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

Reserved on: 24th August, 2016
Pronounced on: 9th December, 2016

\+ **CRL.A. 538/2016**

GAYA PRASAD PAL @ MUKESH ..... Appellant

Through: Mr. Sumeet Verma, Advocate

Versus

STATE ..... Respondent

Through: Mr. Varun Goswami, APP for the State.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K. GAUBA, J:

1. The appellant stands convicted and is aggrieved by judgment dated 15th October, 2015 (in Sessions Case No. 163/2013) on the charge with the gravamen of he having assaulted and committed forcible sexual intercourse with his less-than-14 years' old step-daughter making her pregnant with his child and subjecting her to criminal intimidation. The trial held in the court of Additional Sessions Judge, also designated as Special Court under Section 28 of the Protection of Children from Sexual Offences Act, 2012 (POCSO

Act) for New Delhi district, had arisen out of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C), submitted by Station House Officer (SHO) of Police Station Vasant Vihar (the police station) on 12.11.2013, upon conclusion of investigation into first information report (FIR) No. 458/2013. The Special Court, by its order dated 12.11.2013, upon perusal of the complaint and other documents submitted with the said report (charge-sheet), had taken cognizance of offences punishable under Sections 354A, 376 and 506 of Indian Penal Code, 1860 (IPC) read with Sections 4 and 5 of POCSO Act. The trial judge by proceedings recorded on 10.01.2014 put the appellant on trial on charge for offences under Sections 354,376,506 IPC read with Section 4 of POCSO Act. On the conclusion of trial, the impugned judgment dated 15th October, 2015 was passed holding the appellant guilty, as charged, for offences punishable under Sections 354 and 506 IPC besides under Section 4 of POCSO Act read with Section 376 IPC. By subsequent order dated 5th January, 2016, separate punishments were awarded against the appellant for offences punishable under Section 376 IPC, Section 6 POCSO Act, Section 354 IPC and Section 506 IPC. In addition, the trial judge directed compensation to be paid specifying the amounts at ₹ 13 lakhs payable with reference to Section 33 (8) of POCSO Act read with Rule 7 (2) of Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules) besides ₹2 lakhs recommended under Section 357-A Cr.P.C. read with POCSO Rules.

2. By the appeal at hand, the appellant impugns not only his conviction but also the order on sentence.

SOME CONCERNS

3. Before we deal with the issues raised before us, lament on some aspects of the case needs to be expressed at the very outset. On the material placed before us it is beyond the pale of any doubt or controversy that the victim of the offences statedly committed by the appellant was a *'child'* within the meaning of the expression defined in Section 2(1)(d) of POCSO Act, she being below the age of 18 years at the relevant point of time. Given the nature of offences involved, she is entitled to the protection envisaged by law in Section 33(7) of POCSO Act. To put it simply, the special court was duty bound to ensure that her identity was "not disclosed at any time". As we shall note later, this precaution was given **a** go-by during the proceedings before the trial judge more than once.

4. As we shall also see elaborately in due course, the graver offence defined by Section 5 of POCSO Act ("aggravated penetrative sexual assault"), punishable under Section 6, though mentioned in the order of cognizance**,** was forgotten when the formal charge was framed. The order on framing charge is too cryptic to gauge the reasons why a lesser offence under Section 4 of POCSO Act ("penetrative sexual assault") was preferred. The impugned judgment was passed by another presiding officer holding the appellant guilty as charged. But, the order on sentence was pronounced by her successor who, for unexplained reasons, chose to mete out punishment to the appellant for the graver offence (Section 6 of POCSO Act) for which there was neither a charge laid nor conviction recorded.

5. The order on sentence reveals gross confusion prevailing in the mind of the trial judge with regard to the inter-play of various provisions dealing with the issue of compensation in such cases as at hand. Inexplicably, the Additional Sessions Judge passing the order on sentence while directing the appellant to be sent to prison under the conviction warrant also observed that he was accepting the personal bond ("PB") that had been furnished under Section 437A Cr. PC.

FACTS BEYOND DISPUTE

6. The substantial part of the evidence adduced by the prosecution at the trial in support of its case against the appellant was admitted by him in the course of his statement under Section 313 Cr.P.C., which evidence, even otherwise being wholly reliable, deserves to be accepted and set out at the outset as territory which is beyond dispute.

7. The victim (who we may also be referring to as "the prosecutrix") was born on 10.09.1999 to PW-3 (mother of the prosecutrix) out of her first marriage that took place about 20 years prior to the incidents which are subject matter of the case. Her first husband (biological father of the prosecutrix) had died in an accident when the victim was about one and half years' old. PW-3 entered into her second marriage with the appellant and gave birth to a son who was about 8 years' old in 2013. PW-3 with her second husband (the appellant) and the two children, which include the prosecutrix as the child of the first marriage and the son as the child of the second marriage, were living together in a one room tenanted portion on the first floor of the house of PW-1. The appellant would work for gain as a driver while PW-3 served several households including that of PW-

4, as a maid servant to earn her livelihood. The prosecutrix was a student of 6th standard in a government school in nearby locality (requiring journey on foot for about half an hour).

8. On 8.10.2013, the prosecutrix was taken, with prior appointment, by PW-4 (employer of the mother of the prosecutrix) to the clinic of Dr. Anuradha Tuli (PW-8) in Panchsheel Park, Shivalik Road, New Delhi, upon reference by Dr. Bithika Bhatyacharya, Gynaecologist. PW-8 conducted ultra-sound examination and gave report (Ex.PW-8/A) on the basis of ultra-sound film (Ex.PW-8/B) that the prosecutrix was carrying a pregnancy of about 20 weeks and 4 days plus and minus one week four days. It may be added here that during the investigation, after registration of the FIR by the police, the prosecutrix was subjected to another ultra-sound examination on 18.10.2013 by Dr. Priyanka (PW-14) and Dr. Kanhaiya (PW-15) in Safdarjung Hospital and their report (Ex.PW-14/A) confirmed that the prosecutrix was pregnant with a child carrying a foetus assessed at that stage to be 22 weeks and 1 day old. It further needs to be mentioned here itself that the prosecutrix gave birth to a male child on 10.2.2014 in Deen Dayal Upadhyay Hospital, New Delhi. It is evident when the prosecutrix gave birth to the child she herself was 14 years and 5 months old.

CASE FOR PROSECUTION

9. Since the case carries an element of delay in reporting the subject incidents to the appropriate authorities, we would rather narrate the facts in chronology of they having come to light.

10. Per the versions of the prosecutrix (PW-2), her mother (PW-3) and her mother's employer (PW-4), PW-3 had been working as maid in the household of PW-4 for about 10-12 years. There has, thus, been a long association between them wherein PW-4 grew fond of the child (the prosecutrix). She (PW-4) is a professional, well-settled in life, working as political scientist (consultant) and writer, her family including her husband who is working with Indian Institute of Technology (IIT) and a grown up son pursuing studies as a resident scholar. She (PW-4) was well-acquainted with the prosecutrix since she would often accompany the mother (PW-3) from the times she had been an infant.

11. Sometime in October, 2013, per PW-3 and PW-4, the health of PW-2 (the prosecutrix) had become a cause for worries. The mother noted the bloating belly of the victim. She took it initially as some "gastric" problem. Her tension and disturbed state of mind was palpable and came to the notice of PW-4. When the mother (PW-3) had discussed with her employer (PW-4) the worries about the health of prosecutrix, upon she (PW-4) insisting the prosecutrix was taken along by the mother to the employer's residence. Some conversation between the employer (PW-4) and the victim (PW-2), to which we shall advert later, aroused suspicion of the former. She arranged a visit to the doctor and, on advice, the child victim was put to ultra-sound examination in the clinic of PW-8 on 8.10.2013 revealing the pregnancy.

12. We must add here that the medical opinion (per PW-4) received at the stage of revelation of pregnancy was that the foetus could not be

aborted as it was past the time such procedure would be permissible and thus, steps had to be taken to secure the health of the victim and the child she was carrying to the stage of safe delivery. This part of the testimony of PW-4 must be accepted in view of the age of the foetus at the time of discovery of facts.

13. Coming back to the narrative, after the ultra-sound examination conducted on 8.10.2013 in the clinic of PW-8 had revealed that the prosecutrix was carrying a foetus, PW-4 statedly questioned her in the course of which the prosecutrix informed her that her step father (the appellant) was responsible for the pregnancy. She narrated events going back to the time when the prosecutrix had just turned 11. She spoke about the appellant having indulged in indecent assault on her person *("chhedkhani")* followed by a specific episode of sexual assault that took place in the tenanted room in the afternoon of May, 2013 when her mother (PW-3) had gone away for work, taking her younger step brother along, leaving her alone. According to PW-4, the prosecutrix informed her in detail as to how the appellant had accosted the prosecutrix in privacy of the tenanted room, having bolted the door from inside, disrobed her and committed sexual intercourse with her after disrobing himself. The prosecutrix also expressed before PW-4 her apprehensions about the welfare of her mother and step-brother if the step-father (appellant) were to go to jail mentioning in this context that threats had been extended by the appellant after the sexual assault.

14. According to the prosecution case, PW-3 (mother of the prosecutrix) was a little unsure in the beginning as to the appropriate

course of action. She was advised by her employer (PW-4) that, given the facts, the case had to be reported to the police. In order to arrange proper counseling, PW-4 contacted Ms. Ravinder Kaur (PW-16), Head of Resilience Centre and Coordinator, 'Child Line Butterflies', a non-governmental organization (NGO) on 16.10.2013. PW-16, with her colleague, went to the house of PW-4 on 17.10.2013 where they interacted with the prosecutrix and her mother. Eventually, they were able to persuade the mother (PW-3) to take the matter to police and, on 18.10.2013, accompanied her (the prosecutrix) and the employer of the mother to the police station leading to complaint (Ex.PW-2/A) being lodged by the prosecutrix which was registered as FIR (Ex.PW-6/A) by SI Manju (PW-6) on the basis of endorsement made by SI Mukti (PW-10), the Investigating Officer (IO). The report (Ex.PW-16/A) of PW-16 was submitted with request for action (vide Ex.DW-16/B).

15. After the registration of the FIR, the prosecutrix was sent for her medical examination to Safdarjung Hospital on 18.10.2013. The medico legal certificate (MLC) was prepared by Dr. Jahanvi Meena (PW-9), Senior Resident (Gynaecologist) and was proved by her at the trial (vide Ex.PW-2/B). As mentioned earlier, medical examination followed by ultra-sound examination confirmed the pregnancy. Pertinent to mention here that the examining medical officer (PW-9) had also set out the facts narrated to her by the prosecutrix at the time of medical examination attributing the pregnancy to sexual intercourse committed by the appellant.

16. It is not disputed that the appellant was arrested on 18.10.2013 at 11.55 p.m. vide arrest memo (Ex. PW-10/A), after personal search (Ex. PW-10/B) by the Investigating Officer (PW-10) in the presence of constable Pawan (PW-11) who is a signatory to the arrest memo. As per their evidence, the arrest was made from Munirka bus stand. He was taken for medical examination to Sardarjung Hospital before being formally arrested. The MLC (Ex.PW-11/A) prepared by Dr. Arjum Ara after examination by Dr. Vikas Kumar Pandey was proved by Dr. Pratima Anand (PW-13) who is acquainted with the handwriting and signatures of the author who is no longer available. As per the evidence of PW-13, the appellant was referred to forensic medicine department for further examination. Thus, the appellant was taken to the department of Forensic Medicine and Toxicology in All India Institute of Medical Sciences (AIIMS) on 19.10.2013 whereupon he was medically examined by Dr. Rajesh Kumar (PW-12) who prepared the MLC (Ex. PW-12/A). On the basis of the said report of medical examination, PW-12 has affirmed not only about the absence of any indication of incapability of the appellant in engaging in sexual intercourse but also, and more importantly, about he having preserved biological samples including sample of the blood of the appellant in a piece of gauze. The cross-examination of the witnesses relating to the above mentioned investigative steps would not make any dent in the evidence for the prosecution.

17. As noted earlier, the prosecutrix gave birth to a male child on 10.02.2014. The delivery took place in Deen Dayal Upadhyay Hospital where the prosecutrix had been taken as per the arrangement

worked out by the Superintendent of Children Home for Girls-IV (Nirmal Chhaya Complex) in coordination with the local police (refer to letter of request dated 15.01.2014 vide Ex. PW-10/H), the girl having earlier been shifted to the said facility under directions of the Child Welfare Committee (as per order dated 06.11.2013 vide Ex. PW-10/J). After birth**,** the child was medically examined (vide MLC Ex. PW-10/G) and samples of the blood of the prosecutrix as also her new born child were taken and passed on to the investigating officer (vide Ex. PW-10/F).

18. The evidence on record shows that the biological samples (blood samples) of the prosecutrix, of her new born child and of the appellant (besides other exhibits statedly relatable to him) were sent to Forensic Science Laboratory (FSL) where they were examined in the DNA Fingerprinting Unit by Ms. Anita Chhari, Senior Scientific Officer (Biology) (PW-18). PW-18 appeared at the trial and proved her reports (Ex. PW-10/K). The reports show that from the source of the samples of the blood of the appellant (marked as "Ex.1"), of the prosecutrix (marked as "Ex.5") and that of the new born baby (marked as Ex.6"), the DNA fingerprinting profile was generated by using "*AmpFLSTR identifiler plus kit*" employing STR analysis, data being analysed by using Genemapper ID-X software. The DNA expert found one set of alleles from the source of Exhibit '1' and from the source of Exhibit '5' to be "accounted" in the alleles from the source of Exhibit '6' and, on that basis, concluded it to have been established that the appellant and the prosecutrix are the biological father and mother respectively of the baby born on 10.02.2014. The opinion

given by the Senior Scientific Officer (Biology) of the DNA Unit of FSL is supported by detailed alleles data derived for genotype analysis from the three blood samples.

19. The reports indicate that besides the three blood samples, the penile swab, control swab and the undergarment of the appellant had also been sent to the FSL (as contained in three other parcels marked as parcel nos.2 to 4). PW-18 was questioned and she clarified that the said other parcels were not utilized for the purposes of DNA fingerprinting since the blood samples were sufficient. As may be added here, Dr. Rajesh Kumar (PW-12) during his examination had also clarified that the purpose of penile swab to be taken was only to ascertain if any veginal cells could be detected therein. Since it is not a case where the appellant had been taken for medical examination immediately after the sexual intercourse, such other biological sample was of no utility.

FINDINGS ON FACTS

20. We have gone through the evidence of the prosecutrix (PW-2) very carefully. She has stood by her version in the FIR (Ex. PW-6/A) based on her complaint (Ex. PW-2/A). In May 2013, she was a child less than 14 years' old, living as a step-daughter of the appellant in the one room tenancy taken out in the house of PW-1. Her evidence as also the explanation offered by the appellant in his statement under Section 313 Cr. PC reveals that she had been living as a step-daughter with the appellant and her mother (PW-3) from the time of infancy, soon after death of her father, the mother having entered into the second marriage. She confirmed that the appellant

had throughout treated her as a daughter but had started making improper advances from the time she had turned 11 (which would be the time she was reaching puberty). Noticeably, when asked by the defence counsel to elaborate, the prosecutrix during her cross-examination spoke about the appellant being in the habit of touching her breasts and private part. A girl of age of eleven is generally endowed by nature with the capacity to make a distinction between an affectionate parental touch and an inappropriate touch. It is the inappropriate nature of the physical contact to which the appellant would subject her which is described by her as "*chhedkhani*". Pertinent to mention here, this is the narration of improper advances made by the appellant over the period as was also given by the prosecutrix to PW-16, a representative of the NGO whose services had been roped in by PW-4, and set out in detail in her report (Ex. PW-16/A).

21. It is apparent from the very fact that the prosecutrix, giving birth to a child on 10.02.2014, had been subjected to sexual intercourse sometime around May 2013. Given the background facts, only PW-2 would know as to who was the person, who had engaged her in the sexual intercourse. She attributes this to the appellant narrating the sequence of events as noted earlier. There is no reason before us as to why we should entertain any doubts as to the truthfulness of her account. The scientific evidence (DNA report) nails the case against the appellant leaving no room for doubt that he**,** being the biological father of the child born to PW-2 on 10.02.2014**,** is

the person who had committed sexual intercourse with her in May 2013, as reported to the police on 18.10.2013.

22. Indeed, there has been a delay on the part of the PW-2 in bringing the facts out but the delay in the present case has been properly explained. PW-2 had lost her natural father when she was a small child. Her mother, apparently facing financial hardships, had been constrained to settle into a second marriage (with the appellant). As she was growing, having entered teenage, becoming an informed person with each passing day (also courtesy the formal education which she was receiving) seems to have realized the importance of dependence of the family on the appellant. It is obvious that she knew what had happened was gross. It is also obvious that she was more concerned about two possible consequences to follow – one, wherein she herself might be found guilty of misconduct and, the other, wherein the family might lose the presence and support of the appellant (as he could go to jail). Thus, when the signs of advancing pregnancy were becoming all too apparent and she was taken by the unsuspecting mother (PW-3) to her employer (PW-4) and questioned closely by the latter (PW-4), she (the prosecutrix) first responded by saying that she had not done anything wrong. This assertion (more in self-defence) made when she was trembling with fear *("like a leaf")* followed by clear expression of her fears as to the adverse consequences befalling her mother (PW-3) and junior sibling (step-brother) – "*meri mummy toot jaegi aur meri bhai ka kya hoga*" (my mother would be crest fallen and what would happen to my brother), "*ki agar mera papa jail jaega to meri mummy aur meri bhai ka kya*

hoga" (what would happen to my mother and brother if my father were to go to jail) and "*main sab dukh maan leti hoon par mein mummy ko dukh mein nahi dekhna chahti*" (I can take all miseries upon myself but I cannot see my mother being in misery) – coupled with her narration about the threats extended by the appellant to kill her (if she were to reveal) collectively are sufficient, in our opinion, to hold that the delay in reporting cannot result in the word of PW-2 being doubted as a doctored one.

23. Pertinent to add here that, even after the pregnancy had been detected and PW-3 was receiving counsel and advice not only from her employer (PW-4) but also from professionals engaged in such services (PW-16), there was hesitation on the part of the mother in taking recourse to legal action. She took ten days in resolving what must have been her inner conflict before approaching the police, with the assistance of PW-4 and PW-16. This delay, in the facts and circumstances, also is no reason why the credibility of PW-2 should get adversely impacted.

24. For the foregoing reasons, we find no merit in the challenge by the appellant to the findings on facts returned by the learned trial judge in the impugned judgment. It has been proved beyond the pale of any doubt that the appellant had subjected the prosecutrix (PW-2), who was living with him as his step-daughter, on several occasions from sometime 2009 onwards to improper touch, the contact made being with her breast and private parts and, thus, clearly with the intention, or knowledge of likelihood, of outraging her modesty, such touch and contact in the given facts and circumstances being use of criminal

force. These facts constitute the offence punishable under Section 354 IPC, with which the appellant was charged.

25. Further, it has been proved that the appellant subjected the prosecutrix (PW-2) to sexual intercourse by inserting his male organ into her private parts (vagina) and since she was less than 14 years' old at that point of time, said acts constituting the offence of rape defined in Section 375 IPC (ordinarily punishable under Section 376 IPC) and within the mischief of the offence of penetrative sexual assault as defined in Section 3, ordinarily punishable under Section 4 of POCSO Act as included in the second head of the arraignment.

26. The evidence, we are satisfied, further proves that having committed sexual intercourse amounting to rape (and penetrative sexual assault), the appellant also extended threats to the prosecutrix putting her in the fear of death if she were to reveal his conduct to anyone. This amounts to criminal intimidation within the meaning of the expression defined in Section 503 IPC, punishable under second part of Section 506 IPC, thereby bringing home the third head of the charge against the appellant.

27. We noted in the beginning of this judgment that the police, by the charge-sheet, had sought prosecution of the appellant, *inter alia*, for the offence of aggravated penetrative sexual assault, as defined in Section 5 of POCSO Act. The special court while taking cognizance by order dated 12.11.2013 had accepted the said prayer. As observed earlier, cognizance having been taken also of the offence under Section 5 of the POCSO Act, the said penal clause escaped the mind of the learned trial judge when the question of charge came up for

consideration. The proceedings do not reveal as to why only Section 4 of POCSO was mentioned in the second head of the charge (where there is also reference to Section 376 IPC).

SEXUAL OFFENCES: OVERLAP BETWEEN IPC & POSCO ACT

28. The provision contained in Section 5 of POCSO Act renders the penetrative sexual assault, as defined in Section 3, an aggravated offence and attracting more serious punishment (as in Section 6) in certain fact situations. For purposes of present discussion, the situations covered by clauses (j) (ii), (n) and (p) of Section 5 are relevant and may be noted as under :-

> *"Section 5 – Aggravated penetrative sexual assault –*
>
> *x x x*
>
> *(j). whoever commits penetrative sexual assault on a child, which –*
> *(i). x x x*
> *(ii). In the case of female child, makes the child pregnant as a consequence of sexual assault;*
>
> *x x x*
>
> *(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*
>
> *x x x*
>
> *(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*
>
> *x x x*
>
> *is said to commit aggravated sexual assault.*"

29. Seen against the facts which have been established, it is vivid that the case at hand is one which involved the offence defined in law as "*aggravated penetrative sexual assault*" punishable under Section 6 of POCSO Act. Clause (j)(ii) of Section 5 applies as the prosecutrix (PW-2) became pregnant and the impugned act led to she giving birth to a child as a consequence of the sexual assault. Since the appellant was a relative of the victim through marriage (she being the daughter of PW-3) from her first marriage and, thus, a step-daughter to him and was living in the same shared household, clause (n) of Section 5 gets attracted. Given the trust that had been reposed by PW-3 in the appellant on account of her marriage with her, it is obvious that the appellant being the step-father was in a position of trust and authority vis-à-vis the prosecutrix (PW-2). Thus, the penetrative sexual assault having occurred within the confines of the home where the prosecutrix was living with the appellant, virtually her guardian, clause (p) of Section 5 also renders it a case of aggravated penetrative sexual assault.

30. In above fact-situation, we are unable to comprehend as to why the learned trial judge did not invoke Section 6, the penal clause for punishment of aggravated penetrative sexual assault, of POCSO Act at the time of framing of the charge. The error could have been rectified during the trial or atleast before the judgment. This seems to have escaped the notice even later. Thus, the conviction has been recorded besides for other offences, only for the offence under Section 4 of POCSO Act (read with Section 376 IPC).

31. The Protection of Children from Sexual Offences Act (POCSO Act) was brought on the statue book as a complete code for achieving the object of protecting children from offences of sexual assault, sexual harassment and pornography, though for general procedural aspects it incorporates, *inter alia,* the Code of Criminal Procedure 1973 (Cr.P.C) subject, of course, to modifications with which the latter is to be contextually read *mutatis mutandis.* It not only brought on the statute book certain new offences (second to fourth chapters) but also contains detailed provisions on the subjects of "procedure for reporting of cases" (fifth chapter), "procedures for recording of statement of child" (sixth Chapter), establishment of "special courts" (seventh chapter) as indeed, and more importantly for present discourse, on "procedure and powers of special courts and recording of evidence" (eighth chapter).

32. There is overlap in the offences of "assault or criminal force to woman with intent to outrage her modesty" punishable under Sections 354 IPC and of "rape" punishable under Section 376 IPC on one hand and the offence of "sexual assault" defined in Section 7 and made punishable under Section 8 of POCSO Act as indeed the offences of "penetrative sexual assault" punishable under Section 4 and "aggravated penetrative sexual assault" under Section 6 of POCSO Act, on the other.

33. It is of interest here to compare these penal clauses. The provisions contained in Section 354 IPC and Section 7 of POCSO Act read as under:-

Section 354 IPC

"Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

Section 7 of POCSO Act

"*Sexual assault: Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."*

34. The acts involving "physical contact" by touching "with sexual intent", the vagina or breast of a child are covered within the mischief of the offence of "sexual assault" defined in Section 7 of the POCSO Act. These very acts, under the general criminal law, have all along been treated as assault or use of criminal force (as the case may be) against a woman (which expression denotes, per Section 10 Cr.P.C., "a female human being of any age") from which the intention to outrage, or knowledge of likelihood of thereby outraging, her modesty may be drawn so as to attract the penal provision under Section 354 IPC.

35. The POCSO Act came into force with effect from 14.11.2012. The provision contained in Section 354 IPC was amended by Criminal Law (Amendment) Act, 2013 (Act 13 of 2013) brought into force with effect from 3.2.2013. Prior to the said amendment, the offence under

Section 354 IPC attracted punishment of imprisonment of either description for a term which could extend to two years, or with fine, or with both. Under the amended law, the offence under Section 354 IPC (committed on or after 3.2.2013) may be visited with punishment of either description which shall not be less than one year but may extend to five years, and with fine. In contrast, the offence of "sexual assault" punishable under Section 8 of POCSO Act attracts the punishment of imprisonment of either description for a term which cannot be less than three years but which may extend to five years and with fine.

36. The provisions contained in Section 375 IPC (as amended w.e.f. 03.02.2013) and Section 3 of POCSO Act run as under:

> *Section 375 IPC*
>
> *"Rape- A man is said to commit "rape" if he-—*
>
> *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
>
> *(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—*
>
> *First.—Against her will.*

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.".

"Section 3 of POCSO Act

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."

37. Prior to the amendment of the penal code with effect from 3.2.2013 by Act 13 of 2013, the offence of "rape" was defined by Section 375 IPC in terms, generally speaking, essentially requiring it to be proved that the accused had engaged in sexual intercourse with a woman against her will or without her consent, vaginal penetration by the male organ being always held to be necessary to constitute sexual intercourse. The amendment of 2013 has enlarged and expanded the definition of "rape". For present discussion, however, suffice it to note that vaginal penetration by the male organ continues to constitute the offence of rape provided the other ingredients are also satisfied which include absence of consent or it being against the will of the

woman. Noticeably, the issue of consent would not arise, in view of sixth clause, in case the victim woman is less than 18 years of age (the earlier requirement being 16 years of age). These very acts constitute the offence of "penetrative sexual assault" defined by Section 3 of POCSO Act which was enacted with the object of protecting "children from offences of sexual assaults" etc. The acts which amount to "rape" (S.375 IPC) or those amounting to "penetrative sexual assault" (S.3 POCSO Act) are now described in phraseology which is almost identical – the words "woman" and "her" in former having been replaced by words "child" and "the child", and the word "penis" having been added to the body parts covered by the last clause, in the latter.

38. To put it simply, what is defined by law as "rape" (Section 375 IPC) may also constitute "penetrative sexual assault" (Section 3 POCSO Act) in case of a child. Conversely put, acts constituting the offence of "penetrative sexual assault" against a girl child would also amount to rape. The prime distinction between the two offences is that "penetrative sexual assault", an offence under the special law (POCSO Act), is gender-neutral and for it the victim must be a child (person less than 18 years of age) while the offence of "rape" under general law (IPC) must be against a woman irrespective of her age. Since the issue of consent does not arise in case of offence against a child, the definition in POCSO Act omits any reference to it.

39. The first exception to Section 375 IPC (rape) regarding "medical procedure or intervention" being excluded is covered by similar exclusion in Section 41 POCSO Act concerning all "medical

examination of medical treatment" taken with consent of parents or guardian of the child. We may add, in passing, that the second exception to Section 375 IPC concerns issues of marital rape which do not arise in the present case.

40. An examination of the punishment prescribed by the law for the offences involved is required to be undertaken at this stage**.** Before the amendment of 2013, the offence of "rape" was ordinarily punishable, in terms of Section 376 (1) IPC, with imprisonment of either description for a term which could not be less than seven years, but which may be for life or for a term which may extend to ten years, though discretion was left to the court, under the proviso to the said sub-section, to impose a sentence of imprisonment for a term of less than seven years if adequate and special reasons existed for taking such lenient view. Sub-section (2) of Section 376, as it stood before the amendment of 2013, also prescribed the punishment in certain aggravated forms of offence of rape which do not have much relevance for the present discussion.

41. Section 376 IPC, as amended with effect from 3.2.2013, to the extent germane, reads as under:-

> *"376. Punishment for rape*
>
> *(1). Whoever, except in the cases provided for in sub-section*
>
> *(2). commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not he less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.*
>
> *(2). Whoever,—*

xxx *xxx* *xxx*

(f). being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

xxx *xxx* *xxx*

(i). commits rape on a woman when she is under sixteen years of age; or

(k). being in a position of control or dominance over a woman, commits rape on such woman; or

xxx *xxx* *xxx*

…… shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine"

(Emphasis supplied)

42. We must add here that the Act 13 of 2013 whereby IPC was amended, added four new penal provisions (Section 376-A to 376-D) which deal with aggravated form of the offence of rape. In present case, we need not dwell on the said other cognate clauses.

43. The POCSO Act contains parallel provisions for dealing with punishments for the offences of "penetrative sexual assault" (Section 4 POCSO Act) and its aggravated form (Section 6 POCSO Act). For comparison, we may extract the said two penal clauses hereunder:-

"4. Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

6. Punishment for aggravated penetrative sexual assault:

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine". (Emphasis supplied)

44. In terms of Section 28(1) POCSO Act, a "court of sessions" is notified and designated as *"special court to try the offences under the Act"* for the concerned district. Sub-section (2) of Section 28 clarifies that such special court, while trying an offence under the POCSO Act, shall also "try" any other offence (i.e. other than under POCSO Act) with which the accused may be charged at the same trial under the Code of Criminal Procedure, 1973 (Cr.P.C) which, in terms of Section 31, applies to proceedings before such special court *"save as otherwise provided (in this Act)"*. The departure from the general criminal procedure may be sampled by referring to Section 33(1) whereunder a special court under the POCSO Act, unlike the court of sessions dealing with general penal law offences, *"may take cognizance of any offence, without the accused being committed to it for trial".*

45. In the context of overlap of offences and the issues that arise here, it is essential to take note of some of the relevant provisions on the subject of "charge" as contained in the seventeenth Chapter of Cr.P.C. Section 218 requires a separate charge to be framed for

"*every distinct offence*". Section 211 requires every charge to "*state the offence with which the accused is charged*" it being described in the charge by the "*specific name*" given to the offence by the law which creates it, with reference to the law and the statutory provision against which it is alleged to have been committed. Section 212 (1) Cr.P.C. mandates that the charge must contain "*such particulars as to the time and place of the alleged offence, and the person (if any) against whom" it was committed as is "reasonably sufficient to give the accused notice of the matter with which he is charged*".

46. Section 214 Cr.P.C. clarifies that the "*words used in describing the offence*" in every charge shall be "*deemed"* to have been used in sense attached to them respectively by the law. Though the general rule in Section 218 (1) is that each separate charge for every distinct offence is "*(to) be tried separately*" the law creates exceptions "*three offences of the same kind within the space of twelve months*" being one such exception envisaged in Section 219 (1). Interestingly, Section 219 (2) clarifies that "offences are of the same kind" when they are punishable with the same amount of punishment under the same section of IPC or of any special or local law. This, of course, cannot be treated as exhaustive meaning of the expression "offences of the same kind" since the nature of the offence may also render certain offences to fall in the category of "cognate" or "of same kind". The sexual offences with which we are dealing in the matter at hand provide a ready illustration on the subject.

47. We must also refer here to Section 220 Cr.P.C. which permits a common trial for more than one offence in certain fact-situations. The provision, to the extent relevant, reads as under:-

> "*220. Trial for more than one offence.*
>
> *(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.*
> *Xxx xxxx xxxx*
> *(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.*
> *(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.*
> *(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860)."*

48. The third and fourth sub-sections of Section 220 Cr.P.C. quoted above are of special interest here. As demonstrated by the preceding discussion, the acts of commission constituting the offence under Section 354 IPC may also amount to offence under Section 8 of POCSO Act. Similarly, the offence of "penetrative sexual assault" under the POCSO Act would also constitute the offence of rape if the victim is a female human being. In such fact-situation, it is legitimate for the accused to be charged with and tried at one trial both for the

offence under Section 354 IPC and also under Section 8 of POCSO Act.

49. Further, the preceding discussion has brought to the fore that out of the two offences (which are the subject matter here) of the POCSO Act, the one of "sexual assault" is the lesser one, the acts covered thereunder being also essential part of the gravamen of the charge to be framed for the graver offence (of penetrative sexual assault). Apparently, the offence of "aggravated penetrative sexual assault" includes within it the offence of "penetrative sexual assault", the former being treated as graver than the latter for the additional fact-situations (inclusive of abuse of authority or fiduciary relationship etc.). Thus, it is permissible, in terms of Section 220 (4) Cr.P.C. for separate charge to be framed not only for the offence of "aggravated penetrative sexual assault" but also for "penetrative sexual assault" and "sexual assault" as indeed for the offences of "rape" and "assault or criminal force to outrage the modesty of the woman", against an accused at one trial. Section 221 (1) Cr.P.C. guides the criminal courts that in case of doubt, it is proper that the accused is charged "in the alternative" with having committed some one of the several offences which may be proved by bringing home the allegations concerning a single or a series of acts.

50. The above-noted provisions of the procedural criminal law are ordinarily subject to three riders; first, as indicated by Section 220 (5) quoted above (referring to Section 71 IPC), second, under Section 222 Cr.P.C and, the third, more apt for present context, under section 42 of POCSO Act, which we consider hereafter.

51. Section 71 IPC provides as under:

"Section 71 - Limit of punishment of offence made up of several offences

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences. (emphasis supplied)

52. Section 222 Cr.P.C. reads as under:

"*222. When offence proved included in offence charged.*

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.
(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions

requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

(emphasis supplied)

53. Section 42 of POCSO Act runs thus :

"42. Alternative punishment : Where an act or omission constitutes an offence punishable under this Act and also under section 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, not with standing anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree." (emphasis supplied)

54. A conjoint reading of the above statutory provisions makes it clear that though the acts committed leading to the offence of "penetrative sexual assault" include some acts which by themselves may amount to the lesser offence of "sexual assault" – and in some cases even the offence of "sexual harassment" (Section 11 of POCSO Act), if they were committed in the course of some transaction, the offender may not be punished for *"more than one of (his) such offences"*. Further, if all the facts alleged against the accused on arraignment for the charge for the graver offence are not proved and the facts which are proved reduce it to a "minor offence", the accused may be convicted for such minor offence though he was not separately charged with it.

55. A good illustration is of case where charge for the offence of "aggravated penetrative sexual assault" is framed but the circumstances requisite for such "aggravated" form of the offence are

not proved, the accused can still be punished for the lesser offence of "penetrative sexual assault". Similarly, though an accused is charged with the offence of "rape" if sexual intercourse is not proved, he can still be held guilty and convicted for the offence of attempt to rape or even the lesser offence of assault for outraging the modesty of the woman.

56. Yet another illustration, more germane to the discussion required to follow in the case, would be of a case where there has been penetrative sexual assault by the offender against a female human being who appears, on the basis of material available at the threshold, to be less than 18 years' old. In such case, it would be permissible, in terms, *inter alia*, of Section 220 (3) and Section 221(1) Cr.P.C. to put the accused on trial on the charge for offences both under Section 4 POCSO Act (or its aggravated form, if so made out) and under Section 376 IPC. If the acts alleged to have been committed by the accused are proved at the trial and if it is also established that the victim was a female human being less than 18 years in age on the relevant date, the accused would be liable to be convicted and punished for the offence under the POCSO Act. Conversely, if the victim were to be found to be more than 18 years' in age, provided the absence of her consent is also proved, the accused may be punished instead on the charge of "rape" under Section 376 IPC. But, if the ingredients of both the offences (penetrative sexual assault under POCSO Act and rape under IPC) are brought home, the law would not permit the convicted person to be punished for both the offences. The acts committed by him being common, he can be punished only for one of such offences;

ideally, for the one graver out of the two, provided there was a charge properly framed in such regard.

57. Using the present case as an illustration, the acts constituting the offence of "aggravated penetrative sexual assault" (as defined in POCSO Act) or of "rape" (as defined in IPC) were statedly committed by the appellant in May, 2013. In this view, the provisions contained in Sections 375 and 376 IPC amended with effect from 3.2.2013 would also apply. Given the facts that the appellant is a relative (step father), he was in a position of trust and authority vis-à-vis the prosecutrix having control and dominance over her, in particular as she was under 16 years' of age and living under the same roof with him, the case would also attract the prescription of punishment in terms of Section 376 (2) (f), (i) and (k) IPC. This is the spirit of the provision contained in Section 42 POCSO Act which expects the court to invoke the offence attracting graver punishment.

58. Law confers sentencing discretion on courts which is to be carefully exercised taking on board all relevant factors. One of the central factors which must be considered is the gravity of the offences. How must this be assessed? Some indication is found in the statutory scheme. The expression "minor offence" as has been used in law, illustratively in Section 222 Cr.P.C. quoted above, is to be understood with reference to not only the gravity of the consequences that flow for the victim but also the degree of punishment with which the law expects it to be dealt with. To put it simply, higher the prescription of punishment, the graver the offence. To put it other way round, if the

offence attracts punishment lesser in degree to another cognate offence, the former is "minor offence" in its relation.

ERRORS IN CHARGES: EFFECT

59. We find in the present case that if the acts of assault or use of criminal force actuated by the intent to outrage the modesty of the prosecutrix (as committed during period anterior to the forced sexual intercourse) were to be dealt with as an offence under Section 354 IPC committed before 03.02.2013, the imprisonment (of either description) that may be awarded may not exceed two years and may or may not be accompanied by levy of fine. In contrast, if the incriminating acts constitute this offence had been committed also after the amendment of IPC by Act 13 of 2013 (w.e.f. 03.02.2013), by virtue of the said amendment of 2013, the punishment is to be in the form of imprisonment of either description which cannot be less than one year but which may extend to five years, and with fine. On the other hand, if the same acts were to be dealt with as a case of sexual assault punishable under Section 8 of the POCSO Act, the punishment would have to be in the form of imprisonment of either description for a term which shall not be less than three years but which extend to five years, accompanied by fine.

60. It needs to be examined as to how the learned trial judge has proceeded in the present case. The first head of the charge framed on 10.01.2014 by the trial court reads as under:-

> *"That sometimes in the year 2009 to 5-6th October, 2013 at Delhi you being the step father of the prosecutrix X aged about 15 years (the name and details of which are mentioned in the charge sheet) had molested her and*

thereby you committed an offence punishable u/s 354 of IPC and within my cognizance;" (emphasis supplied)

61. We express our dis-satisfaction with the language employed in framing the above-noted charge. We also record our disapproval for use of expression "molested" in the charge. The penal provision contained in Section 354 IPC, as noted above, pertains to an offence which is described in law as "assault or criminal force to woman with intent to outrage her modesty". As noted earlier, Section 211 (2) Cr.P.C. mandates that "if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only".

62. We are conscious that, in general parlance, the word "molest" (of which the word "molested" is the past tense) is also understood to convey "sexual assault or abuse". But, as the following definition of the expression (see Shorter Oxford English Dictionary 6th edition, page No. 1817) would show, it includes possibility of its use in the context of non-sexual harassment as well and does not invariably connote assault or use of criminal force against a woman with intent to outrage her modesty:

"1. Cause trouble to; vex, annoy, inconvenience.

2. Interfere or meddle with (a person or (formerly) a thing) harmfully or with hostile intent. xxx Sexually assault or abuse (a person, esp. A woman or child)"

63. We may also note here the provision contained in Section 215 Cr.P.C. which deals with the effect of errors in framing the charge. Even a bare reading of the provision makes it abundantly clear that for an error in charge to be treated as "material" so as to vitiate the

judicial proceedings, it must be showed that the accused was thereby misled and this has "occasioned a failure of justice".

64. Having gone through the record of the trial court in entirety, we are satisfied that the loose language used by the trial court in framing the charge under the first head did not mislead the appellant. The allegations constituting the offence under Section 354 IPC (which was duly mentioned in the said charge) were part of the material which was shared with the appellant at the very inception in terms of Section 207 Cr.P.C. The acts attributed to the appellant constituting the said offence (shown committed repeatedly on several occasions over a prolonged period ever since the prosecutrix turned 11) are set out at length not only in the complaint forming the basis of the FIR but also in her statement under Section 164 Cr.P.C. as indeed reported to the elders and the representatives of the NGO whose services were engaged. The evidence led in this context is consistent with the case originally set up and was put to the appellant at the stage of his statement under Section 313 Cr.P.C. seeking his explanation. Therefore, no failure of justice can be suggested to have been occasioned by the improper use of the expression "molested" in the formal charge under the first head.

65. As already observed by us, the acts of commission attributed to the appellant in the charge-sheet and as shown (proved) by the evidence adduced at the trial also render it a case of "sexual assault" punishable under Section 8 of POCSO Act. Given the fact that these acts are noted in the afore-quoted charge to have continued till October, 2013, it was incumbent on the learned trial judge to consider

including the offence under Section 8 of POCSO Act in the charge. If the trial court was in doubt as to whether such offence under POCSO Act had been committed or not, a separate charge "in the alternative" could still have been framed in terms of the provision contained in Section 221 (1) Cr.P.C. There was no consideration of this aspect at any stage. Undoubtedly, the offence under Section 8 of POCSO Act is a graver offence as compared to the offence under Section 354 IPC (even after amendment of 2013) for the reason the law provides imprisonment for three years in the minimum for the former.

66. For reasons we cannot fathom, relatively minor offence under Section 354 IPC was invoked. It is too late in the day for the omission to be rectified. It is trite that without formal charge under Section 8 POCSO Act being framed, the punishment under the said law cannot be awarded. Since no charge under Section 8 POCSO Act was laid, the appellant will get away with the conviction for the lesser crime (Section 354 IPC) having been proved.

67. We record regret that no charge was framed for the graver offence under Section 8 of POCSO Act.

68. The second head of the charge for which the appellant was put on trial by the learned trial court, by order dated 10.01.2014, was framed in the following terms:

> *"Secondly, on 1st May, 2013 at house no. 331, Village Munirka, New Delhi you had committed penetrative sexual assault upon the prosecutrix X aged about 15 years (the name and details of which are mentioned in the charge sheet) and thereby you committed an offence punishable u/S 4 of POCSO Act r/w section 376 IPC and within my cognizance;"* (emphasis supplied)

69. Again, the manner in which the charge has been framed leaves much to be desired. As noted at the outset, the circumstances which would render it a case of "aggravated penetrative sexual assault" within the meaning of the provision contained in Section 5 of the POCSO Act have not been mentioned. The learned trial judge, thus, restricted the charge to the offence punishable under Section 4 of the POCSO Act.

70. But then, the second head of the charge is in continuation of the first charge wherein it was duly indicated that the appellant stood in the capacity of "step father" vis-a-vis the prosecutrix, a minor child. Though, ideally, the offence under Section 376 IPC should have formed the subject matter of a separate "alternative" charge, the way it is projected in the charge framed it can still be treated as a charge "in the alternative" though, of course, subject to the caution that punishment cannot be meted out both for the POCSO offence and the IPC offence thereby constituted.

71. Picking up the ingredients, requisite to bring home charge for the offence of rape from the formal charges framed, it is vivid that the appellant had been put to notice that he was also being tried for the offence of rape punishable under Section 376 IPC on the allegations that in May, 2013, in House No. 331, Village Munirka, New Delhi he (as the step father) of the prosecutrix had subjected her to penetrative sexual assault at a stage when she was a person less than 18 years in age. This would render it a case duly covered by the penal provision

contained in clauses (f), (i) and (k) of sub-section (2) of Section 376. Since a charge under Section 376 IPC was framed, it being a graver offence vis-a-vis the corresponding offence under POCSO Act, the error (or omission) in the context of the charge relatable to the latter would be inconsequential as, again, it did not mislead the appellant in any which way nor is shown in any manner to have occasioned a failure of justice within the mischief of Section 215 Cr.P.C. In the given fact-situation, the failure on the part of the learned trial judge in invoking offence under Section 6 of POCSO Act (aggravated penetrative sexual assault) at the stage of framing of the charge will not come in the way of recording conviction under Section 376 (2) (f), (i) and (k) IPC.

ON PUNISHMENT

72. The learned trial judge passing the order on sentence on 05.01.2016 imposed the following punishment for offence under Section 354 IPC:

> *"(3a) Convict is directed to undergo rigorous imprisonment for the period of 5 years for offence u/Sec. 354 IPC and*
>
> *(3b) Convict is further directed to pay fine of Rs.10,000/- in default of payment of fine simple imprisonment of 3 months".*

73. Since the punishment is in accord with the punishment prescribed for the offence under Section 354 IPC as amended with effect from 03.02.2013 and given the background facts wherein this offence was followed by penetrative sexual assault by a step father against the prosecutrix (also amounting to rape) we do not see any

reason to interfere with the order to the extent of punishment awarded for offence under Section 354 IPC. We, however, reserve, for later part of this judgment, our decision on the question as to how the sentences for different offences are to run.

74. The learned trial judge who passed the order on sentence, to our mind, has unfortunately exceeded his jurisdiction in a manner which cannot be countenanced. The punishment awarded in the context of the second head of charge by him in the impugned order on 05.01.2016 is in the following terms:-

> *"(1a) Convict is directed to undergo rigorous imprisonment for life for offence u/sec. 376 IPC and*
>
> *(1b) Convict is further directed to pay fine of Rs. 50,000/-. In default of payment of fine simple imprisonment of 3 months for offence u/sec. 376 IPC.*
>
> *(2a) Convict is directed to undergo rigorous imprisonment for life for offence u/sec. 6 of the Protection of Children From Sexual Offences Act, 2012. AND*
>
> *(2b) Convict is further directed to pay fine of Rs. 50,000/-. In default of payment of fine simple imprisonment of 3 months."*

75. Since the appellant was neither put to trial nor was held guilty nor convicted for the offence under Section 6 of the POCSO Act, it was wholly impermissible – rather, it was illegal – for punishment for such offence to be also awarded.

76. The learned trial judge also seems to have overlooked the basic precept of criminal law that a person may not be punished twice over

for the same set of acts of commission or omission which collectively constitute an offence covered by two different provisions of law. Though the law permits trial on alternative charge to be held for both the offences, the punishment may be awarded only for one of them, the one which is graver in nature. Section 71 IPC, quoted earlier, concludes with the command that the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences. The charge under the corresponding provision of POCSO Act (Section 4) on which the appellant has been found guilty is in addition to his conviction for the offence under Section 376 IPC. Since the circumstances attendant on the acts committed by the appellant attract Section 376(2) IPC, the punishment under the corresponding (alternative) offence under Section 4 of POCSO Act 2002 would be rendered lesser in degree in as much as, unlike the latter provision, the former – 376(2) IPC – prescribes punishment which may extend to "imprisonment for life" which shall mean imprisonment for the remainder of such person's "natural life" and "shall also be liable to fine". In these facts and circumstances, Section 42 of POCSO Act would kick in and the court is duty bound to punish the offender for the offence under Section 376(2)(f)(i) and (k) of IPC; which is greater in degree in comparison to the offence under Section 4 of POCSO Act.

77. The learned counsel representing the appellant urged that the severity of the punishment for rape be reduced to imprisonment for a specified term instead of imprisonment for life. He placed reliance on a judgment of the Supreme Court reported as *Bhavanbhai Bhayabhai*

Panella Vs. State of Gujarat, (2015) 11 SCC 566 and another of a division bench of this court reported as *Lokesh Mishra Vs. State of NCT of Delhi, (2014) SCC Online Del 1106*. We find that the view taken in both cases cited at bar has to be restricted to the factual matrix of the respective cases and cannot be adopted as the general rule. The case at hand presents a sordid scenario where the trust and confidence reposed in him by his wife and step-daughter was abused by the appellant to bring about, out of sheer lust, untold miseries on the body, mind and psyche of the prosecutrix child leaving scars which would not ever heal. Thus, we see no scope for any ruth in the matter of punishment.

78. We, thus, set aside the direction of the trial court awarding punishment under Section 6 of POCSO Act. In the given facts and circumstances, we uphold the award of imprisonment for life for the offence with fine of ₹50,000/- (and the default sentence) as imposed by the trial court for the offence under Section 376 IPC clarifying that in the case at hand the conviction having been recorded with reference to clauses (f)(i) and (k) of sub-Section (2) of Section 376, "the imprisonment for life" shall mean, be construed and enforced as imprisonment for the remainder of the appellant's "natural life". We are conscious that this was not explicitly stated by the trial judge in the impugned order on sentence dated 05.01.2016. But, given the facts and circumstances of the case noted at length above, the observations we make in above regard are only to clarify the position of legislative command for the authorities which are to administer the punishment awarded to the appellant under Section 376(2) of IPC to bear in mind.

79. The trial court deemed it proper to award rigorous imprisonment for a period of 7 years for the offence under Section 506 (IInd part) IPC. Given the factual matrix of the case, we do not find any cause for reduction of the said sentence.

80. On the subject of punishment, there is one more issue required to be addressed. After awarding various sentences for the different offences on which the trial court convicted the appellant, it added the following directions / observations :-

> "*…Benefit u/sec. 427 Cr. PC is given to convict for the offence u/sec. 376 IPC and Sec. 6 POCSO Act. No benefit u/sec. 354 IPC and Sec. 506 IPC is given to convict and these sentences shall run successively*…"

81. We are pained to observe here that the learned Judge passing the order on sentence did not notice that Section 427 Cr. PC deals with situations ("sentence on offender already sentenced for another offence") which do not even arise in the case at hand. We have not found even a shred of allegation or proof that the appellant had been prosecuted, found guilty, convicted, or sentenced to imprisonment in any case prior to the one at hand. It was conceded at bar by the learned additional public prosecutor that there is no past criminal record of the appellant. There was, thus, no occasion for assuming that the appellant was "*already undergoing a sentence of imprisonment*" or "*imprisonment for life*" so as to attract the provision contained in Section 427 Cr. PC. The conviction for more than one offence in the same trial could not have been treated as "*subsequent conviction*".

82. The second sentence in the above-quoted part of the impugned order indicates that what was on the mind of the trial judge was the need to regulate or set off the period of detention already undergone by the appellant against the sentences awarded. This should have attracted his attention to the provision contained in Section 428 Cr. PC which reads as under :

> *"Section 428 - Period of detention undergone by the accused to be set off against the sentence of imprisonment*
>
> *Where an accused person has, on conviction, been sentenced to imprisonment for a term [not being imprisonment in default of payment of fine,] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.*
>
> *Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section."*

83. It seems incongruent that the benefit of "*set off*" was granted in the context of award of imprisonment for life but declined in the case of other two offences where imprisonment for different terms have been imposed. We do not approve of the expression "*shall run successively*" as has been used by the trial judge in the order on sentence. The courts are expected to use clear and unambiguous language rather than loose expressions. It is, though, clear that the learned judge meant to convey "*shall run consecutively*", in contrast to

the possible direction that the sentences "*shall run concurrently*". Even if the direction of the trial judge is thus understood, there is an added difficulty in enforcing it in that it is not clarified as to punishment for which offence runs first and which would be consecutive or is to follow.

84. Whilst it is true that the law gives the discretion to the criminal court to direct the sentences for different offences on which conviction has been recorded in the same trial against the same accused, to run concurrently or consecutively (Section 31 Cr. PC), it has to be borne in mind that "*imprisonment for life*", as is one of the sentence awarded here, has all along been understood to mean and construed as imprisonment for "*the full and complete span of life*". [*Ashok Kumar @ Golu Vs. Union of India, (1991) 3 SCC 498*].

85. In a decision of Constitution Bench of the Supreme Court of India reported as *Muthuramalingam and Ors. Vs. State rep. by Inspector of Police, 2016 SCC Online SC 713*, the question of law addressed was as to whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he had been tried in a single trial. The court answered the question in the negative and held that while the sentences for imprisonment for life can be awarded for multiple murders or other offences punishable for imprisonment for life, the life sentence so awarded cannot be directed to run consecutively. It was observed that such sentence would be "*superimposed over each other so that any remand or commutation*

granted by the competent authority in one does not ipso facto result in remission of the sentence awarded to the prisoner for the other".

86. After answering the above noted question of law, the Constitution Bench in *Muthuramalingam* (supra) also dealt with another dimension involving the question "*as to whether the court can direct life sentence and terms sentences to run concurrently*". The question was answered thus :-

> *"32. ...The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutively. It was contended on behalf of the appellants that even this part of the direction is not legally sound for once the prisoner is sentenced to undergo imprisonment for life, the term sentence awarded to him must run concurrently. We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr. P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence. ...."*

87. Since we have clarified above that the sentence of imprisonment for life awarded to the appellant for the offence under Section 376(2) IPC shall mean and be enforced as imprisonment for the remainder of

his natural life, the question of directing any of the sentences to run consecutively is rendered redundant.

ON COMPENSATION

88. We cannot drop curtain on the matter with observations on the quantum of punishment. The learned trial court while passing the order on sentence on 05.01.2016, after spelling out the punishment it was awarding, further directed as under :-

> *"COMPENSATION U/SEC. 7 POCSO RULES, 2012*
>
> *Section 33(8) of POCSO Act, 2012 provides that in appropriate cases, compensation may be prescribed to the child.*
>
> *Rule 7(2) of POCSO Rules, 2012 further provides that special court may on its own award compensation when the accused is convicted.*
>
> *Now in this case, it is one of the most demanding circumstances, in which the heinous offence is committed by the convict on his daughter and made her pregnant resulting a birth of child. Now there are two victims of crime i.e. the child and the baby born out of said offence.*
>
> *So, in these circumstances, the case demands a compensation which is not only with respect to the loss suffered but also injury /aftermath as a result of crime.*
>
> *In these circumstances, it is directed that a compensation of ₹13 Lacs is awarded to the victim. It is further directed that out of ₹13 lacs, ₹12 lacs shall be deposited in bank account and thereby be converted into FDR long term account, in the name of infant child, and the principal shall not be realized till the child attains majority. It is further directed that the*

interest accumulated on the said FDR account shall be deposited in a separate bank saving account and the victim / her guardian is at liberty to utilize said amount for the welfare of the child.

Considering the fact that the child born to the victim is minor. Victim herself is minor. In these circumstances, the mother of the victim may apply to get appointed as guardian or may apply to the bank for opening the accounts of both minors, if their rules permit.

Out of ₹13 lacs, victim is awarded ₹1 lac on account of the loss suffered by victim.

<u>COMPENSATION U/SEC. 7(3 AND 4) OF POCSO RULES, 2012 AND SEC. 357(A) CR. P.C.</u>

In the present case, the victim is minor and is dependent for her necessary expenses.

Considering the young age of the prosecutrix, the mental trauma that she have undergone, she needs financial support. It is recommended that she be given a compensation of ₹2 lacs. A copy of this order be also sent to the prosecutrix and to Delhi State Legal Services Authority, for disbursement of compensation and a copy be also supplied to the complainant and the complainant may also approach DLSA for disbursement of compensation..”

89. There are primarily two provisions of the Code of Criminal Procedure, 1973 (Cr. PC) dealing with the question of compensation which would be of relevance at this stage of the proceedings, they being Sections 357 and 357A. The former provision, to the extent relevant, reads as under:-

“357. Order to pay compensation -

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

x x x x x

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

90. Section 357(1) permits the amount of fine imposed and realized to be applied, *inter alia*, for payment of compensation to the victim for any "*loss or injury*" caused by the offence in all such cases where compensation may be claimed by bringing an action in the civil court.

91. As noted above, the learned trial judge while directing the appellant to undergo imprisonment for various terms has also imposed fine of ₹10,000/- for the offence under Section 354 IPC and Rs.50,000/- for offence under Section 376 IPC but did not consider as to whether the said amounts of fine may be released as compensation for the loss or injury suffered by the prosecutrix on account of the offences to which she was subjected to.

92. In the case reported as *Ankush Shivaji Gaikwad Vs. State of Maharashtra, (2013) 6 SCC 770*, the question of award of compensation to be paid by the convict (appellant) to the bereaved family of the victim of the offence under Section 304 (part II) IPC had arisen and the Supreme Court, after taking note of the jurisprudence that has evolved against the backdrop of the provision contained in Section 357 Cr. PC, concluded thus :

> *"66. ...While the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding / refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Cr. PC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it*

unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his / her family."

93. Though it must be noted that the learned trial judge did bear in mind its duty to consider the grant of compensation in the case at hand, unfortunately it restricted itself to the provision contained in Section 357 A Cr. PC and the corresponding provision contained in the POCSO Act and the rules framed thereunder.

94. Given the difficulties in enforcement in entirety of the above extracted directions about the compensation ordered to be paid by the learned trial judge, which we shall discuss at some length a little later, we are of the view that the amount of fine thus imposed for the above said two offences also must be directed to be released, upon realization, to the prosecutrix in terms of Section 357(1)(b) Cr. PC. The needs of the prosecutrix for recompense and rehabilitation must take precedence over all other considerations.

95. The learned trial judge has referred to Section 357A Cr. PC besides Section 33(8) of the POCSO Act read with Rule 7 of the POCSO Rules. The provision of law in Code of Criminal Procedure may be extracted hereunder :-

"Section 357A – Victim Compensation Scheme –

(1) Every <u>State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim</u> or his

dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

(emphasis supplied)

96. We may also extract the relevant POCSO provision which specifically permits direction for payment of compensation *"in addition to fine"* and reads thus:

> *"Section 33 - Procedure and powers of Special Court*
>
> *x x x*
>
> *(8). In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."* (emphasis supplied)

97. In addition and apart from S. 357 Cr.P.C. directing payment of compensation by the individual accused, S. 357A is the legislature's recognition of the responsibility of the State to compensate victims as well as dependants of victims of crime who have suffered loss or injury as a result of the crime and need rehabilitation.

98. Having regard to the letter and spirit of the provision contained in Section 357A Cr. PC it is clear that the court is to make a recommendation for compensation to be paid in terms of the Victim Compensation Scheme to be prepared and notified by the Government, the responsibility to decide and arrange for the release of the compensation having been placed at the door of the legal service authorities. Section 357A (3) Cr. PC makes it clear that recourse to the Victim Compensation Scheme can be taken even if compensation has been ordered to be paid in terms of Section 357 Cr. PC. Section 33 (8) of POSCO Act also makes it explicit that the compensation

ordered is in addition to the punishment which would include the sentence of fine.

99. We also extract hereunder the relevant rule 7 under the POCSO Rules which reads as follows:-

> *Rule 7 of POCSO Rules – (1). The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report such interim compensation paid to the child shall be adjusted against the final compensation, if any.*
>
> *(2). The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.*
>
> *(3). Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-*
>
> *(i). type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;*
>
> *(ii). the expenditure incurred or likely to be incurred on his medical treatment for physical and / or mental health;*

(iii). loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv). loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v). the relationship of the child to the offender, if any;

(vi). whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii). whether the child became pregnant as a result of the offence;

(viii). whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix). whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x). any disability suffered by the child as a result of the offence;

(xi). financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii). any other factor that the Special Court may consider to be relevant.

(4). The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and

rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5). The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6). Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

(emphasis supplied)

100. Therefore, in a case as the present one where the prosecutrix, a young child less than 14 years' in age, was rendered pregnant by her own step-father (appellant) by forced penetrative sexual assault (constituting the offence of rape), the said pregnancy having led to delivery of a child in due course, the amount of compensation of ₹60,000/- (as ordered by us to be paid upon the amount of fine of equivalent value being realized in terms of the above directions) would hardly be adequate for her appropriate or full rehabilitation. In these circumstances, there can be no doubt that the case of the prosecutrix deserves to be considered for purposes of suitable compensation under the Victim Compensation Scheme notified under Section 357A Cr. PC on account of the inadequacy of the compensation awarded under Section 357 Cr. PC.

101. The enabling provision contained in Section 33(8) of the POCSO Act only reiterates the expectation from the court in terms of

Section 357A Cr. PC discussed earlier; though, it must be added, it restricts the considerations by stating that compensation which can be ordered by the Special Court under the POCSO Act to be paid to the victim child is "*for any physical or mental trauma"* or "*for immediate rehabilitation*" of such child. Noticeably, the statutory direction is that the compensation shall be ordered to be paid in the appropriate cases by the court "*as may be prescribed*". This required the authorities vested with the responsibility for putting in position subordinate legislation (Central Government in terms of Section 45 POCSO Act and State Government under Section 357 A Cr.P.C.) to "prescribe" parameters and method for calculation of the amount of compensation in cases of varied nature.

102. In the name of prescription within the meaning of the clause contained in Section 33(8) of the POCSO Act, however, the Central Government has included Rule 7 in the POCSO Rules notified and brought into force with effect from 14.11.2012, as extracted earlier. Sub-Rule (3) of Rule 7 indicates the factors which are to be taken into account by the court in determining the appropriate award of compensation to the victim child, they including considerations of the type of abuse, gravity of offence, severity of mental or physical harm or injury, the expenditure incurred or likely to be incurred for restoring the physical or mental health, loss of engagement in gainful activity, etc. Noticeably, the abuse of the close relationship of the child to the offender; the fact as to whether the sexual abuse was a protracted one and further, more importantly, as to whether the offence resulted in pregnancy leading to a live birth would be integral & essential part of

the consideration of the "expenditure incurred or likely to be incurred for restoring the physical or mental health, as well as loss of engagement in gainful activity" are to be borne in mind. But, these guidelines are general in nature and do not assist much in quantifying the amount of compensation. The POCSO Rules make no provision for a child born out of the sexual violence or the offence suffered by the child, who is not only a dependant of the victim, but the direct victim of the offence.

103. While there can be no quarrel with the proposition that the factors set out in Rule 7(3) of the POCSO Rules are of utmost and crucial import, the difficulty with the guidance provided by the rules stems from the fact that sub-rule (4) of rule 7 of the POCSO Rules refers one back to the Victim Compensation Fund and the Victim Compensation Scheme prepared and enforced by the Government in terms of Section 357A Cr. PC. This clause renders Section 33(8) of the POCSO Act nothing but reiteration of what was already on the statute book in the form and shape of Sections 357 and 357A Cr. PC. We are informed that the Government of National Capital Territory of Delhi by Notification F.No.11/35/2010/HP II dated 02.02.2012 issued and published by Home (Police-II) Department, had brought into force a scheme under Section 357A Cr. PC for purposes of the National Capital Territory of Delhi called "Delhi Victims Compensation Scheme, 2011 ("Delhi Scheme of 2011"). We are also informed that the Government of National Capital Territory of Delhi is yet to establish the Victim Compensation Fund to fulfill the obligations in terms of its own scheme (Delhi Scheme of 2011); this inspite of the

nudge given by this Court through a series of order passed in a public interest litigation bearing *WP(C) No.7927/2012, Court on its own motion vs. Union of India & Ors.*. The Delhi Scheme of 2011 does not take into account the afore-noticed special consideration for victim of an offence under POCSO Act. The legislative command in Section 33(8) POCSO Act for the compensation payable to the child who suffered the sexual offence to be "prescribed" does not find resonance in the subordinate legislation notified in terms of the power to make rules under Section 45 or in the Victim Compensation Scheme enforced under Section 357 A Cr.P.C. We also find that the Scheme does not make any provision for one who is born from the rape of the child and would be covered under the definition of both "victim" as well as "dependent on the victim."

104. Seen against the above position of law on the subject, we are of the opinion that the learned trial judge has erred while dealing with the issue of compensation in the case at hand. It appears that he considered it permissible, and wrongly so, for compensation to be ordered by directing an amount to be paid separately under Section 33(8) of the POCSO Act read with Rule 7(2) of the POCSO Rules, on one hand, and by award of another amount under Section 357 A Cr. PC read with rules 7(3) and (4) of POCSO Rules, on the other. Sub-Rule (2) of Rule 7 of the POCSO Rules is to be read with Section 33(8) of the POCSO Act. Sub-Rules (3) and (4) of Rule 7 only provide the guidance for enforcing what can be recommended as the award of compensation under sub-Rule (2) of Rule 7, read with Section 33(8). In terms of sub-Rule (4) of Rule 7, the obligation to

pay the amount eventually ordered is the responsibility of the State Government by appropriate drawal from the Victim Compensation Fund (if, as and when) notified under Section 357A Cr. PC. Thus, separate awards of ₹13 Lakhs and ₹2 Lakhs ordered to be paid as compensation by the trial judge are not correct application of the law.

105. Besides the above, there are other difficulties with the dispensation ordered by the trial court on the question of compensation. Though it ordered ₹13 Lakhs to be paid as compensation to the victim under Section 33(8) of the POCSO Act read with Rule 7(2) of the POCSO Rules, there is nothing indicated in the proceedings recorded or the order passed as to on which basis the said figure had been computed. The amount seems to have been picked up by the learned trial judge just from the air. There was absolutely no inquiry to gather the necessary material or evaluate to reach a reasonable conclusion. This is not a correct approach to adopt. Having ordered such amount of money to be paid as compensation and from out of the said amount ₹12 Lakhs to be kept apart in fixed deposit for the benefit of the child born to the prosecutrix on account of the pregnancy resulting from the offence of rape, the trial judge directed the case file to be consigned to the record room. There is no arrangement made in the impugned order as to who would be responsible for recovery of the said amount of money and / or by what mode. If the intent was for the amount of such compensation to be realized from the appellant, there is no inquiry or consideration as to whether the appellant had the capacity or resources to pay such an amount of money as compensation.

106. It is well settled that the amount ordered to be paid as compensation in a criminal case may be realized as fine. [see *K.A.Abbas H.S.A. vs. Sabu Joseph (2010) 6 SCC 230*]. Further, the default in payment of the amount of compensation may also be visited by imprisonment in default. [see *R. Mohan vs. A.K. Vijaya Kumar (2012) 8 SCC 721]*.

107. Under the criminal jurisprudence, the trial court is also the executing court. It is its obligation to take all directions it lawfully passes to the logical conclusion subject, of course, to the modification or inhibition, if any, ordered by the appellate or revisional courts. For such purposes, it must keep its proceedings open and not generally expect, as seems to be the case here, an "execution" application to be moved.

108. The direction for payment of ₹13 Lakhs as compensation in the first part of the order on the subject quoted earlier, in the given facts and circumstances, turns out to be merely a promise on paper – nothing more and nothing less – no arrangement having been made for its enforcement. This dispensation, being unreasoned, must resultantly be vacated and we hereby so order.

109. No inquiry regarding means of the offender or ability to compensate has been held and so meaningful order for enhancing fine to be paid to victim under S. 357(1) Cr.P.C. is not possible. No order directing offender to pay compensation under Section 33(8) of POCSO to child victim is also possible on the record in the present case. The consideration of an award of compensation under section

33(8) of POCSO has to be confined, therefore, to the Scheme under rule 7(4) of the POCSO Rules.

110. In the above facts and circumstances, the road to award an appropriate amount of compensation to the victim in the case at hand, in terms of the provisions contained in the POCSO Act and the rules framed thereunder, leads us eventually to search for remedy in the Victim Compensation Scheme and Victim Compensation Fund under Section 357A Cr. PC. Though we are informed that the Delhi State Legal Services Authority (DSLSA) has taken certain steps in conjunction with the concerned authorities in the Government of National Capital Territory of Delhi to improve upon the Delhi Scheme of 2011 (in which context the draft of Delhi Victims Compensation Scheme, 2015 seems to be presently under consideration), the compensation in the case at hand has to be considered and granted within the constraints of the existing scheme of 2011.

111. As noted earlier, the learned trial court has recommended, under the Delhi scheme of 2011, an amount of ₹ 2 Lakhs to be paid to be prosecutrix as compensation by DSLSA, it being the "minimum limit". We notice that in the case of loss or injury arising out of the offence of rape, the maximum amount of compensation that can be recommended to be paid by the legal services authority under the said Delhi Scheme of 2011 is ₹3 Lakhs. We find no reasons set out in the order of the learned trial judge as to why he opted for the minimum amount of ₹2 Lakhs to be paid under the said scheme. Since we are vacating the directions of the trial judge for the amount of ₹13 Lakhs

to be paid as compensation separately (out of which ₹1 Lakh was to go to the victim prosecutrix), there is an added reason why the compensation ordered under Section 357A Cr. PC be enhanced.

112. As noticed above, the Delhi Victims Compensation Scheme 2011 was notified by the Government of NCT of Delhi on 02.02.2012. The Protection of Children from Sexual Offences Act, 2012 came into force on 14.11.2012. Obviously, the said special law having come on the statute book subsequently, there was no provision made in the said scheme for the child victims of sexual offences. The Protection of Children from Sexual Offences Rules, 2012 were simultaneously prepared and notified by the Central Government so as to be brought into force on 14.11.2012.

113. As noted above, Delhi State Legal Services Authority has initiated certain steps to improve upon the Delhi Scheme of 2011. From the draft of Delhi Victims Compensation Scheme 2015, which was shown to us, we find that the concerns of child victims are proposed to be addressed by permitting the compensation amount to be "increased by upto 50% more than specified". For the offence of rape, the upper limit of compensation is proposed to be enhanced to ₹5 Lakhs. Thus, it is expected that once the draft scheme of 2015 is finally accepted and enforced, the compensation in such cases as at hand for the offence of rape may be awardable, in case of child victims, to the extent of ₹7.5 Lakhs.

114. We find that there is a complete vacuum in the consideration of compensation so far as the sexual offence resulting in the birth of a

child. Such a child is clearly a victim of the act of the offender and entitled to compensation independent of the amount of compensation paid to his/her mother. Such award would require to include amount towards his/her maintenance and support.

115. The fact, however, remains that the Delhi Scheme of 2011, as presently in force, does not actually take care of the responsibility of the State in terms of Section 33(8) of the POCSO Act read with Rule 7 of the POCSO Rules and Section 357A Cr. PC vis-à-vis child victims of sexual offences. In other words, as on date, neither a Victims Compensation Scheme nor a Victims Compensation Fund exists in Delhi for purposes of child victims of sexual offences. This is a vacuum within the scenario envisaged in Rule 7(4) of the POCSO Rules quoted earlier. While we note that the improved scheme would take care of vacuum in the provision for child victims, there is no inhibition before us in awarding a suitable amount of compensation for the prosecutrix in the case at hand, without feeling strait-jacketed by the Delhi Scheme of 2011.

116. As observed earlier, the learned trial judge did not hold any inquiry to gather further material for fair and reasonable compensation to be evaluated. It is too late in the day for such inquiry to be now held. Given the value of money, the amount of ₹3 Lakhs which is the maximum permissible under the Delhi Scheme of 2011, even if disbursed, would hardly suffice for the prosecutrix for total recompense and rehabilitation.

117. The background of the family, as noted by us in the initial part of this judgment, shows the prosecutrix has been leading a socially disadvantaged life, her mother making the two ends meet by working as a maid-servant in several households. Given the nature of loss, pain and suffering which she undoubtedly would have undergone, we find this to be a fit case where the State must pay compensation for the minimum sum of ₹7.5 Lakhs (which would be the compensation awardable under the proposed scheme of 2015, as and when brought in force). We recommend accordingly for appropriate award and the provision to be made by Delhi State Legal Services Authority. The amount of ₹2 Lakhs awarded as compensation by the trial court, if paid, of course, would be suitably adjusted.

118. We are informed that with no Victims Compensation Fund having yet been established by the Government of NCT of Delhi, Delhi State Legal Services Authority has been arranging the payment of compensation under Section 357A Cr. PC with the help of funds periodically transferred to it by the Government of NCT of Delhi under directions of this court in the public interest litigation (I*n re: Court on its own motion*) referred to earlier. We are further informed that Delhi State Legal Services Authority has also been maintaining a separate account, on its own initiative, pending creation of Victims Compensation Fund by the State Government, collecting therein the amount of costs or fines imposed by various courts which fund is also routinely tapped for compensation to be paid. Should Delhi State Legal Services Authority find it difficult to pay the compensation ordered by us in the case at hand from the funds transferred to it by the

Government of NCT of Delhi, it would have the liberty to utilize the funds collected by it on its own initiative as referred to above.

119. In order to ensure that the amount of money reaching the hands of the prosecutrix at very young age is not frittered away, we direct that the sum to be released to her now shall be put in interest bearing fixed deposit receipt in a nationalized bank of her choice in her name for a period of ten years with right to draw periodic interest.

120. For reasons set out earlier, we are unable to uphold the direction about the amount of ₹13 Lakhs to be paid as compensation over and above what has been ordered under Section 357A Cr. PC. Noticeably, the said amount included an amount of ₹12 Lakhs, which was to be preserved as a corpus in a fixed deposit receipt in the name of the child born on account of the offence of rape to the prosecutrix. It seems to have escaped the notice of the learned trial judge passing the order on sentence that the said child, after its birth on 10.02.2014, has already been given away in adoption. This is what was stated in the court by the prosecutrix (PW-2) during her deposition and by her mother (PW-3), both recorded on 28.04.2014. Given the concerns of privacy and confidentiality and given the possible repercussions such order might entail impacting the future welfare of the individuals involved, we do not consider it appropriate to uphold such directions in the case at hand vis-à-vis the child born to the prosecutrix and consequently set aside the same as well, though reserving a right unto the adoptive parents of the said child to approach the legal services authority for

compensation in its favour should they feel it necessary to claim on its behalf.

121. We direct that the learned trial judge shall call for a report from the DSLSA with regard to the proper compliance by payment of compensation under Section 357A Cr. PC to the victim prosecutrix and issue further directions, as may be required in accordance with law. Further, it shall also take all necessary steps under the law to endeavour to recover the fine and for the amount thereby realized to be paid to the victim as compensation in terms of direction given by us under Section 357(1)(b) Cr. PC. We, however, must add a word of caution that such recovery shall not be enforced by attachment or sale of any of such assets of the appellant as are in use or enjoyment of the prosecutrix or her mother.

GENERAL OBSERVATIONS

122. In the beginning of this judgment, we expressed our anguish at the disclosure of the identity of the victim prosecutrix in the case at hand. If reference is required in this context, the particulars of the prosecutrix noted at the stage of recording of the evidence only need to be seen. The objective behind the statutory command for *in-camera* proceedings in such cases being the rule in terms of Section 327 Cr. PC is to protect the victim female from secondary victimization.

123. In the context of child victim of sexual offences, the POCSO Act explicitly so directs, by the provision contained in Section 33(7), which reads as under :-

"33. Procedure and powers of Special Court –

(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."

124. In view of the above, it is the statutory responsibility of the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The proviso carves out an exception for the court to permit such disclosure but the consideration therefor being again "*the interest of the child*". As clarified in the explanation, the identity of the child does not mean only the name but includes the identity of family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed.

125. All concerned, not merely the statutory authorities (which include the courts), would have to bear in mind that the legislative command against disclosure of identity of victims of sexual offences requires strict and scrupulous compliance. It has to be borne in mind that the relevant provisions including those referred to above are to be read, after coming into force of Criminal Law (Amendment) Act, 2013 with effect from 03.02.2013, with the provision contained in Section

228 A IPC, whereunder improper disclosure of the identity of the victim of such offences entails sanction in penal law. Since the responsibility to enforce the criminal law rests with the criminal courts, breach of such propriety by the courts themselves cannot be brooked. Though directions on the subject have been given in the past, we reiterate and direct that all the trial courts shall ensure that the identity of the victim in cases involving sexual offences shall not be disclosed anywhere on judicial record and that names shall be referred by pseudonyms in accordance with law and they be so identified during the course of trial and in the judgment.

126. The learned trial judge erred in recording concluding directions as well. The appellant was arrested on 18.10.2013. He has remained in custody ever since. He was sentenced to life imprisonment and directed to be sent to prison under the conviction warrant. Yet, the order also states he was called upon to furnish personal bond which had even been "accepted" in terms of Section 437-A Cr.P.C. Obviously, there was no occasion for Section 437-A to be applied.

127. Before parting, we feel the necessity of touching upon one more concern which may appear, on first blush, to be cosmetic but which, to our mind, is of import. As mentioned earlier, the FIR of the case at hand was registered also for investigation into an offence under the POCSO Act. Upon conclusion of the investigation into the FIR, charge-sheet was submitted by the police in the court of sessions designated as the "Special Court" under Section 28 of the POCSO Act on 12.11.2013, addressing it as "Metropolitan Magistrate". The

Special Court took cognizance on the said report describing itself as the court of Additional Sessions Judge for New Delhi district. In all the subsequent proceedings, right through to the stage of order on sentence passed on 05.01.2016, the learned trial court described the power and jurisdiction exercised by it to be that of an Additional Sessions Judge. There is no reference whatsoever anywhere reflecting that the trial court was conscious that the jurisdiction it was exercising in the case at hand was that of a Special Court created under the POCSO Act.

128. The courts dealing with the sexual offences of the kind involved here, whether as the courts of session under the general law or as the special court under the special enactments like Commissions for Protection of Child Rights Act, 2005 or the POCSO Act are presided over by judicial officers who are fairly senior in rank, well experienced and carefully picked up for such responsibilities requiring utmost sensitivity for the issues arising for resolution and determination. The nomenclature "Special Court", in contrast to the expression "court of session" is not merely a matter of form. The qualifying word "special" preceding the word "court" imbues it with the elements of specialty or specialization. It may be that the same court originally designated as a court of session with responsibility for sessions trials under the general law, is also designated as the "Special Court" under the special enactments like POCSO Act. But it is essential, and of import, that while exercising the powers and jurisdiction under the special law, the presiding judge properly describes himself as the presiding judge of the "Special Court". Any

other expression or description tends not only to create confusion as to the procedure and powers but also erode the requisite level of sensitivity on the part of the judge-in-chair. We, thus direct that the judicial officers shall always bear in mind the jurisdiction they are exercising in the cases brought before them and properly describe the power, designation and jurisdiction in the proceedings.

FINAL ORDER

129. The appeal against conviction is thus dismissed with modification in the order on sentence as directed above. The learned trial court, or the successor court, shall take all necessary and consequential follow-up steps in accordance with the law in light of these directions.

130. Given the issues of general nature which have come up for our consideration and directions in this case, it would be proper that the judgment is circulated for information and necessary compliance amongst all judicial officers of Delhi. We direct the District and Sessions Judge (HQ) to do so at the earliest under intimation to the Registrar General of this court.

131. We also direct a copy of this judgment to be made over to the Member Secretary of Delhi State Legal Services Authority and to the Principal Secretary (Law) of the Government of NCT of Delhi for bearing in mind the concerns expressed by us vis-à-vis the enforcement of the provisions contained in Section 357A of the Code of Criminal Procedure, 1973, read with Section 33(8) of the Protection

of Children from Sexual Offences Act, 2012 and Rule 7 of Protection of Children from Sexual Offences Rules, 2012.

(R.K. GAUBA)
JUDGE

(GITA MITTAL)
JUDGE

DECEMBER 09, 2016
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