

Latest HLJ 2025 (HP)(1) 101 In the High Court of Himachal Pradesh, Shimla.

Cr. Appeal No.20 of 2022

Indian Penal Code, 1860 Sections–377&506 read with Section–6 of Protection of Children from Sexual Offences Act, 2012–Unnatural sexual assault (sodomy)–Lack of medical corroboration for sodomy– Determination on Medical and Scientific Evidence–Accused committed unnatural sexual assault (sodomy) on a 10-year-old child in a forested area after luring him with mangoes–Victim categorical said that the accused had committed sodomy–Conviction–Appeal–Held–That, there was no evidence of penetrative sexual assault in the anus of the child based on clinical examination and FSL report–In the absence of medical or scientific evidence, a conviction under Section 377 IPC cannot be sustained–Thus, the learned Trial Court erred in 2025 Abhishek Mohammad @ Shekhu V/s State of H.P. 101

finding that the accused had manipulated the private parts of the victim–Conviction set aside–Appeal allowed. (Paras 14,19&20) Cases referred:

(1) Varkey Joseph vs. State of Kerala, 1993 Supp (3) SCC 745: 1993 SCC (Cri) 1117.

(2) State (Govt. of NCT of Delhi) vs. Mullah Muzib, 2015 SCC OnLine Del 7228.

Parties represented by:

For the Appellant: Mr. Arun Sehgal, Advocate in Cr. MP(M) NO. 2431 of 2024.

For the Respondents: Mr. I.N. Mehta, Senior Additional Advocate General with Ms. Sharmila Patial, Additional Advocate General. Rakesh Kainthla, Judge:- The present appeal is directed against the judgment dated 28.01.2022 and order dated 31.01.2022 passed by learned Special Judge, Fast Track Court, Kangra at Dharamshala (learned Trial Court) vide which the appellant (accused before learned Trial Court) was convicted of the commission of offences punishable under Sections 377 and 506 of Indian Penal Code (in short 'IPC') and Section 6 of Protection of Children from Sexual Offences Act (in short 'POCSO Act') and was sentenced as under:-

Section Sentence imposed Under Sections 506 of IPC To undergo simple imprisonment for two years and to pay a fine of ₹2,000/- and in default of payment of fine to further undergo simple imprisonment for one month. Under Section 6 of POCSO To undergo simple imprisonment for ten years and to pay a fine of ₹8,000/- and in default of payment of fine to further undergo simple imprisonment for three months.

2. The learned Trial Court has also ordered that both the substantive sentences would run concurrently and also mentioned that no separate sentence was awarded to the accused under Section 377 of IPC.

3. Briefly stated, the facts giving rise to the present appeal are that the victim's uncle (PW3) made a complaint (Ext. PW3/A) to the police stating that the victim was aged 10 years and was studying in 6th Class. He had vacations at the school. The victim told the informant's son on 04.07.2018 at about 9:00 pm that he (the victim) and PW2 had gone to the Jungle to fetch

mangoes. 'R' went towards Mansa Mata Temple and the victim was left alone in the jungle. The accused came and enquired from the victim as to what he was doing in the jungle. The victim replied that he had visited the jungle to fetch mangoes. The accused told the victim that he would bring the mangoes to him. He asked the victim to accompany him. He took the victim towards the jungle and gave him some mangoes. Thereafter,

the accused sodomized the victim. He threatened the victim to kill him in case, the incident was revealed to any person. The victim suffered pain in his anus. The police registered the FIR (Ext. PW6/D). Krishan Kumar (PW9) conducted the investigation. He visited the spot and prepared the site plan (Ext. PW9/1). He took the photographs of the spot (Ext. PW3/B1 to Ext. PW3/B4). He got the spot position video recorded and the video recording was transferred to CD (Ext. PW3/B5). He filed an application (Ext. PW5/A) for conducting the medical examination of the victim. Dr Aman (PW5) conducted the medical examination of the victim. He found an old bruise on the base of nose in healing process. He preserved the samples and reserved his opinion to be given after the report of FSL. He handed over the samples to the police official accompanying the victim.

He issued the MLC (Ext. PW5/B). The case property was deposited with HC- Yashpal (PW6). Krishan Kumar (PW9) arrested the accused on 05.07.2018. He

filed an application (Ext. PW5/C) for the medical examination of the accused. Dr. Aman (PW5) conducted the medical examination of the accused and found that there was nothing to suggest that the accused was incapable of performing sexual intercourse. He preserved the samples and handed them over to the police official accompanying the accused. He issued the MLC (Ext. PW5/D). The case property was deposited with HC Yashpal (PW6), who sent them to FSL for analysis. Krishan Kumar filed an application (Ext. PW7/A) to obtain the birth certificate of the accused. Balwinder Singh (PW7) issued the birth certificate (Ext. PW7/B) showing that the date of the birth of the accused was 12.04.2000. Krishan Kumar also filed an application (Ext. PW8/A) for obtaining the birth certificate of the victim. Dilbag Singh (PW8) issued the birth certificate (Ext. PW8/B) showing that the date of birth of the victim was 14.12.2007. He also issued the abstract of the birth register (Ext. PW8/C). Krishan Kumar filed an application (Ext. PW9/2) for recording the statement of the victim. His statement (Ext. PW1/A) was recorded. The case property was sent to FSL and the result of analysis (Ext. PA and Ex. PB) was issued showing that no blood or semen was detected on the samples analyzed in the laboratory. Human blood was detected in the blood samples of the accused and victim. Since no blood or semen was detected in the samples; therefore, they were not analyzed for DNA profiling. Dr Aman (PW5) issued a final opinion that there was no evidence to suggest that unnatural offence had been committed successfully. Statements of remaining witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and presented before the learned Special Judge.

4. Learned Trial Court charged the accused with the commission of offences punishable under Sections 377 and 506 of IPC and Section 6 of the POCSO Act to which the accused pleaded not guilty and claimed to be tried. 5. The prosecution examined 10 witnesses to prove its case. Victim (PW1) narrated the incident. PW2 is the cousin of the victim, who had accompanied him to the jungle. PW3 is the informant. PW4 is the cousin of the victim to whom the incident was narrated. Dr Aman (PW5) conducted the medical examination of the accused and the victim. HC

Yashpal (PW6) was working as MHC with whom the case property was deposited. Balbinder Singh (PW7) issued the birth certificate of the accused. Dilbag Singh (PW8) issued the birth certificate of the victim. Krishan Kumar (PW9) conducted the investigation. Neeraj Kumar Rana (PW10) signed the FIR and filed the charge sheet before the learned Trial Court.

6. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. He stated that a false case was made against him due to enmity. He had not committed any offence. No defence was led by the accused.

7. The learned Trial Court held that ordinarily, the testimony of the victim has to be relied upon. His testimony was corroborated by his previous statement recorded by learned Judicial Magistrate First Class, Jawali. The defence version that the prosecution case was made against the accused due to enmity was not probable. There was a delay in reporting the matter to the police but it was properly explained. The testimony of the Medical Officer did not rule out the possibility of sodomy on the victim; therefore, the accused was convicted and sentenced as aforesaid.

8. Being aggrieved from the judgment and order passed by the learned Trial Court, the accused has filed the present appeal asserting that the learned Trial Court erred in convicting and sentencing the accused. Learned Trial Court misread the statements of the witnesses and drew wrong conclusions from them. The medical report did not support the prosecution case. There were major contradictions in the statements of prosecution witnesses, which falsified the prosecution case. The prosecution had relied upon the related witnesses and the defence version that a false case was made out against the accused due to the enmity was highly probable. Therefore, it was prayed that the present appeal be allowed and the judgment and sentence passed by the learned Trial Court be set aside.

9. We have heard Mr Arun Sehgal, learned counsel for the appellant/accused and Mr I.N. Mehta, learned Senior Additional Advocate General assisted by Ms Sharmila Patial, learned Additional Advocate General, for the respondent/State.

10. Mr. Arun Sehgal, learned counsel for the appellant/accused submitted that the learned Trial Court erred in convicting and sentencing the accused. The prosecution version is not corroborated by the medical evidence; rather the same was contradicted by it. Learned Trial Court made a different case than was projected by the prosecution to convict the accused. There were major contradictions in the testimonies of the prosecution witnesses which made the prosecution case highly suspect. Therefore, he prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

11. Mr. I.N. Mehta, learned Senior Additional Advocate General for the respondent/State supported the judgment and order passed by the learned Trial Court. He submitted that the testimony of the child victim was satisfactory and was corroborated by his cousin's testimony. The defence version that a false case was made against the accused due to the enmity was not established by leading any evidence, and learned Trial Court was justified in discarding the same. He prayed that the present appeal be dismissed.

12. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

13. It was specifically stated in the complaint made to the police that the victim suffered pain in his anus and he reported the matter to his cousin.

14. Dr. Aman (PW5) conducted the medical examination of the victim. He stated that after the examination of the victim, he did not find any evidence to prove that an unnatural offence had been committed successfully. He admitted that being a Medical Expert, he could not rule out the sodomy on the victim in view of the definition of penetrative sexual assault mentioned in Section 3 of the POCSO Act. He stated in cross-examination by learned counsel for the defence that in case of penetration, there would be cut, fissures and bleeding from the anus. He admitted that there would be abrasion, redness and bruising on the anus and private part of the person assaulting the child. He volunteered to say that it would not be so in case of manipulation of private parts in the anus. He admitted that in case any attempt was made to penetrate, there would be redness in the anal orifice. He did not find any redness. He admitted that there was no evidence of penetrative sexual assault in the anus of the child based on clinical examination and FSL report. He also did not find any injury on the private part of the accused.

15. The learned Trial Court heavily relied upon the admission made by the Medical Officer that being a Medical Expert, he could not rule out the sodomy on the victim in view of the definition of penetrative sexual assault mentioned in Section 3 of the POCSO Act. This witness was asked a leading question by the prosecution which is evident from the fact that it is written in the form of 'it is correct'. It was laid down by Hon'ble Supreme Court in Varkey Joseph v. State of Kerala, 1993 Supp (3) SCC 745: 1993 SCC (Cri) 1117 that asking a leading question by the Prosecutor is violative of the right of fair trial enshrined under Article 21 of the Constitution of India:

"11. The leading question is one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. The leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject of the enquiry/trial. The court may permit leading questions to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggests to the witness the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence that the prosecutor

wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provide the right to cross-

examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness answer merely "yes" or "no"; but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into the witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell the unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses to what he intended that they should say on the material part of the prosecution case to prove against the appellant which is illegal and unfair to the appellant offending his right to fair trial enshrined under Article 21 of the Constitution. It is not a curable irregularity." (Emphasis supplied)

16. Therefore, the Prosecutor could not have been permitted to ask the leading question and no reliance could have been placed upon the answer elicited in response to such a leading question.

17. It was not the case of the prosecution that the penetration had not taken place or there was manipulation of the private part of the victim. It was specifically stated in the complaint made to the police that the victim was complaining of pain in his anus. The victim stated in his examination-in-chief that the accused took him towards the jungle. The accused put off his capree and committed sodomy with him. Thus, the victim was quite categorical in saying that the accused had committed sodomy with him. He has nowhere stated that the accused had manipulated his anus. Thus, the learned Trial Court erred in finding that the accused had manipulated the private parts of the victim.

18. It was laid down by the Delhi High Court in State (Govt. of NCT of Delhi) v. Mullah Muzib, 2015 SCC OnLine Del 7228, that in case of a complete offence under Section 377 of Cr.P.C, medical evidence should be definite against the accused, and where there was no medical or scientific evidence, the accused cannot be convicted. It was observed:

"12. In *Mirro v. Emperor*, reported at AIR 1947 All 97, it was held that in a case of completed offence under section 377 IPC medical evidence could and should be definite against the accused.

13. In *Channabasappa s/o Shanmukhappa v. State of Honnali Police*, reported at 2010 (2) KCCR 1385, it was opined that since there was no penetration and medical evidence didn't support the prosecution version, the conviction was set aside.

14. In *Kailash Laxman v. State of Maharashtra*, reported at 2010 CriLJ 3255, it was observed that as no injuries were found in the medical evidence; the prosecution failed to prove its case beyond a reasonable doubt.

15. In Phool Singh v. State, reported in 2011 (3) JCC 2235, it was held that the prosecution case did not corroborate with the medical evidence. Hence the conviction of the accused was set aside.

16. In the present case, PW-8 SI Suresh Pal, the Investigating Officer admitted in his testimony that he had not seized the undergarments of the victim and in order to justify his version he deposed that PW1 told him that he had washed his clothes on October 28, 2013 which is contrary to the version of the victim. If there was any stain marks as deposed by PW-2, it was the duty of PW-8 to seize the same and send the same to FSL. Had the semen of the accused be found in the underwear of the victim, it would have amounted to a cogent piece of evidence in support of the victim.

17. In Devi Das (1928) 10 Lah 794, it was opined that in a charge of sodomy stains of semen constitute important evidence. Great weight must be attached to the Chemical Examiner's report.

18. In CrI. A. 52/03 and 628/2003 titled Rai Singh v. State, the Hon'ble Division Bench of this court comprising HMJ B.N. Chaturvedi and HMJ Rajiv Shakhder has held that since scientific evidence on which reliance was placed by the prosecution does not erringly conclude that sodomy has been committed hence the benefit of the doubt should be given.

19. Thus we are of the opinion that the prosecution has failed to produce any significant medical and scientific evidence and therefore any adverse inference to prove the allegations of carnal intercourse cannot be conclusively drawn against the accused."

19. In the present case, there is no medical or scientific evidence to corroborate the version of the victim; rather the medical or scientific evidence shows that no such incident had taken place.

20. In State of H.P. versus Varinder Soran, 2025:HHC:560, the victim had made an allegation of sodomy, which was not corroborated by medical or scientific evidence. No injury was detected in the anus of the victim. It was held by this Court that the accused cannot be convicted of the commission of the offence punishable under Section 377 of IPC in these circumstances.

21. In the present case also, there is no corroboration to the testimony of the victim by the medical and the scientific evidence and he could not have been convicted and sentenced by the learned Trial Court.

22. Learned Trial Court held that the testimony of the victim was corroborated by his statement made under Section 164 of Cr.P.C. This statement will not assist the prosecution because the medical and scientific evidence does not support his version. Further, the testimonies of the cousins the victim or his uncle will also not assist him because they had not witnessed the incident and were told about the facts by the victim.

23. Thus, in these circumstances, the judgment and order passed by the learned Trial Court cannot be sustained. Hence, the present appeal is allowed and the judgment and order passed by the learned Trial Court are ordered to be set aside. Accused-Abhishek Mohammad @ Shekhar is acquitted of the commission of offences punishable under Sections 506 and 377 of

IPC and Section 6 of the POCSO Act. The appellant/accused be released forthwith, if not required in any other case. Release warrants be prepared accordingly. The fine amount be refunded to him after the expiry of limitation, in case no appeal is preferred, and in case of appeal, the same be dealt with as per the orders of the Hon'ble Supreme Court.

24. In view of the provisions of Section 437-A of the Code of Criminal Procedure [Section 481 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)], the appellant/accused is directed to furnish his personal bond in the sum of ₹25,000/- with one surety in the like amount to the satisfaction of the learned Registrar (Judicial) of this Court/learned Trial Court, within four weeks, which shall be effective for six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of the leave, the appellant/accused, on receipt of notice(s) thereof, shall appear before the Hon'ble Supreme Court.

25. Records be sent back forthwith. Pending applications, if any, also stand disposed of.