houses from my house. We had gone to the house of accused after the incident. Accused Jabbar was present at his house. All other family members were sleeping at that time including his father and brother. It is correct that accused Jabbar was apprehended by me at that time and handed over to the police. Again said, the accused was not brought by me from his house at that time. The accused was taken by the police on the day of *Jumma* (Friday) at 2:00 PM. It is wrong to suggest that there were many other children present. It is wrong to suggest that the accused was falsely implicated in the present case. It is wrong to suggest that I am deposing falsely being the mother of the victim child."

4. Mohd Saleem (PW-6), the father of 'S' deposed, during trial, thus:

"**On SA.**

I am residing on the above said address with my wife and three children. I have two sons and one daughter. The victim child is my youngest born child who is aged about 6 years. We are permanent resident of District Purnia, Bihar. About 6 months back at about 10.30 p.m. my son i.e. victim child went for laterine outside near the house. But he did not

return thereafter. I made efforts with my wife to search for him. My wife while searching went towards the fields and she heard some noise and at about 11:30 PM she found my son coming while crying. Accused Jabbar present in the court today ran away after seeing my wife. I also went there and brought the child back to home. On enquiry my son i.e. the victim child told that accused Jabbar took him to jungle side and caused him hurt from his backside (anal region). On hearing this I went to the house of accused Jabbar who is residing in the same locality. I found all the family members were sleeping in the house. Accused Jabbar was not present at home at that time. Thereafter, I came back to my home and found that my son was not feeling well as he was feeling giddiness. On seeing the condition of my son, I called the police at 100 number. PCR van came and took me, my wife and my son to SGM Hospital where the medical examination of my son was conducted. Two police officials came in the night at the hospital itself and recorded my statement which is Ex. PW-6/A and bears my signature at point A. Again Said: Thereafter, one lady police also came there who had recorded my statement Ex. PW-6/A. We remained in the hospital for two days for treatment of my son S. My son was discharged on 22.3.2013 at 3:00 p.m. and thereafter we brought him back to our house. The police officials also came to my house and from there we went to the house of accused Jabbar who was not present at his home. I along with the police officials went in search of the accused who was apprehended from Begum Pur Chowk, Main Kanjhawala Road at 6:00 p.m. on the same day. He was arrested vide his arrest memo Ex. PW-6/B and was personally searched vide memo Ex. PW-6/C, both of which bear my signatures at point A. I can identify accused Jabbar. (The witness has correctly identified accused Jabbar in the court today).

I had brought my son 'S' to the court for his statement and his statement was recorded by learned MM. I do not remember the date of the said statement.

At this stage learned Addl PP prays that she be permitted to put a leading question to the witness regarding the date on which statement of child 'S' was recorded by learned MM.

Heard. Allowed.

It is correct that statement of 'S' was recorded by learned MM on 25.3.2013. It is correct that I could not remember the said date as I am illiterate.

XXXXXX By Sh. Arun Shehrawat and Sh. Rajnish Kumar, learned amicus curiae for accused Jabbar.

My statement was recorded in the hospital by the police. I cannot tell time. House of accused Jabbar is three houses away from my house. I am a mason and my timings are from 8.00 a.m. to 5.00 p.m. Police came at about 11.30-12.00 midnight after my call at 100 number. Public persons collected at the spot from where accused was arrested. The arrest and personal search memo of accused was prepared at that spot itself by the I/O and my signatures were also taken there on said papers. Accused has tried to run away from the spot before police apprehended him. It is wrong to suggest that accused has been falsely implicated in this case or that I am deposing falsely being the father of the victim."

Police Witnesses

7. We may, refer, now to the evidence of the various police witnesses, who deposed in this case.

8. PW-1 HC Chander Singh deposed that, on 21st March, 2013, at about 11.16 p.m, he received information, through the wireless operator of PS Begumpur, that, at H.No.C-18, Rajni Vihar, Begumpur, someone had committed a wrong act with a six year-old girl, which information he reduced to writing *vide* DD No.30/A (Ex.PW-1/A).

9. PW-7 Const. Poonam and PW-11 SI Manju Yadav [who was the Investigating Officer (IO) at that time] of PS Begumpur, deposed,

during trial, that, consequent on receipt of DD No. 30/A, on the night between 21st and 22nd March, 2013, informing them that a case under the POCSO Act was to be investigated, they reached the Hospital, where they were met by SI Sandeep Tushir (PW-10) and HC Suresh (PW-14). SI Sandeep Tushir and HC Suresh handed over, to them, copies of DD No.30/A (Ex.PW-1/A) and the MLC of 'S' (Ex.PW-12/A), along with exhibits taken from 'S' by the doctor. The IO SI Manju Yadav seized the exhibits *vide* Seizure Memo (Ex.PW-7/A) and recorded the statement of Mohd. Saleem (PW-6), on which she made an endorsement (Ex.PW-11/A) and prepared *rukka*. The *rukka* was given to Const. Suresh, for registration of FIR. SI Manju Yadav further deposed that, at about 3.00 p.m. on 22nd March, 2013, she, along with Const. Suresh (PW 14), went to the house of Mohd. Saleem (PW 6), who took them to the place of incident, the site plan whereof was exhibited as Ex.PW-11/B. Later, on the same day, they found Jabbar at Begumpur Chowk. Though Jabbar tried to flee, he was apprehended, with the help of Const. Suresh, interrogated and arrested *vide* Arrest Memo (Ex.PW-6/B). Thereafter, Jabbar was brought to the Police Station, where his disclosure statement (Ex.PW-11/C) was recorded. The appellant led them to an open place of land near an electric pole, which was pointed out by him, *vide* Pointing Out Memo (Ex. PW-11/D), as the spot where he had committed sodomy on 'S'. SI Manju Yadav further deposed that, thereafter, the appellant was medically examined at the Hospital, after which exhibits relating to him, and his clothes, were handed over, to Const. Suresh, by the doctor, which were seized *vide* Seizure Memo Ex.PW-11/E, and thereafter, deposited with the MHCM HC Ram Kumar (PW-5). She

correctly identified Jabbar who was present in court. She further testified that, two days after his admission, 'S' was discharged from the Hospital, whereafter his statement was recorded under Section 164, Cr.P.C., by the learned Metropolitan Magistrate (hereinafter referred to as "the learned M.M."), after which the resumed exhibits were sent to the Forensic Science Laboratory (FSL) and statements of other witnesses were recorded. She also confirmed having collected the Aadhar Card of 'S' (Ex. PW-11/H), from Mohd. Saleem, as proof of the age of 'S', and that, after completion of investigation, charge sheet was filed by her through the SHO. In the course of examination, SI Manju Yadav deposed that the appellant had been arrested at 6:00 P.M. on 22nd March, 2013 and that, though she had requested certain members of the public, who were present at the spot, to join the investigation, no one agreed to do so. We have perused the Aadhar Card (Ex.PW-11/H) and find that, in the said Card, the age of 'S' is, indeed, reflected as six years. We may also note that the veracity of the said Aadhar Card has not been questioned by the defence, at any stage of proceedings.

10. The above depositions, of PW-7 Const. Poonam and PW-11 SI Manju Yadav, are corroborated by the evidence of other police witnesses, i.e. PW-5 HC Ram Kumar [the MHC(M)], PW-8 HC Vijay Kumar, PW-10 SI Sandeep Tushir and PW-14 HC Suresh.

11. PW-5 HC Ram Kumar confirmed the deposit, with him, of seven *pullandas*, sealed with the seal of the Hospital, by SI Manju Yadav on 22nd March, 2013; the handing over by him, of the said

pullandas to Const. Ashok, on 25th March, 2013, for being deposited in the FSL; the deposit of the said *pullandas*, in the FSL *vide* RC 41/21/13, and the handing over, to him, of the acknowledgment issued by the FSL (Ex.PW-5/C), by Const. Ashok.

12. PW-8 HC Vijay Kumar, in his deposition during trial, confirmed receipt of the *rukka*, sent by SI Manju Yadav (PW-11), by him, at 2.45 a.m, on 22nd March, 2013, and registration of FIR No. 96/13 (Ex.PW-8/B) under Section 377 of the IPC, on the basis thereof.

13. SI Sandeep Tushir, deposing as PW-10 confirmed, in his examination-in-chief on 11th September, 2013, having visited the Hospital, where 'S' was found admitted *vide* MLC No.488 (Ex.PW-12/B), and his placing a request for sending a lady police officer, as the case related to the POCSO Act, whereupon SI Manju Yadav (PW-11) and Const. Poonam (PW-7) reached the Hospital.

14. HC Suresh, deposing as PW-14, confirmed having received the *rukka*, from SI Manju Yadav (PW-11), and of having had the FIR registered on the basis thereof. He also confirmed the apprehension and arrest of Jabbar, at 6.00 p.m. on 22nd March, 2013, from Begumpur Chowk, *vide* Arrest Memo (Ex.PW-6/B), and the making of the disclosure statement (Ex.PW-11/C) by Jabbar, thereafter. He further confirmed the fact that Jabbar pointed out the place of incident *vide* Pointing Out Memo (Ex.PW-11/D), and that he was taken to the Hospital, where he was medically examined.

15. None of the aforementioned police witnesses was cross-examined by the defence, despite grant of opportunity.

16. The facts of the case, from the point where Noor Jahan Begum (PW-3) met 'S', in the company of the appellant, till the filing of charge-sheet, by SI Manju Yadav (PW-11) on 22nd March, 2013, stand clearly and consistently mapped out, by the evidence referred to hereinabove.

Testimony of the victim 'S'

17. Inasmuch, in such cases, the evidence of the victim of assault is of prime importance, it would be necessary to set out, *in extenso*, the statements of 'S', recorded under Section 164 of the Cr.P.C, and, thereafter, during trial.

18. The proceedings relating to the statement of 'S', under Section 164 of the Cr.P.C. may be reproduced as under:

> "FIR No. 96/13
> PS: Begumpur
> U/s: 376 IPC and Section 6 of POCSO Act
>
> Date: 25.03.2013
>
> Statement u/s 164 Cr.P.C of 'S' S /o. Salim aged about 6 years R/o B-18, Rajni Vihar, Begumpur, Delhi
>
> An application for recording of the statement of victim 'S' aged about 6 years u/s 164 Cr.P.C is moved by IO, PS Begumpur, Delhi. The same is moved before me being the Ist Link MM of Sh. Sumedh Kr. Sethi, Ld. M.M., Rohini Courts, Delhi. IO has produced the victim. He has been identified by the IO.

Statement of IO/WSI, Manju Yadav No.D-5293, PS-Begumpur, Delhi.

On SA

I identify the victim 'S' S/o Salim aged about 6 years R/o B-18, Rajni Vihar, Begumpur, Delhi.

RO&AC

Sd/-
(AJAY NAGAR)
LMM/Rohini/Delhi/25/03/13

I have already taken off my coat and tie so that child may feel comfortable and fearless.

At this stage I have asked IO to leave the chamber, she/he has left the chamber and at this stage except myself, victim and mother of victim nobody is present inside the chamber.

I have asked the mother of the victim to sit in the chamber, so that victim may feel comfortable to make the statement. Let the statement of the victim be recorded.

Before recording the statement of victim, I have also asked him whether he understands the meaning of oath to which the victim answered in affirmative. He also stated that after taking oath, one should also speak truth. However, he has not been administered the oath as he has not completed the age of 12 years. Having thus satisfied myself, I am of the opinion that the victim is ready to give his statement without any fear, influence or tutoring. Hence, I proceed to record his statement. I have asked certain questions to the victim as mentioned below to know about his state of mind and voluntariness.

Q. What is your name?

A. 'S'

Q. What is your father's name?

A. Salim

Q. What is your mother's name?

A. Noor Jan

Q. What is your address?/Who has come with you?

A. Mother.

Q. Which class are you studying in?

A. I am not studying

Q. In which class will you be promoted?/What is name of your friends?

A. Mithun, Altaf, Bitoo, one more Sohaib.

Q. Which School are studying in?

A. Studying in Masjid

Before recording his statement, I have asked certain number of questions to ensure that the victim has not been tutored by any one. Before recording his statement, I have instructed Mother of victim not to tutor him during recording of statement of victim.

The victim has given rational answers and it seems that he is able to understand the situation and is in fit state of mind. His statement is recorded separately.

RO&AC

Sd/-
(AJAY NAGAR)
LMM/Rohini/Delhi/25/03/13

Certified that statement of victim has been recorded by me in his presence and in the presence of his mother and I have ensured that mother of victim does not tutor or prompt

him during the recording of statement and contains the true and correct account of statement given by him before me.

Sd/-
(AJAY NAGAR)
LMM/Rohini/Delhi/25/03/13

Proceedings stand concluded. It be put in a sealed cover and sent to the concerned Court.

Sd/-
(AJAY NAGAR)
LMM/Rohini/Delhi/25/03/13"

19. The statement of 'S' under Section 164 of the Cr.P.C, translated from the vernacular into English, reads thus:

"Q Yes my son, what happened on the night of 21st / 22nd March, 2013?

A I had gone there to do potty. From there Jabbar took me into the jungle. He then started hitting me from behind. He was threatening me while taking me. He, Jabbar, removed his pant as well as my underwear. Thereafter, he sodomised me. He then told me that we would return via the *pansari*. I told him that three men were standing there and I would return only via that route. Then Jabbar, while threatening me, was returning with me.

Q Son, was anyone else present on that day?

A No, there was only one man.

Q Son, do you want to say anything else?

A No.

Q Son, has anyone done any wrong act with you?

A Yes

Q Who has done wrong act with you?

A Jabbar has.

Q Son, do you want to say anything else?

A No

Q Where do you want to go and with whom?

A Home, with my mother."

20. The fact of recording of the above statement and statement of 'S' under Section 164 Cr.P.C., was proved by the learned M.M. Ajay Nagar, who deposed as PW-4, during trial.

21. The record of the deposition of the victim 'S' during trial, may be reproduced, *in extenso*, thus (along with the translations, into English, of the questions/responses in vernacular):

"**On SA**

The victim child is small tender age child aged about 6 years and so his statement is recorded in the Chamber of the undersigned in camera proceedings. Sh. Salim, father of the victim child, has been permitted to remain present with the child as support person. Learned amicus curie Sh. Rajnish Kumar Antil and learned Additional PP are also present. The accused is sitting in the Court room itself and he has not been called inside the Chamber so that the witness does not get overawed or apprehensive by the presence of the accused.

Since the victim is a small child, he has been provided some chart books to keep him occupied. He is now playing comfortably and identifying fruits and vehicles from the books. In order to ascertain whether the witness is capable of understanding questions and answering them, some questions have been put to him.

Q. *Aap ka naam kya hai?* ("What is your name?")

A. 'S'

Q. *Aap ke papa ka kya naam hai?* ("What is your father's name?")

A. Salim

Q. *Aap ki mummy ka kya naam hai?* ("What is your mother's name?")

A. Mummy

Q. *Aapke kitne bhai behein hai?* ("How many brothers and sisters do you have?")

A. *Ek bada bhai and ek bahin hai.* ("I have one elder brother and one sister.")

Q. *Aap School jate ho?* ("Do you go to school?")

A. *Haa, dusri class me.* ("Yes, to second-class.")

Q. *Aap ke school ka kya naam hhai?* ("What is the name of your school?")

A. *Nahi pata.* ("I don't know.")

Q. *School kaise jate ho?* ("How do you go to school?")

A. *Paidal* (on foot).

Q. *Aap ke school me dost hai?* ("Do you have friends in school?")

A. *Haa.* ("Yes.") Altaf, Bitoo, Mithun.

Q. *Aap ko khane me kya pasand hai?* ("What food do you like?")

A. *Sualeen ki goli.* ("Sualin tablets.")

Q. *Sach bolna sahi hai ya juth bolna?* ("Is it right to tell the truth or to tell lies?")

A. *Sach bolna. Juth bolne se jail wale pakad lete hai.* ("To tell the truth. If you tell lies, person from the jail will catch you and take you away.")

After being satisfied that the witness is capable of understanding questions and answering them reasonably, considering his age, his testimony is recorded in question answer form as under. However, considering his tender age he has not been administered oath.

Q. *Kya hua tha?* ("What happened?")

A. *Bahut din hue the, muje Jabbar ne dard kiya tha.* ("Many days ago, Jabbar caused pain to me.")

Q. *Aap kahan the?* ("Where were you?")

A. *Main latrine karne gaya tha.* ("I had gone to do latrine.")

Q. *Aap kahan gaye the?* ("Where had you gone?")

A. *Main ghar ke pass light ke khambe ke pass latrine karne gaya.* ("I had gone near the electric pole near my house, to do latrine.")

Q. *Phir kaya hua tha?* ("Then what happened?")

A. *Jabbar mujhe uthake jungle mein le gaya.* ("Jabbar picked me up and took me into the jungle.")

Q *Phir kya hua?* ("What happened thereafter?")

A. *Maine payjama pahna hua tha, Jabbar ne payjama utar diya.* ("I was wearing pyjama. Jabbar removed my pyjama.")

Q. *Phir kya hua?* ("What happened thereafter?")

A. *Phir Jabbar ne kiya tha* ("Thereafter Jabbar did") (witness has stood up and touched his anal region with his hand)

Q. *Tumhe kya hua tha?* ("What happened to you?")

A. *Dard hua tha.* ("It caused pain.")

Q. *Phir kya hua?* ("What happened thereafter?")

A. *Usne 10 rupye diya, biscuit diya or "O-Yes" kurkare ka packet diya.* ("He gave me ₹ 10, a biscuit and a packet of *kurkure*.")

Q. *Phir kay hua?* ("What happened thereafter?")

A. *Phir wo muje ghar la raha tha.* ("Thereafter he was bringing me home.")

Q. *Phir kya hua?* ("What happened thereafter?")

A. *Meri mummy aa rahi thi, mummy ne dekh liya aur mummy ko dekhkar wo bhag gaya.* ("My mother was coming, mother saw us, and on seeing mother he ran away.")

Q. *Phir kya hua?* ("What happened thereafter?")

A. *Phir hum Jabbar ke ghar gaye the.* ("Thereafter we went to Jabbar's house.")

Q. *Phir kaya hua?* ("What happened thereafter?")

A. *Phir police wale ko phone kiya.* ("Thereafter we phoned the Police.")

Q. *Kya Jabbar ko jante ho?* ("Do you know Jabbar?")

A. *Haa.* ("Yes.")

At this stage, the glass pane of the window in the chamber has been opened. The window is overlooking the corridor outside the court room where accused is present in police custody. The witness has looked through the window at the accused and states that he is the same boy who had taken him away in jungle and hurt him from back side.

XXXX By Sh. Rajnish Kumar Antil, Learned amicus curie for accused.

Q. *Kya apne Jabbar ko pahle bhi dekha tha kabi?* ("Have you seen Jabbar ever earlier?")

A. *Haa.* ("Yes.")

Q. *Kab dekha tha?* ("When did you see him?")

A. *Wo sharab lekar aya tha. Main latrine karne gaya, muje uthkar mera muh band kar diya. Main, muh band karne se pahle chilaya, koi aya nahi.* ("He came after buying liquor. I had gone to do latrine, he picked me up and covered my mouth. Before he covered my mouth, I shouted, but no one came.")

Q. *Tum Jabbar ka naam kaise jante ho?* ("How do you know Jabbar's name?")

A. *Pahle pahle, wo hamare pados me rahta tha.* ("In the beginning, he used to stay in our neighbourhood.")

Q. *Jab tum latrine karne gaya the, wahan aur bhi bache or admi the?* ("When you went to do latrine, were any other children or men present there?")

A. *Ek Jabbar hi tha.* ("Only Jabbar was there.")

Q. *Waha par light thi?* ("Was that light in the area?")

A. *Bahut sare khambo par light thi.* ("There was light on several poles.")

Q. *Waha par as-pass ghar hai?* ("Were there any houses in the area?")

A. *Haa.* ("Yes.")

Q. *Kya apke chilane par koi admi aya tha?* ("Did anyone come when you shouted?")

A. *Nahi.* ("No.")

Q. *Jab apne mummy ko dekha tha, to tum chilaye the?* ("When you saw your mother, did you shout?")

A. *Haa.* ("Yes.")

Q. *Kya waha par koi dukan hai?* ("Was there any shop in the area?")

A. *Nahi, Jab wo vapas la raha tha, tab maine kaha tha, pansari ki dukan ke wahan par se chal, usne kaha nahi. Dusri jagah se le gaya, mummy aa gayi.* ("No. When he was bringing me back, I asked him to go via the shop of the *paan*-seller, but he refused. He took me via another route, mother came there.")

Q. *Jab app aa rahe the, tab waha par teen admi the?* ("While you were coming were three persons there?")

A. *Nahi. Sab so gaye the.* ("No everyone had gone to sleep.")

Q. *Aaj apko mummy aur papa ne bataya hai ki aaj kya batana hai?* ("Today, did your mother or father tell you what to say?")

A. *Nahi mummy aur papa ne nahi bataya hai. Main apne apse bataya hai.* ("No, mother and father did not tell me. I have spoken of my own accord.")

RO & AC

ASJ(N-W)-01
Rohini/Delhi
10.09.2013"

Medical Evidence

22. With that, we proceed to the medical evidence available in this case. 'S' was examined by the doctors at the Hospital on two occasions; on 21st March, 2013, on which date his MLC (Ex. PW-12/A) was prepared and, thereafter, on 1st May, 2013.

23. PW-12 Dr. Binay Kumar, Sr. Medical Officer in the Hospital deposed, during trial, that on 21st March, 2013, 'S' was brought to him by ASI Bhagna Ram with an alleged history of sodomy, having taken place at about 10:33 PM on the same day. He testified that, on inspection, he observed blood stains and mucosal tear over the perianal region of 'S' which, on palpation, also indicated perianal tenderness. He proved his MLC (Ex. PW-12/A), and further deposed that, after examination, he referred 'S' for surgical and forensic opinion, *vide* an endorsement on the said MLC. To a question put by the Court, as to whether the findings entered by him on the MLC were affirmative of sodomy, he answered that the said injuries, as mentioned by him, on the MLC, were 'possible by sodomy'. He was not cross examined, despite grant of opportunity.

24. Dr. Chittaranjan Nayak (PW-15), Sr. Resident, Surgery, in the Hospital, who examined 'S', consequent to his reference, to him, by PW-12 Dr. Binay Kumar, deposed, during trial, that, on examining 'S' on 21st March 2013**,** he found the following injuries:-

> " On local examination of anal region, there was blood stain.
> 2. Tenderness ++ in the perianal region.
> 3. Mucosal tear in 6 O'clock, 7 O'clock and 12 O'clock.
> 4. Per rectal examination :- Anal spasam ++ (present)."

He further testified that 'S' was admitted in the Hospital for treatment, and was discharged on 22nd March, 2013. He also confirmed having entered the above observations on the body of MLC of 'S' (Ex. PW-12/A). To a question, by the Court, as to whether the observations entered by him, on the MLC of 'S', were affirmative of

sodomy, he responded that "they may be". On his being further queried as to whether similar injuries could result from any other condition, Dr. Nayak opined that such injuries were possible only if the patient fell directly on a sharp object, but that the probability, in cases where such injuries were sustained, was always of sodomy having taken place.

25. As already noted hereinabove, 'S' was again examined, in the Hospital, on 1st May, 2013. Dr. Manoj Dhingra (PW-13), who examined 'S' on the said occasion, deposed, during trial, that, he did not find any injury mark on 'S' but that there was pain and tenderness in the anal region. He also confirmed having given his opinion, to the said effect, on the MLC (Ex.PW-12/A). He confirmed that as the injury had been sustained by 'S' on 21st March, 2013, his examination, of 'S' had taken place about a month and a half thereafter. He, too, when questioned as to whether the pain and tenderness, present in the anal region of 'S' was affirmative of sodomy, responded that "they may be". In response to another question, he clarified that it was possible that even after a month and half following an incident of sodomy pain and tenderness in the anal region of the patient persisted. He confirmed that the pain and tenderness could not be attributed to constipation as it was present in and around the entire anal region.

26. The MLC of 'S' (Ex. PW-12/A) as prepared by PW-12 Dr. Binay Kumar read thus:-

> "Informant: Father (Saleem)
> A/H/O unnatural sexual Act (Sodomy) at around 10.30 PM on 21/03/2013 as told by father of pt.

No H/o /vomiting/ ENT Bleeding
O/s pt. in conscious oriented
Pulse = 82/100
B.P. = 20/WS
Chest -
EVS - - Cl.WNL
CNS -
PIA Bold B (+)

L/E Inspection: Blood stain over perianal region and mucosal tear in perianal region.
Palpation : perianal tenderness present

Adv
Preservaiton of full pant (as patient not wearing undergarment)
Preservation of anal and perianal swab.

A/H/OUnnatural Sexual Act
(Anal penetration by penis)
At 10.30 IM on 21/03/2013
Pt. examined on 21/3/2013
O/E pt. conscious oriented
No H/O LOC/Cavil
No h/o Clinc cstpal bleeding P/R
No H/o any recent injury in and around perianal region
Blood stained
Tender in perianal region
Mucosal tear in 6 O'clock, 7 O'clock and 12 O'clock.
PIR - Anal spasam

1/5/2013
After examination there is no injury mark present but there is pain, tenderness present anal region.
- No bleeding
- Preservation of anal & perianal swab is already done when MLC has been made.

27. None of the above witnesses i.e. Dr. Binay Kumar (PW-12), Dr. Manoj Dhingra, (PW-18) and Dr. Chittaranjan Nayak (PW-15) was cross examined, despite grant of opportunity.

28. The appellant Jabbar was also medically examined, on 22nd March, 2013, whereupon his MLC (Ex. PW-9/A) was prepared by Dr. Niranjan under the supervision of Dr. Bina (PW-9), CMO in the Hospital. Dr. Bina confirmed, during trial, the fact of examination, of 'S', by Dr. Niranjan, who was working under her supervision. She confirmed that, on examination of the appellant, no fresh external injuries were seen and there was nothing to suggest that the appellant was not capable of performing sexual intercourse. She proved the MLC (Ex. PW-9/A) prepared by Dr. Niranjan, and identified his handwriting and signatures, stating that she was familiar therewith. She was not cross-examined, despite grant of opportunity. The relevant portion of the MLC of the appellant Jabbar may be reproduced thus:-

O/E: Pt. is stable conscious & oriented

BP- 122/80

PR -86

CNS
CVS
P/A
Chest
NAD clinically

L/E: No Fresh External injuries are seen

- Pelvis, testis, and scrotum are (N) adult size.

- Secondary "sexual characters are well developed"

- No signs of venereal disease

From the above examination there is nothing to suggest that this person is not capable of performing sexual intercourse.

Statement of appellant under Section 313 Cr.P.C.

29. The statement of the appellant was recorded under Section 313 Cr.P.C., by the learned ASJ on 25th September, 2013. As is usual in such cases, the statement reads as an omnibus denial of all allegations and imputations put to him and professes complete ignorance, regarding 'S' having ever been sodomised or taken to the Hospital and treated therefor. The appellant insisted that he was innocent and that the prosecution witnesses had falsely deposed against him as they were interested witnesses. He alleged that the case against him was false and fabricated and stated that he did not wish to lead any defence evidence.

The Impugned Judgement

30. As has already been noted hereinabove, consequent to leading of above evidence, the learned ASJ proceeded to hear the parties and pronounce the impugned judgment, thereafter, on 26th March, 2013.

31. Regarding the recording of the evidence of 'S', during trial, the learned ASJ has noted, in the impugned judgment, that in order for 'S' to identify the appellant, the glass pane of the window in the chamber attached to the Court room, was opened. She has observed that 'S'

identified that appellant by pointing through the window and stated that the appellant was the boy who had taken him to the jungle and sodomised him. She has observed, that, from the testimony of the appellant, it was seen that he had not only identified the accused but had also elaborated the manner in which the offence of penetrative sexual assault was committed upon him by the appellant.

32. The learned ASJ, even while holding that the testimony of 'S' itself went to prove the commission, by the appellant, of the said offence of aggravated penetrative sexual assault on 'S', has also observed that the testimonies of 'S', PW-3 Noor Jahan Begum and PW-6 Mohd. Saleem were consistent and trustworthy in the narration of the incident in which 'S', who had gone to ease himself at about 10-10:30 P.M. at night outside his house, was taken to the jungle/fields nearby where penetrative sexual assault was committed, on him, by the appellant, by "penetrating his penis in the anus of the child 'S' ". She has relied on ***Surjan and Others vs State of M.P., AIR 2002 SC 476*** and ***State of Maharashtra vs Chandraprakash Kewal Chand Jain, (1990) 1 SCC 550*** as authorities on the point that conviction could be based on the evidence of the solitary witness of sexual assault, where the evidence inspired judicial confidence and was reliable in nature. She has also noticed, in this context, the presumption of guilt contained in Section 29 of the POCSO Act and the fact that there was no reason why a six year old such as the appellant would implicate an innocent person for having committed an offence against him. She has relied on the judgment in ***State of U.P. vs Krishan Master, AIR 2010 SC 3071***, for the proposition that there

was no presumption that a child of tender age would not be able to recapitulate facts, and that seeking corroboration for the evidence of such a child would be unjustified. The learned ASJ has further observed that minor contradictions could not erode otherwise reliable testimonies of their evidentiary value. She has also relied on the medical evidence available on record, which revealed blood-stains and mucosal tear in the perianal region of 'S' along with perianal tenderness. She noted that, even a month and a half after the incident, pain and tenderness in the anal region continued to persist as observed by Dr. Manoj Dhingra (PW-13). She has also relied on the responses of Dr. Binay Kumar (PW-12) and Dr. Manoj Dhingra (PW-13), to questions posed to them by the Court, in which they opined that the injury in the perianal region of 'S' could possibly be due to sodomy. In these circumstances, the learned ASJ has proceeded to hold the charge of sodomy having been committed by the appellant and, thereby, the charge of having committed the offence of "aggravated penetrative sexual assault", punishable under Section 6 of the POCSO Act, proved against the appellant beyond reasonable doubt. She, has, therefore, proceeded to convict the appellant under Section 6 of the POCSO Act.

33. *Vide* subsequent order dated 28th September, 2013, the learned ASJ observed that the act of sodomy perpetrated by the appellant on 'S' was cruel in the extreme, the cruelty whereof stood documented by the fact that even a month and a half after the commission of the said act, tenderness persisted in the anal region of 'S'. She has, thereby, held the appellant to have insulated himself, by his own act, from any

claim to leniency. She has, therefore, sentenced him under Section 6 of the POCSO Act to suffer rigorous imprisonment for life, with a fine of ₹ 5000/- and default rigorous imprisonment for six months as noted at the commencement of this judgment.

Submissions before this Court

34. Arguing for the appellant, Mr. B.S. Chowdhary submitted that the entire evidence, even if holistically viewed, was insufficient to confirm, against his client, the charge of committing sodomy on 'S'. He relied on the fact that there were discrepancies and inconsistencies, *inter se*, between the statements of the mother and father of the victim 'S', i.e. PW-3 Noor Bano Begum and PW-6 Mohd Saleem. He also relied on the fact that the MLC of the appellant (Ex.PW-9A) specifically found no fresh injury, on his person. He emphasised the fact that, in his deposition, during trial, the only complaint, of 'S' was of pain in the anal region, and not of sodomy. He submitted that the area where the crime was alleged to have taken place was a well lit area, as was admitted by 'S' himself, in response to a query, put to him in cross-examination, as to whether there was light in the area. Mr. B.S. Chowdhary submitted that it was highly improbable that such a crime would take place without any objection by any public person. Finally, and without prejudice to his other submissions, Mr. B.S. Chowdhary complained against the sentence awarded to his client by the learned ASJ, submitting that it was excessive, and prayed for the reduction thereof.

35. *Per contra*, Ms. Aashaa Tiwari, learned APP, submitted that, in view of Section 29 of the POCSO act, read with the testimony of 'S', as also the medical evidence available in the case, there was no scope, whatsoever, for interference with the decision of the learned ASJ, either in the matter of conviction or in the matter of sentence awarded therefor. She, therefore, prayed that the appeal be dismissed.

Analysis

Age of the victim 'S'

36. Inasmuch as the appellant has been convicted, by the learned ASJ, under Section 6 of the POCSO Act, it is essential, before proceeding further, to deal with the aspect of the age of 'S'. The POCSO Act defines "child", in clause (d) of Section 2 (1), as "any person below the age of eighteen years". The manner in which the age of a person is to be determined, in order to ascertain whether she, or he, is a juvenile, now stands codified in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the JJ Rules"), which was approvingly relied upon, by the Supreme Court, in ***Jarnail Singh vs State of Haryana, (2013) 7 SCC 263***, which has been followed, by this Court, in ***State vs Charan Singh, MANU/DE/1263/2017*** and ***State vs Mohan, MANU/DE/1766/2017***. Paras 22 and 23 of the report in the said case read thus:

> "**22.** *On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007*

(hereinafter referred to as "the 2007 Rules"). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

> "**12. Procedure to be followed in determination of age**.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
>
> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—
> (a)(i) the matriculation or equivalent certificates, if available; and *in the absence whereof*;
> (ii) *the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such

evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. *Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime.* For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. *Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix* VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12

extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only *in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon.* Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."

(Emphasis supplied)

37. Rule 12 of the JJ Rules, therefore, assigns, in descending order of importance, primacy, as proof of age, to (i) the matriculation, or equivalent, certificate, (ii) the date of birth as recorded by the school first attended, and (iii) the certificate of birth, given by a Corporation, municipal authority, or panchayat. No specified format, for these certificates, is prescribed in the said Rules. The Aadhar Card, being a document issued by the Government of India is, in our view, equivalent – in fact, superior – to a certificate given by a Corporation, municipal authority, or panchayat. The entry, in the said Aadhar card (Ex. PW-11/H), of the age of 'S' as 6 years, must be taken, therefore,

as proof of the fact that, on the date of issuance of the said card (2nd March, 2013), 'S' was, in fact, 6 years of age. We may mention, here, that a Division Bench of the High Court of Madras, in ***Panneerselvam vs. Inspector of Police, MANU/TN/1054/2014***, opined that the Aadhar Card could not satisfy the requisites of Rule 7 of the JJ Rules, as proof of age of the holder thereof, as it did not mention the date of birth, and mentioned, instead, the age in years. This, in our view, is a distinction without a difference. After all, the determination of the date of birth is only for the sake of ascertaining the age of the person concerned. That apart, Rule 7 (3) of the JJ Rules states that "the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee *by seeking evidence* by obtaining" one of the documents enlisted thereunder. As such, the document is only to be referred to, *by way of evidence* for ascertaining the age of the person concerned, and the Rule does not require, either expressly or by necessary implication, that the date of birth of the person should figure on the body of the said document. Indeed, when the document mentions the age itself, no better proof could be sought, for ascertaining the age of the person concerned. We, therefore, regretfully express our inability to subscribe to the view adopted by the High Court of Madras in ***Paneerselvam (supra)***.

38. Besides, the learned ASJ has also opined that, having seen 'S' in court, it was obvious that he was about 6 years of age. Due respect has to be accorded to this view. After all, the issue was not concerning a boy or girl of around fifteen to eighteen years of age, where the age could not be gauged by a mere visual appraisal of the person

concerned. The POCSO Act applies to every person below 18 years of age. If, on seeing 'S' in court, the learned ASJ felt that he was, indeed, around 6 years of age, it can hardly be sought to be contended that she erred in applying, to the present case, the POCSO Act. By no stretch of imagination can it be sought to be contended that a boy, who, at a bare glance, appeared to be around 6 years of age – as contended by him and his parents, and as borne out by the Aadhar Card issued in his name – may have actually been over the age of eighteen.

39. It is obvious, therefore, that 'S' was a "child", within the meaning of clause (d) of Section 2(1) of the POCSO Act and that, therefore, the learned ASJ was justified in so holding.

Applicable interpretative principles

40. The Supreme Court, in a recent decision in ***Alakh Alok Srivsatava vs U.O.I., 2018 SCC Online 478***, after extracting certain paragraphs of the Statement of Objects and Reasons, and the Preamble to the POCSO Act, examined the *raison d' etre* behind its enactment, thus:

> "**12.** In ***Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi), (2017) 15 SCC 133*** one of us (Dipak Misra, J), dwelling upon the purpose of the Statement of Objects and Reasons and the Preamble of the POCSO Act, observed:—
>
> > "20. … the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and

confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.+"

13. At the very outset, it has to be stated with authority that the POCSO Act is a gender neutral legislation. This Act has been divided into various Chapters and Parts therein. Chapter II of the Act titled "Sexual Offences Against Children" is segregated into five parts. Part A of the said Chapter contains two Sections, namely Section 3 and Section 4. Section 3 defines the offence of "Penetrative Sexual Assault" whereas Section 4 lays down the punishment for the said offence. Likewise, Part B of the said Chapter titled "Aggravated Penetrative Sexual Assault and Punishment therefor" contains two sections, namely Section 5 and Section 6. The various sub-sections of Section 5 copiously deal with various situations, circumstances and categories of persons where the offence of penetrative sexual assault would take the character of the offence of aggravated penetrative sexual assault. Section 5(k), in particular, while laying emphasis on the mental stability of a child stipulates that where an offender commits penetrative sexual assault on a child, by taking advantage of the child's mental or physical disability, it shall amount to an offence of aggravated penetrative sexual assault.

14. That apart, Section 28 which occurs in Chapter VII titled "Special Courts" requires for designation of a Court of Session in each district as Special Court specifically, to try offences under the POCSO Act for ensuring a speedy trial which is one of the fundamental objectives of the Act. Further, Section 32 stipulates that State Government shall appoint a Special Public Prosecutor for every Special court, so designated under Section 28, for conducting cases only under the POCSO Act.

15. Chapter VIII of the Act deals with the procedure and powers of these Special Courts and the procedure for recording evidence of the child victim. Section 33 falling under Chapter VIII provides for various safeguards at the trial stage and ensures that various manifold interests of the child are protected. We think it appropriate to reproduce the relevant part of Section 33:—

> "**33. Procedure and powers of Special Court -** (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.
>
> (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.
>
> (3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.
>
> (4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.
>
> (5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation. - For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed."

17. The aforesaid provisions make it clear as crystal that the legislature has commanded the State to take various steps at many levels so that the child is protected and the trial is appropriately conducted.

18. Section 37 provides that the Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence; Section 36 casts a duty on the Special Court to ensure that the child is not exposed in any way to the accused at the time of recording of the evidence while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate. The objective of the POCSO Act is to protect the child from many an aspect so that he/she does not feel a sense of discomfort or fear or is reminded of the horrified experience and further there has to be a child friendly atmosphere.

19. Speaking about the child, a three-Judge Bench in ***M.C. Mehta vs State of T.N, (1996) 6 SCC 756,*** opined that:—

"… "child is the father of man". To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must receive

> education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned."

20. In ***Supreme Court Women Lawyers Association (SCWLA)* v. *Union of India, (2016) 3 SCC 680,*** this Court has observed:—

> "In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for unfathomable reasons and it is the obligation of the law and law-makers to cultivate respect for the children and especially the girl children who are treated with such barbarity and savageness as indicated earlier. The learned Senior Counsel appearing for the petitioner has emphasised on the obtaining horrendous and repulsive situation."

21. Alice Miller, a Swiss psychologist, speaking about child abuse has said:—

> "Child abuse damages a person for life and that damage is in no way diminished by the ignorance of the perpetrator. It is only with the uncovering of the complete truth as it affects all those involved that a genuinely viable solution can be found to the dangers of child abuse."

22. Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved."

41. While it is true that the above decision deals more with the procedural, rather than the substantive, aspects of the POCSO Act, we have, nevertheless, referred to it as it emphasises the child-centric

character of the legislation, an aspect which is more than amply underscored by the Statement of Objects and Reasons to the said Act, already extracted hereinabove *in extenso*.

42. The character and lustre of gold metamorphoses over a period of time, and the "golden rule" of statutory interpretation, today, is not what it was a decade ago. A. K. Sikri, J., in his concurring opinion in ***Shailesh Dhairyawan vs Mohan Balkrishna Lulla, (2016) 3 SCC 619***, explained the position thus:

> "**31.** The aforesaid two reasons given by me, in addition to the reasons already indicated in the judgment of my learned Brother, would clearly demonstrate that the provisions of Section 15(2) of the Act require purposive interpretation so that the aforesaid objective/purpose of such a provision is achieved thereby. The principle of "*purposive interpretation*" or "*purposive construction*" is based on the understanding that the court is supposed to attach that meaning to the provisions which serve the "*purpose*" behind such a provision. The basic approach is to ascertain what is it designed to accomplish? To put it otherwise, by interpretative process the court is supposed to realise the goal that the legal text is designed to realise. As Aharon Barak puts it:
>
> > "Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language." [Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).]
>
> **32.** Of the aforesaid three components, namely, language, purpose and discretion "*of the court*", insofar as purposive

component is concerned, this is the *ratio juris*, the purpose at the core of the text. This purpose is the values, goals, interests, policies and aims that the text is designed to actualise. It is the function that the text is designed to fulfil.

33. We may also emphasise that the statutory interpretation of a provision is never static but is always dynamic. *Though the literal rule of interpretation, till some time ago, was treated as the "golden rule", it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced. Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by the courts not only in this country but in many other legal systems as well.*"

(Emphasis supplied)

43. ***Richa Mishra vs State of Chhatisgarh, (2016) 4 SCC 179***, reiterates the principle, thus:

"**30.** *In order to gather the intention of the lawmaker, the principle of "purposive interpretation" is now widely applied.* This has been explained in ***Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619*** in the following words: (SCC pp. 641-42, paras 31-33)

> "31. The aforesaid two reasons given by me, in addition to the reasons already indicated in the judgment of my learned Brother, would clearly demonstrate that provisions of Section 15(2) of the Act require purposive interpretation so that the aforesaid objective/purpose of such a provision is achieved thereby. *The principle of "purposive interpretation" or "purposive construction" is based on the understanding that the court is supposed to attach that meaning to the provisions which serve the "purpose" behind such a provision. The basic approach is to ascertain what is it designed to accomplish? To put it otherwise, by interpretative process the court is*

supposed to realise the goal that the legal text is designed to realise. As Aharon Barak puts it:

> 'Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language.' [Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).]

32. Of the aforesaid three components, namely, language, purpose and discretion "*of the Court*", insofar as purposive component is concerned, this is the *ratio juris*, the purpose at the core of the text. *This purpose is the values, goals, interests, policies and aims that the text is designed to actualise. It is the function that the text is designed to fulfil.*

33. We may also emphasise that the statutory interpretation of a provision is never static but is always dynamic. *Though literal rule of interpretation, till some time ago, was treated as the "golden rule", it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced.* Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by the courts not only in this country but in many other legal systems as well."

(Emphasis Supplied)

44. Applying the principle of purposive construction, it is essential, therefore, that the provisions of the POCSO Act are interpreted in a child-centric manner, the avowed intention and purpose of the statute being prevention of sexual offences against children. While doing so, however, the Court is, needless to say, to be ever-mindful of the fact that, in its zeal to secure justice to child-victims of sexual oppression, the axe never falls on the neck of the innocent.

45. Also, as noticed in ***Alakh Alok Srivsatava*** *(supra)*, the POCSO Act is gender-neutral. It does not, therefore, discriminate or distinguish between a boy and a girl, as victims of sexual offences. The jurisprudence that has developed, with respect to the testimonies of girl-victims, as witnesses would, therefore, apply, so far as the POCSO Act is concerned, *mutatis mutandis* to boy-victims.

Statement of the child-victim

46. In our recent decision, dated 24th May, 2018 in ***Sanjay Kumar Valmiki vs State*** [***Crl Appeal 773/2015***], we have, on the basis of earlier judicial pronouncements, of the Supreme Court in ***Yogesh Singh vs Mahabeer Singh, (2017) 11 SCC 195***, ***Satish vs State of Haryana, (2018) 11 SCC 330*** and ***State of Madhya Pradesh vs Ramesh, (2011) 4 SCC 786***, and of this Court in ***Latif vs State, 2018 SCC Online Del 8832***, culled out the following principles, regarding the treatment of the evidence of child witnesses, and the value to be attached thereto:

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only *where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.*

(iii) *If, therefore, the child witness is found competent to depose to the facts, and reliable, his evidence can be relied upon and can constitute the basis of conviction.*

(iv) The Court has to ascertain, for this purpose, *whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.*

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as,

otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, *the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored.* Twin, and mutually opposing, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially those of tender years, are open to influence and could possibly be tutored. On the other hand, credibility is attached, to the evidence of a competent child witness, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vii) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness.

47. Applying the above tests, we find no reason to discredit or disbelieve the testimony of 'S', which was consistent, in all material particulars, as recorded under Section 164 of the Cr.P.C. on 25th March, 2013 and, thereafter, during trial on 10th September, 2013. The learned ASJ satisfied herself, regarding the credibility and competence of 'S' to testify, by putting leading questions to him, and eliciting answers thereto. As has already been noted herein above, the position, in law, is that the Trial Court is the best authority to arrive at an impression regarding the competence of the child witness to testify, and, unless there is an obvious reason to feel that such an impression has been arrived at, without any valid justification, this Court would be loath to interfere therewith. Nevertheless, we have perused the preparatory questions, put by the learned ASJ who recorded the statement of 'S', under Section 164 of the Cr.P.C., and have also gone through Ex. PW-4/C, which sets out the steps taken and precautions observed before recording the said statement, and we are satisfied that the learned ASJ exercised all care and caution to assess and ascertain the competence of 'S', to testify, before recording his statement. Equally, we have gone through the questions put by the learned ASJ who, later, recorded the statement of 'S' during trial, and find that all necessary precautions were taken by the said learned ASJ as well, before recording the testimony of 'S'. We have also gone through the statements of 'S', as recorded under Section 164 of the Cr.P.C. and, thereafter, during trial, and find that they are coherent, confident and detailed, and do not disclose any hesitation, or prevarication, on the part of 'S', at any stage. It is also significant to note, in this regard, that, in his cross-examination, 'S' specifically denied the suggestion,

put to him, that he had been tutored, either by the Police or by his parents, before giving the said statements, and asserted, categorically, that he was giving his statements of his own accord.

48. We are satisfied, therefore, that 'S' was a competent and credible witness, and that, being the victim, his statement, if it inculpated the appellant, could legitimately constitute the sole basis for his conviction.

49. Having gone through the depositions of 'S', under Section 164 of the Cr.P.C. and, thereafter, during trial, we find that they allege, quite categorically, that the appellant had sodomised him. The suggestion, to the contrary, by Mr. B. S. Chowdhary, during arguments before us, that 'S', in his statement during trial, only alleged that the appellant had caused pain to him, deserves to be rejected outright. A reading of the said deposition makes it clear that 'S' asserted, unequivocally, that, when he had gone to ease himself, the appellant picked him up, carried him towards the jungle, removed his pyjama, and assaulted him in his anal region. The reference to pain having resulted therefrom was only to indicate the trauma suffered by him as a consequence of the assault committed by the appellant. It is clear, on the face of it, that 'S', in his depositions, categorically held the appellant liable for having sodomised him in the fields, where he had gone to ease himself at night.

50. The depositions of 'S' stand corroborated by the testimonies, during trial, of his parents, Noor Bano Begum (PW-3) and Mohd

Saleem (PW-6), who deposed, consistently, that (i) about six months prior to the recording of their statements, i.e. around March, 2013, at about 10.30 p.m, Noor Jahan Begum saw 'S' returning from the fields, where he had gone to ease himself, (ii) he was accompanied by the appellant, who fled on seeing her, (iii) 'S' was crying, (iv) her husband Mohd. Saleem also reached the spot and they brought 'S' home with them, (v) on enquiry, from him, 'S' revealed that the appellant had taken him towards the jungle and sodomised him, (vi) Mohd. Saleem, thereupon contacted the P.C.R. Van, which arrived and took them to the Hospital, where the medical examination of 'S' was conducted, (vii) 'S' remained in the Hospital for two days and, consequent to his discharge on 22nd March, 2013 at 3.00 p.m, was brought back home, (viii) at 6.00 p.m, on the same day, the appellant was apprehended from Begumpur Chowk and arrested *vide* Arrest Memo Ex.PW-6/D. It is true that, in her deposition, Noor Jahan Begum (PW-3) initially said that, after returning home with their son, on 20th March, 2013, they had proceeded to the appellant's house, where he had been arrested; however, immediately, thereafter, she corrected herself to say that the appellant was arrested on the day of *jumma* (Friday). There is also discrepancy regarding the time of arrest of the appellant, with Noor Jahan Begum (PW-3) stating that he was arrested at 2.00 p.m, and Mohd. Saleem (PW-6) stating that he was arrested at 6.00 p.m. However, these inconsistencies do not impinge on the main issue of the appellant having sodomised 'S'; accordingly, we are not inclined to attach much importance thereto. Besides, absolute consistency cannot be expected, of parents of a six years old boy who had been sodomised six months prior thereto.

51. The fact of the appellant having been sodomised also stands proved by the MLC (PW-12/A) of the appellant, which contained the comments of as many as three doctors, i.e. Dr. Binay Kumar (PW-12), Dr. Chittaranjan Nayak (PW-15) and Dr. Manoj Dhingra (PW-13), and was proved by each of them, during trial. The MLC, read with the statements of the said three doctors during trial, make it clear that, when 'S' was examined, on 21st March, 2013, first by PW-12 Dr. Binay Kumar and, thereafter, by Dr. Chittaranjan Nayak, bleeding was noted around his anal area, along with mucosal tears at three places in the perianal region, aggravated anal spasm and perianal tenderness observed on palpation. Both the doctors, on being questioned, further deposed that the anal injuries suffered by 'S' could be attributed to sodomy, with Dr. Nayak further clarifying that the only other situation in which such injuries could be suffered were if the patient were to directly fall on a sharp object. There is no dispute that no such fall was sustained by 'S'; that apart, Dr. Nayak went on to opine that, in any case, the probability, in the case of such injuries, was always of sodomy having taken place. Dr. Manoj Dhingra (PW-13), who examined 'S' almost a month and a half after his examination by Dr. Binay Kumar and Dr. Chittaranjan Nayak, observed that, even at that distance of time, there was pain and tenderness in the anal region. He was also of the opinion that such pain and tenderness could be attributed to sodomy, and clearly rejected the suggestion that constipation could be the cause thereof, noting that the pain and tenderness were present in and around the entire anal region.

52. Clause (m) of Section 5 of the POCSO Act defines "aggravated penetrative sexual assault" as including, *inter alia*, "penetrative sexual assault on a child below 12 years". "Penetrative sexual assault" is, in turn, defined in Section 3, which states that a person is said to commit "penetrative sexual assault" if, *inter alia*, "he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child…" In view of our findings hereinabove, it is obvious that the decision, of the learned ASJ, to hold the appellant guilty of having committed "aggravated penetrative sexual assault" on 'S', is both unassailable and unexceptionable.

53. The residuary evidence available in the case, too, fortifies the above conclusion. It was consistently deposed, by PW-10 SI Sandeep Tushir and PW-11 SI Manju Yadav, that, on seeing the Police, the appellant tried to flee. These testimonies, too, sustained cross-examination. We may also rely, for our conclusion, on the fact, as deposed by SI Manju Yadav and HC Suresh (PW-14), that the appellant correctly pointed out the spot where he had committed sexual assault on 'S'. While HC Suresh was not cross-examined, the deposition of SI Manju Yadav, was subjected to cross-examination, no specific suggestion, questioning the correctness of her deposition to this effect, is to be found therein.

54. Per sequitur, we uphold, unhesitatingly, the conviction, of the appellant, under Section 6 of the POCSO Act.

Sentence

55. Psychosocial deviancy and aberrant sexual proclivities are writ large on the offence committed by the appellant on 'S', a helpless 6 year old boy. We wholeheartedly agree with the learned ASJ, when she holds that the persistence, of the pain and tenderness, in the perianal region of 'S', a month and a half after he had been sodomised, was indicative of the brutality of the act. As against this, however, we also bear in mind the fact that the appellant is only 30 years of age as on date, and that there is no evidence to indicate that he was a habitual offender, or incorrigibly inclined towards committing such acts. There is no reason to believe that the offence committed by the appellant on 'S' was not a one-off, or that, having tasted blood as it were, he would continue to repeat such offences in future. In these circumstances, we are of the view that a sufficiently long period of incarceration would be sufficient to chasten the appellant, and deter him from contemplating the commission of such deviant acts in future.

56. While, therefore, we are of the view that the minimum punishment imposable for aggravated penetrative sexual assault, under Section 6 of the POCSO Act, i.e. 10 years' rigorous imprisonment, would be insufficient in the present case, directing incarceration of the appellant, for life, would certainly be disproportionate to the offence committed by him. The right to breathe free, in the open air, is a constitutional guarantee, preambularly promised to every Indian denizen, and, for the citizenry of the country, stands sanctified by Article 21 of the Constitution of India. Permanent extinction of the

said right, for life, must, therefore, necessarily visit only the most hardened of offenders, in the most extreme cases. The "quality of mercy", unstrained, must always temper the hard scales of the law, if a just balance is to be achieved.

57. Section 6 of the POCSO Act stipulates, as punishment for aggravated penetrative sexual assault, "rigorous imprisonment for a term *which shall not be less than 10 years but which may extend to imprisonment for life",* along with fine. Guidance, for the manner in which such an expression is to be understood, may be found in a recent judgement, of a 3-Judge Bench of the Supreme Court, in ***Rakesh Kumar Paul vs State of Assam, MANU/SC/0993/2017***, in which, dealing with the situation in which the statutory provision prescribed maximum, and minimum, periods of imprisonment, it was held thus (in para 25 of the judgement):

> "While it is true that merely because a minimum sentence is provided for in the statute it does not mean that only the minimum sentence is imposable. Equally, there is also nothing to suggest that only the maximum sentence is imposable. *Either punishment can be imposed and even something in between*. Where does one strike a balance? It was held that *it is eventually for the court to decide what sentence should be imposed given the range available.*"
>
> (Emphasis supplied)

58. ***Rakesh Kumar Paul (supra)*** relied, in turn, on ***Bhupender Singh vs Jarnail Singh, (2006) 6 SCC 277***. That case related to Section 304-B of the IPC which postulated, for dowry death, punishment by way of "imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life", which, clearly, is similar to Section 6 of the POCSO Act, with which

we are concerned. The Supreme Court held thus (in para 11 of the report):

> "The position is different in respect of the offence punishable under Section 304-B IPC. In the case of Section 304-B *the range varies between 7 years and imprisonment for life. What should be the adequate punishment in a given case has to be decided by the court on the basis of the facts and circumstances involved in the particular case.*"
>
> (Emphasis supplied)

59. Reference may also usefully be made, in this context, to another recent judgement of the Supreme Court in ***State of Himachal Pradesh vs Nirmala Devi, (2017) 7 SCC 262***, in which, dealing with Sections 307 (which prescribed punishment of imprisonment "which may extend to life imprisonment") and 392 (which prescribed of rigorous imprisonment "which may extend to 10 years") of the IPC, the Supreme Court held that these provisions conferred "*a wide discretion ... to the court to impose any punishment which may be from one day (or even till the rising of the court) to 10 years/life.*"

60. Dealing specifically with a case of rape of an 8-year-old girl, the Supreme Court held, in ***Shyam Narain vs State, (2013) 7 SCC 77***, thus (in para 26 of the report):

> "It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than 10 years, has also provided that the sentence *may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court.*"

61. The above decisions make it clear that, under Section 6 of the POCSO Act, while no sentence, of imprisonment for less than 10

years, may be awarded, the court may award any higher sentence, which may extend to life imprisonment. Balancing all factors, to which allusion has already been made herein above, we are of the considered opinion that, in the present case, a period of 15 years' rigorous incarceration (with the benefit of Section 428 of the Cr. P.C remaining available to the appellant) would suffice.

62. Resultantly, while the impugned judgement, dated 26th September, 2013, whereby the learned ASJ has convicted the appellant under Section 6 of the POCSO Act, is maintained, the order of sentence, dated 28th September, 2013, passed by the learned ASJ, is modified by reducing the punishment awarded to the appellant to 15 years' rigorous imprisonment. The fine of ₹ 5000/–, as well as the default sentence of 6 months rigorous imprisonment, awarded by the learned ASJ, remains undisturbed. The appellant would also be entitled to the benefit of Section 428 of the Cr.P.C., as stands extended, to him, by the learned ASJ.

63. The appeal is partly allowed, in the above terms. Trial Court record be sent back with copy of the judgment. Intimation be sent to Superintendent Jail.

C.HARI SHANKAR
(JUDGE)

S. P. GARG
(JUDGE)

May 30, 2018
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