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

**Date of Decision: 09<sup>th</sup> August 2024**

+ CRL.REV.P. 852/2024

SUNDARI GAUTAM

.....Petitioner

Through: Mr. Piyush Sachdev with Mr. Raja Chatterjee, Ms. Ayushi Arora, Ms. Anupama Gupta and Ms. Riya Datta, Advocates.

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Utkarsh, APP for the State with SI Nisha Sharma, P.S.: Govindpuri.

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present revision petition filed under section 397 read with section 482 of the Code of Criminal Procedure 1973, the petitioner impugns order dated 14.03.2024, whereby, based upon chargesheet dated 10.02.2023, the learned ASJ, Saket Courts, New Delhi has framed charge against the petitioner under section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

2. Notice on this petition was issued *vide* last order dated 08.07.2024; consequent whereupon Status Report/Reply dated 12.07.2024 has been filed by the State.



3. The court has heard Mr. Piyush Sachdev, learned counsel for the petitioner as well as Mr. Utkarsh, learned APP appearing for the State.

**SUBMISSIONS ON BEHALF OF THE PETITIONER**

4. Mr. Sachdev submits, that the petitioner challenges order dated 14.03.2024 made by the learned ASJ principally on the following three grounds :
  - 4.1. *First*, Mr. Sachdev contends, that the incident that is the subject matter of the FIR dates back to 17.07.2018 but the FIR was registered some 04 years after the date of the alleged commission of the offence; and is therefore vitiated by inordinate and unexplained delay.
  - 4.2. *Second*, Mr. Sachdev submits, that based on the material collected during investigation, the chargesheet itself records that no intent of sexual assault can be attributed to the petitioner; and that absent any sexual intent, no purpose would be served by putting the petitioner through trial. It is argued that the aforesaid observation appearing in the chargesheet is based upon the investigation conducted by the police themselves, and in particular it is based on the statement of the petitioner's 06-year-old son, who the police say was present in the house, as also on the opinion of the doctor who examined the injuries found on the body of the victim.
  - 4.3. *Third*, Mr. Sachdev argues, that the offence of "*penetrative sexual assault*" as defined in section 3 of the POCSO Act, and therefore the offence of "*aggravated penetrative sexual*



*assault*” appearing in section 5 thereof, *can never be made-out against a woman*, since a plain reading of the definition in section 3 shows that it only, and repeatedly, uses the pronoun ‘he’; meaning thereby that the intent of the Legislature was *only* to make a man liable for the offence under section 3 of the POCSO Act. It is argued that since section 3 has no application to a woman, section 5 which refers only to an aggravated form of the offence under section 3, can also apply only to a man and not to a woman. To bolster this submission, emphasis has been placed Mr. Sachdev to the definition of ‘rape’ under sections 375 and 376 of the Indian Penal Code, 1860 (‘IPC’). Counsel submits that the definition of rape appearing in IPC is *in pari materia* with the definition of ‘*penetrative sexual assault*’ in section 3 of the POCSO Act; and that therefore an offence under section 3 of the POCSO Act can only be committed by a man just as an offence under section 375 of the IPC. Mr. Sachdev places reliance on judgment of the Supreme Court in *Independent Thought vs. Union of India & Anr.*,<sup>1</sup> wherein it has been held that “... ..*there is no real distinction between the definition of “rape” under IPC and the definition of “penetrative sexual assault” under the POCSO Act... ..*”

#### **SUBMISSIONS ON BEHALF OF THE STATE**

5. Opposing the submissions made on behalf of the petitioner, Mr.Utkarsh, learned APP appearing for the State explains, that the delay in registration of the FIR was by reason of the fact that the

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<sup>1</sup> (2017) 10 SCC 800



victim was admitted to Safdarjung Hospital, New Delhi for treatment; and after considering the nature of the injuries sustained by the child victim, she was then referred to an NGO. Thereafter, a counsellor from the Child Welfare Committee ('CWC') recorded the victim's statement and the matter was referred to the concerned Juvenile Justice Board ('JJB'). It is submitted that it was only after all these proceedings that the FIR came to be registered in the present case.

6. Furthermore, learned APP submits, that medical evidence in the present case has corroborated the testimony of the child victim recorded by the counsellor on 07.09.2018, which was soon after the date of the alleged incident. In this behalf, counsel places reliance on a subsequent medical opinion obtained by the investigating officer which states that "... ..[t]he possibility of penetrative sexual assault cannot be ruled out."
7. As for the applicability of sections 3 and 5 of the POCSO Act to a female offender, learned APP submits, that that the POCSO Act is a gender-neutral legislation and holds perpetrators, regardless of their gender, accountable for sexual offences against minors. Learned APP also draws attention to the word "*person*" appearing at the beginning of section 3 of the POCSO Act, submitting that the use of that word at the beginning of the definition shows that the offence defined therein is not to be construed in a narrow sense and must include women offenders as well.

### **DISCUSSION & CONCLUSIONS**

8. Addressing the *first* issue raised on behalf of the petitioner, namely of delay in registration of the FIR, the argument is that there has been



inordinate, unexplained delay in registering the FIR, which vitiates the entire process and entitles the petitioner to be discharged in the matter. In this behalf, the timeline of various steps and proceedings in the case, from the date of the alleged incident upto the date of registration of the FIR, may be looked at. These may be summarised as below :

Particulars	Relevant Date
Date of the alleged incident	17.07.2018
CWC, Kalkaji directed SHO, P.S.: Govind Puri to take appropriate legal action under POCSO Act	01.08.2018
Information received from CWC, Kalkaji at P.S.: Govind Puri	07.09.2018
Case transferred from CWC, Kalkaji to JJB-II	23.08.2019
JJB-II directed SHO, P.S.: Govind Puri to register FIR	04.09.2019
FIR No. 737/2022 registered under section 376 IPC & section 6 POCSO Act at P.S.: Govind Puri, Delhi	15.10.2022

9. Upon an objective assessment of the forgoing timelines, in the opinion of the court, though the time taken in the proceedings before the CWC and the JJB does not require any explanation, it is noticed that despite JJB-II having issued a direction on 04.09.2019 to the S.H.O. P.S.: Govindpuri, Delhi to register the FIR, the FIR only came to be registered on 15.10.2022, *i.e.* more than 03 years later. There is therefore no doubt that there has been delay in registration of the FIR. However, it is also noticed that *vide* order dated 18.01.2024, while



framing charge, the learned ASJ has also called for a report from the concerned DCP, seeking an explanation from the police officials responsible for the delay. That apart, this court is of the view that delay in registration of an FIR can in any case not be ground for discharge of an accused, which is the subject matter of consideration in the present proceedings. Furthermore, considering the seriousness of the allegations and the nature of the case, this court is also not persuaded to allow the present revision petition merely on the ground that there was delay in registration of the FIR.

10. It may also be noted that under section 6 of the POCSO Act, the offence of '*aggravated penetrative sexual assault*' is punishable with a *minimum* sentence of rigorous imprisonment of 20 years, which may also extend to life imprisonment; and the Legislature has also considered it necessary to emphasise, that for purposes of section 6, life imprisonment shall mean imprisonment for the remainder of natural life of the convict. Considering the harsh punishment prescribed for the offence under section 6, the delay, if any, in the registration of the FIR would, in any case, not warrant quashing of the charge framed against the petitioner.
11. The petitioner's *second* contention is that since, based on the opinion of the doctor and the statement of the petitioner's 06 year old son, the charge-sheet itself narrates that no *intent* of sexual assault can be attributed to the petitioner, therefore the petitioner must be discharged. To answer that contention, it must be noted that since charge has been framed against the petitioner under section 6 of the POCSO Act (which is the punishment section for the offence under



section 5 of the POCSO Act), in line with the decision of this court in *Dharmander Singh vs. State (NCT of Delhi)*,<sup>2</sup> the statutory presumption embedded in section 29 of the POCSO Act gets triggered. Section 29 reads as follows :

**29. Presumption as to certain offences.**—Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

(emphasis supplied)

12. Though the petitioner has challenged the very order framing charge, in the opinion of this court, neither the opinion of the doctor, nor the statement of the petitioner's 06-year-old son (who is stated to have been present at the time of commission of offence), nor any observation in the chargesheet is sufficient to displace the statutory presumption under section 29 or to negate the petitioner's intention in relation to the offence alleged; and such a finding can *only* be made by the court based upon evidence that would be adduced before it, after witnesses have deposed in the course of the trial.
13. Also, it is settled law that at the stage of framing charge the court is only required to assess the evidence produced before it, to see if based on such evidence there is "*grave suspicion*" that the accused has committed the offence alleged; and the court may "*sift and weigh the evidence for the limited purpose of finding out whether or not a prima-facie case against the accused has been made out*", without

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<sup>2</sup> 2020 SCC OnLine Del 1267



conducting a “*roving enquiry into the pros and cons of the matter*” and the court must not assess “*the probative value of the material on the record.*”<sup>3</sup> Equally therefore, while excising its revisional jurisdiction, it is not the remit of this court to opine on the weight or validity of the evidence based on which the trial court has framed the charge.

14. Accordingly, even if in the opinion of the doctor and as per the statement of the child, there was no sexual intent on the part of the petitioner, that opinion and statement is required to be tested in the course of trial and is not sufficient to discharge the petitioner at this stage. The narration in the charge sheet, which is based on the doctor’s opinion and the child’s statement, is equally irrelevant for discharging the petitioner. Accordingly, the second argument raised on behalf of the petitioner also does not warrant quashing of the charge framed against the petitioner.
15. Now coming to the *third* and perhaps the most significant legal argument raised on behalf of the petitioner, which is that the offence of ‘*penetrative sexual assault*’ and ‘*aggravated penetrative sexual assault*’ can simply not be made-out against a woman.
16. To address this submission, it is necessary to first notice certain definitions appearing in the POCSO Act and in the IPC, in light of which this submission must be examined.
17. To appreciate the position, it is necessary to notice section 2(2) of the POCSO Act, which helps in interpreting the other definitions. Section 2(2) reads thus :

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<sup>3</sup> *Sajjan Kumar vs. Central Bureau of Investigation*, (2010) 9 SCC 368 at para 21





**2. Definitions.—(1)**

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(2) *The words and expressions used herein and **not defined** but **defined in the Indian Penal Code** (45 of 1860), the Code of Criminal Procedure, 1973 (2 of 1974), the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) and the Information Technology Act, 2000 (21 of 2000) **shall have the meanings respectively assigned to them in the said Codes or the Acts.***

(emphasis supplied)

18. The next important provision, which is required to be read is section 8 of the IPC, which reads as follows :

**8. Gender.**—*The pronoun “he” and its derivatives are used of any person, whether male or female.*

19. It must also be born in mind that the definition of ‘*aggravated penetrative sexual assault*’ under section 5 is a consequential definition arising from the offence of ‘*penetrative sexual assault*’ defined in section 3 of the POCSO Act. Section 3 of the POCSO Act is reproduced below :

**3. Penetrative sexual assault.**—**A person** is said to commit “penetrative sexual assault” if—

(a) **he** penetrates **his** penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) **he inserts, to any extent, any object or a part of the body, not being the penis,** into the vagina, the urethra or anus of the child or makes the child to do so with **him** or any other person; or

(c) **he manipulates any part of the body of the child** so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with **him** or any other person; or



(d) **he applies his mouth** to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

(emphasis supplied)

20. Drawing from the definition in section 3, the Legislature has engrafted in section 5 the aggravated form of the offence of penetrative sexual assault, in the following words :

**5. Aggravated penetrative sexual assault.**—(a) *Whoever, being a police officer, commits penetrative sexual assault on a child—*

(i) ... .. (iv)

(b) *whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child—*

(i) ... .. (iv)

(c) *whoever being a public servant commits penetrative sexual assault on a child; or*

(d) *whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or*

(e) *whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or*

(f) *whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or*

(g) *whoever commits gang penetrative sexual assault on a child.*



*Explanation.—When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or*

*(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or*

*(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or*

*(j) whoever commits penetrative sexual assault on a child, which—*

*(i) ..... (iv); or*

*(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or*

*(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or*

*(m) whoever commits penetrative sexual assault on a child below twelve years; or*

*(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or*

*(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or*

*(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or*



(q) *whoever commits penetrative sexual assault on a child knowing the child is pregnant; or*

(r) *whoever commits penetrative sexual assault on a child and attempts to murder the child; or*

(s) *whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence or during any natural calamity or in similar situations; or*

(t) *whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*

(u) *whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.*

(emphasis supplied)

21. The object and purpose of enacting a special legislation for protecting the rights of a child has been explained by a 03-Judge Bench of the Supreme Court in *Attorney General for India vs. Satish & Anr. and other connected matters*<sup>4</sup> in the following words :

*“33. So far as the object of enacting the POCSO Act is concerned, as transpiring from the Statement of Objects and Reasons, since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically provided for nor were they adequately penalised, the POCSO Act was enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences and for matters connected therewith and incidental thereto. While enacting the said Act, Article 15 of the Constitution which empowers the State to make special provisions for children, and the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, as acceded to by the*

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<sup>4</sup> (2022) 5 SCC 545



*Government of India, prescribing a set of standards to be followed by all the State parties in securing the best interest of the child, were also kept in view. The POCSO Bill intended to enforce the rights of all children to safety, security and protection from sexual abuse and exploitation, and also intended to define explicitly the offences against children countered through commensurate penalties as an effective deterrence.”*

22. It is clear that the pronoun ‘he’ is not defined anywhere in the POCSO Act. In view of the provision of section 2(2) of the POCSO Act, one must fall back upon the definition of that pronoun as it appears in section 8 of the IPC. Giving due regard to the fact that the Legislature enacted the POCSO Act in order to provide protection to children from sexual offences – regardless of whether an offence is committed upon a child by a man or a woman – the court must not interpret any provision of the statute that derogates from the legislative intent and purpose.
23. When viewed from this lens, the only rational inference is that the pronoun ‘he’ appearing in section 3(a), 3(b), 3(c) and 3(d) must *not* be so interpreted as to restrict the offence engrafted in those sections only to a ‘man’. It is extremely important to note that the said provisions include within the ambit of *penetrative sexual assault*, the *insertion of any object or body-part*; or the *manipulation of any body-part* of a child to cause penetration; or the *application of the mouth*. It would therefore be completely illogical to say that the offence contemplated in those provisions refers only to *penetration by a penis*.
24. Though it has been argued on behalf of the petitioner that in *Independent Thought* (supra) the Supreme Court has held that the definition of ‘rape’ appearing in the IPC is *pari materia* with the



definition of ‘*penetrative sexual assault*’ in the POCSO Act, in the opinion of this court, the petitioner is reading the observations of the Supreme Court in *Independent Thought* in the wrong context and manner, since, as argued by the learned APP, the definition of ‘*penetrative sexual assault*’ under section 3 and of ‘*aggravated penetrative sexual assault*’ in section 5 of the POCSO Act is not limited to the offence of rape.

25. In the opinion of this court, a comparison of the offence defined in section 375 of the IPC (on the one hand) and in sections 3 and 5 of the POCSO Act (on the other) shows that the offences so defined are different. Though the *acts* that form the gravamen of the offence in section 375 of the IPC *are the same* as those in sections 3 and 5 of the POCSO Act, the opening line of section 375 specifically refers to a “man” whereas the opening line of section 3 refers to a “person”. The scope and meaning of the word “man” appearing in section 375 of the IPC is not under consideration of this court in the present proceedings. But there is no reason why the word “person” appearing section 3 of the POCSO Act should be read as referring only to a ‘male’. It is accordingly held that the acts mentioned sections 3 and 5 of the POCSO Act are an offence *regardless of the gender of the offender provided the acts are committed upon a child*.
26. On a conjoint reading of the foregoing provisions of the POCSO Act, it is accordingly held that the word ‘he’ appearing in section 3 of the POCSO Act cannot be given a restrictive meaning, to say that it refers only to a ‘male’; but must be given its intended meaning,



namely that it includes within its ambit any offender *irrespective of their gender*.

27. As a sequitur to the above, on a *prima-facie* consideration of the material placed on record along with the chargesheet, in the opinion of this court, the offence of '*aggravated penetrative sexual assault*' is made-out against the petitioner, even though she is a woman; and the petitioner is therefore required to be put to trial for the offences as charged.
28. In the above view of the matter, this court is not persuaded to allow the prayer made in the petition.
29. The petition is accordingly dismissed.
30. Pending applications, if any, also stand disposed-of.

**ANUP JAIRAM BHAMBHANI, J.**

**AUGUST 09, 2024**

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