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

% ***Judgment Reserved on: 08.01.2026***
Judgment pronounced on: 15.01.2026

\+ CRL.A. 649/2025 & CRL.M.(BAIL) 1046/2025

MADHU SHUDHAN DUTTO .....Appellant

Through: Mr. Biswajit Kumar P. and Ms. Khushboo Gupta, Advocates.

Versus

STATE GOVT. OF NCT OF DELHI .....Respondent

Through: Mr. Pradeep Gahlot, APP for State
Mr. Amit Gupta, Mr. Kshitij Vaibhav, Ms. Muskan Nagpal and Mr. H.S. Mahapatra, Advocates for respondent No.2.

CORAM:
HON'BLE MS. JUSTICE CHANDRASEKHARAN SUDHA

JUDGMENT

CHANDRASEKHARAN SUDHA, J.

1. In this appeal filed under Section 415(2) read with Section 528 of the Bhartiya Nagarik Suraksha Sanhita, 2023, the appellant, the sole accused in SC No. 2685 of 2016 on the file of the Special Court under the Protection of Children from Sexual Offences Act, 2012, Saket Courts, Delhi, assails the judgment dated 17.01.2025 as per which he has been convicted and sentenced for the offences punishable under Section 6 of the PoCSO Act and Section 342 of

the Indian Penal Code, 1860.(IPC)

2. The prosecution case is that on 28.06.2016 at about 03:45 PM at A-215, V.P. Singh Camp Railway Colony, Tuglakabad, New Delhi, the appellant/accused wrongfully confined PW1, the daughter of PW7, a minor girl aged about 9 years, in his clinic and committed aggravated penetrative sexual assault upon her.

3. On the basis of Ext. PW7/A FIS of PW7, given on 28.06.2016, crime no. 198/2016, Prahladpur Police station, that is, Ext. PW13/A was registered by PW13 Woman Sub-Inspector (WSI). PW13 conducted investigation into the crime and on completion of the same filed the charge-sheet/final report alleging commission of offences punishable under Sections 342 and 376 IPC and Section 6 of the PoCSO Act.

4. When the accused was produced before the trial court, all the copies of the prosecution records were furnished to him as contemplated under 207 Cr.PC. After hearing both sides, the trial court as per order dated 02.02.2017 framed a charge under Section

342 IPC and Section 6 of the PoCSO Act, which was read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PWs.1 to 14 were examined and Exts. PW1/A-B, PW2/A-D, PW4/DA, PW5/A-B, PW6/A-B, PW7/A, PW10/A, PW11/A-C, PW 12/A-C, PW13/A-C, PW14/A were marked in support of the case.

6. After the close of the prosecution evidence, the accused was questioned under Section 313 Crpc regarding the incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all those circumstances and maintained his innocence. He submitted that he had been falsely implicated in this case due to monetary disputes he had with PW7.

7. After questioning the accused under Section. 313 CrPC, compliance of Section 232 CrPC was mandatory. In the case on hand, no hearing as contemplated under Section 232 CrPC is seen done by the trial court. However, non-compliance of the said provision does not, *ipso facto* vitiate the proceedings, unless

omission to comply the same is shown to have resulted in serious and substantial prejudice to the accused (See **Moidu K. vs. State of Kerala, 2009 (3) KHC 89 : 2009 SCC OnLine Ker 2888**). Here, the accused has no case that non-compliance of Section 232 Cr.P.C has caused any prejudice to him. No oral or documentary evidence was adduced by the accused.

8. Upon consideration of the oral and documentary evidence on record and after hearing both sides, the trial court, *vide* the impugned judgment dated 17.01.2025 held the accused guilty of the offences punishable under Section 342 IPC and Section 5(m) of the PoCSO Act and hence sentenced him to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 6 of the PoCSO Act and to a fine of ₹ 1,000/-, and in default of payment of fine, to undergo simple imprisonment for two months, and to rigorous imprisonment for 06 months for the offence punishable under Section 342 of IPC. The sentences have been directed to run concurrently. Aggrieved, the accused has

preferred this present appeal.

9. It was submitted by the learned counsel for the appellant/accused that in the light of the unsatisfactory evidence on record, the trial court went wrong in convicting the accused for the offence punishable under Section 6 of the PoCSO Act. According to him, there are several contradictions and inconsistencies in the statement of the material prosecution witnesses. The doctor who examined PW1, the victim, was never examined before the trial court. Therefore, Ext. PW5/B, the Medico-Legal Certificate (MLC) has not been proved. It was further submitted that even assuming for argument sake (without admitting), at best, it is only the offence of sexual assault as contemplated under Section 7 of the PoCSO Act that is made out. As PW1 is below 12 years, the offence comes under Section 9(m) of the PoCSO Act punishable under Section 10 of the Act. As the trial court has grossly erred in convicting the accused for the offence punishable under Section 6 of the Act, the impugned judgment requires to be reversed, goes

the argument.

10. *Per contra*, it was submitted by the learned Additional Public Prosecutor that the testimony of PW1 corroborated by the testimony of PW7, her mother, as well as PW3 and PW4, the neighbours clearly proves the prosecution case. No contradiction, whatsoever, has been brought out in their testimony. The witnesses have given consistent statements all throughout the proceedings. Their testimony has not been discredited in any way and hence, there is no reason(s) to disbelieve them. Further, it was also pointed out that PW14/A, the FSL report, also substantiates/proves the prosecution case. Hence, there is no infirmity in the impugned judgment calling for an interference by this Court, argued the prosecutor.

11. Heard both sides.

12. I shall first briefly refer to the evidence on record relied on by the prosecution in support of the case. The incident in this case is alleged to have taken place on 28.06.2016 at 03:45 p.m.

inside the clinic of the accused, who is stated to be a doctor. Exhibit PW7/A, the FIS of PW7, the mother of the victim, was recorded on the very same day of the incident. In the FIS, PW7 has stated thus:- "Today on 28.06.2016 at about 03:45 p.m. I sent my daughter (PW1) aged 9 years to the doctor (accused) for getting medicine for my another daughter who was sick. After 5 minutes I also went to the doctor. The shutter was half open. The curtain was fully drawn. My younger daughter was sitting on a bench. The curtain in the middle of the room was also drawn. I looked inside the curtain and then I saw my daughter 'X' lying on a bench. The doctor (accused) had pulled down his under garment till his knees and was lying on top of my daughter. Seeing me he got up. I raised alarm. People gathered and the landlady of the doctor (accused) called the police. When I asked my daughter about the incident, she told me thus - the doctor had removed my undergarment and made me lie on the bench. Then, he removed his underwear till his knees and lay on top of me and started rubbing

against my body, then mummy came."

13. PW1/A, the 164 statement of PW1, is seen recorded on 30.06.2016 by the magistrate. In the said statement PW1 states thus:- "My mummy told me to go and fetch medicine for my younger sister aged 03 years. My brother was awake and hence my mother told me that she would feed him and join me. I took my sister to the doctor (accused) who is just 05 minutes away. Everybody calls him Bengali Doctor. I do not know his name. I went there and called out to him. The doctor asked me to go in. I took my younger sister and went. He made my younger sister sit on a bench and he took me inside. He closed my mouth and lay on top of me by which time mummy came. Mummy raised an alarm and so people gathered**.** The landlady also came. I was taken to the house of the landlady. I do not know what happened later."

14. PW1, when examined before the trial court deposed thus:-

"……On 28.06.2016 my younger sister 'A'

aged about 3 years was suffering from dysentery (use baar baar latrine aa rahi thi) and my mother was feeding my brother and she told me to take to nearby Bengali doctor in our colony i.e. at V.P. Singh Colony which is at a distance of five minutes walk from our house. When I went there, the said Bengali doctor was there and he made me and my sister sit in his room and there was a curtain. He pressed my mouth and took me to the other side of the curtain and removed my panty and capri (lower pant) and he also removed his own clothes and put his urinal part in my urinal part (use apnasu-su mere su-su me daal diya). My mother came there and raised alarm and called police by dialing 100 number. Police came and I was taken to hospital for medical examination……..."

15. PW7, the mother of PW1 deposed that, on the said day, she had asked PW1 to take her younger daughter to the accused as the latter was suffering from loose motion. After about 05 minutes she also went there. The clinic of the doctor (accused) is at a walking distance of about 02 minutes. When she reached there, she saw half portion of the shutter of the clinic closed and the remaining half open. The curtain was also drawn so that one could not see the inside of the clinic. She entered the clinic after slightly

sliding the curtain. Then she saw her younger daughter aged 03 years sitting on a bench. Thereafter, she has stated thus:-

> "*Jab mai ander ghusi, apni choti beti "A" ko dekha to mujhe vishvas hua ki meri badi beti bhi yahi hogi, to maine ek parda jo ander laga hua tha usko htaya or maine dekha ki mere betti ko leta rakha tha bench par or accused/Dr. Madhusudhan uske upar leta hua tha, meri beti ka aadha kacha utra hua tha or accused/Dr. Madhusudhan ka bhi aadha kacha utra hua tha. Uske bad mai chilai, or meri awaz sunkar accused k makan malik jiska nam mujhe nhi malum, maine unko sari bat btayi, phir unhone 100 number par call kiya. Meri shor sunkar aas pados k 10-15 log bhi vahan par ikthe ho gaye. When I asked my victim daughter what had happened with her, she narrated the incident to me stating that:- "Mammi mera kacha utar diya tha or mere upar leta hua tha, mera muh bhi daba diya tha. Usne Ye bhi btaya ki accused ne apni susu wali cheez uske susu wali cheez me dal diya tha. <u>Again said, usne dalne ki koshish kiya tha</u>*".

16. PW5 deposed that she had been working in AIIMS Hospital, New Delhi since January, 2015 and that she is familiar with the signature of Dr. M. Sandeep who had prepared the MLC

in this case. According to PW5, Dr. M. Sandeep had left the services of the hospital and that his present whereabouts are not known. PW5 identified the signatures of Dr. M. Sandeep in the MLC and hence the same was marked as PW5/B. PW5 further deposed that as per the MLC, there was no tear of the hymen but it was mildly inflamed and bruised.

17. It is true that PW5 was not the doctor who had examined PW1. However, PW5 deposed that Dr. Sandeep, who had examined PW5 was not available and that his present whereabouts were not known. The learned Additional Public Prosecutor also drew my attention to the report given by the official concerned when the summons issued to Dr. M. Sandeep was returned unserved. In the said report, it is stated that the present whereabouts of the doctor was not known. The testimony of PW5 that the whereabouts of Dr. M. Sandeep was not known, is not seen cross examined on behalf of the accused and, hence, the said

aspect stands established. In such circumstances, the question arises as to how the MLC can be proved by the prosecution.

18. In **Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702**, it has been held that Section 32 of Evidence Act, 1872 (the Evidence Act) provides that when a statement written or verbal, is made by a person in the discharge of professional duty whose attendance cannot be procured without an amount of delay, the same is relevant and admissible in evidence.

19. In **Rambalak Singh v. State of Bihar AIR 1964 Patna 62,** it has been held that if the doctor who had performed the autopsy was not available at the time of trial or he is abroad, the post-mortem certificate prepared by him would be admissible in evidence if the handwriting and signature of the autopsy surgeon on the post-mortem certificate are proved.

20. I also refer to the dictum in **Kochu and Ors. v. State of Kerala, 1978 KHC 321 : 1978 SCC OnLine Ker 79**. In the said case, an argument was advanced on behalf of the accused that the

burden cast on the prosecution cannot be said to have been discharged by the mere examination of the medical officer who is familiar with the handwriting and signature of the doctor who issued the post mortem certificate; but the prosecution must prove the contents of the document and also elicit from the witness examined, his independent opinion as an expert on the conclusions reached by the doctor who held the autopsy. It was held that it was not always necessary and the law also does not insist that in all such cases the witness should give his independent opinion on the findings in the post mortem certificate or speak to each and every statement made therein. Of course, if an expert witness, who has been examined to prove the post mortem certificate issued by a doctor who was dead or was not available for examination in court under the circumstances stated in S.32 (1) of the Evidence Act, also gives independent evidence as an expert on the conclusions arrived at in the post mortem certificate, it would constitute an additional piece of evidence of an expert. Under S.32, statements,

written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in cases falling under sub-s.1 to 8. A post mortem certificate is not substantive evidence. It is only the evidence given in court by the doctor who held the autopsy that constitutes substantive evidence. A post mortem certificate, being a document containing the previous statement of a doctor who examined the dead body, can be used only to corroborate his statement under S.157 or to contradict his statement under S.145 or to refresh his memory under S.159 of the Evidence Act. But, S.32 (2) is an exception to this. If the doctor who held the autopsy is dead or is not available for examination under the circumstances mentioned in S.32 of the Evidence Act, the certificate issued by him is relevant and admissible under S.32(2) of the Evidence Act. The weight to be

attached to such a report or its probative value depends upon the facts and circumstances of each case. The court can come to its independent conclusion on the cause of death, if there is independent evidence on record in support of it. Then the question is whether the statements made in the post mortem certificate, containing what was observed by the doctor during autopsy and the conclusion arrived at by him therein have been properly proved in accordance with law. S.67 of the Evidence Act speaks of the mode of proof of a document. Under S.67 if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. When in cases the prosecution is not able to procure the attendance of the doctor who held autopsy without unreasonable delay or expense, the statement coming under S.32(2) of the Evidence Act has to be proved by one of the various modes prescribed in S.47 of the same Act.

21. Coming to the case on hand, as noticed earlier, the testimony of PW5 that the doctor who examined PW1 was not available, has not been challenged, disproved or discredited. Therefore, the prosecution has succeeded in establishing one of the circumstances contemplated under Section 32(1) of the Evidence Act, that is, the attendance of the doctor who examined PW1 could not be procured without an amount of delay. The MLC was prepared by the doctor in discharge of his official duty. In such circumstances, his statement becomes relevant under Section 32(2) of the Evidence Act. Section 47 of the Evidence Act which deals with situations when opinions as to handwriting are relevant, says that when the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. Section 67 of the Evidence Act which deals with proof of signature and handwriting of person

alleged to have signed or written document, says that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. PW5 deposed that she is familiar with the handwriting and signature of Dr. Sandeep and she identified his signature in Ext. PW5/B in the box, which testimony also has not been discredited. Therefore, in the absence of Dr. M. Sandeep, the prosecution has proved PW5/B, the MLC by resorting to Section 32(2) read along with Sections 47 and 67 of the Evidence Act, which is permissible and therefore, the arguments to the contrary are liable to be rejected.

22. In Exhibit PW5/B, the sexual assault history, is stated to be thus:- "*alleged history given by mother and self that she was sexually assaulted by local Doctor, today evening when she took her younger sister to him for complaint of loose stools. She was forced to remove her under garments and history of penile*

penetration into her and touch of her private parts."

23. PW1 was medically examined in the evening of the very same day of the incident, that is, by about 09:15 p.m. The history that has been recorded in Exhibit PW5/B is also relied on by the prosecution to prove the case of penetrative sexual assault. According to the learned counsel for the appellant/accused, the history recorded is not in consonance or consistent with Exhibit PW7/A FIS of PW7 or Exhibit PW1/A 164 statement of PW1. Therefore, referring to this, it was submitted that there are contradictions and inconsistencies in the testimony and statements of the prosecution witnesses. In the box, PW1 has stated facts, which are absent in her 164 statement. The attention of this Court was also drawn to the testimony of PW1, where the omissions and contradictions have been marked by the trial court. Referring to these, it was pointed out that this is yet another major aspect which raises doubts regarding the prosecution case.

24. On the other hand, the learned Additional Public

Prosecutor submitted that the 161 statement of PW1, her Section 164 statement as well as her testimony in the box are consistent and so there is no reason(s) to disbelieve her.

25. The statements made under Section 161 are statements made to the police during the course of investigation and the same cannot be used except for the purpose stated in the proviso to the Section. Under the proviso to Section 162 Cr.P.C., such statements can be used only for the purpose of contradicting a prosecution witness in the manner indicated in Section 145 of the Evidence Act and for no other purpose. They cannot be used for the purpose of seeking corroboration or assurance for the testimony of the witness in Court. (See **Tahsildar Singh v. State of U.P., AIR 1959 SC 1012**; **Satpal v. Delhi Administration, 1976 (1) SCC 727 and Delhi Administration. v. Lakshman Kumar 1985 KHC 741: (1985) 4 SCC 476**).

26. Therefore, the argument that the Section 161 statement of the witness corroborates the testimony of PW1 cannot be

countenanced for a moment.

27. Now coming to the argument of the defence that the contradictions and omissions stand proved. The contradictions pointed out in the testimony of PW1 reads –

> *"I had told the police. as well as Lady Judge that I was wearing capri on that day. (Confronted with the statement Ex.PW1/A and Ex.PW1/B where it is not so recorded). I had also told in my statement to police that the accused had pressed my mouth. (Confronted with the statement Ex.PW1/B where it is not so recorded). I had told the police that the accused had put his private part into my private part. I had told at the time of my statement u/s 164 Cr.P.C that accused had put his private part into my private part. (Confronted with the statement Ex.PW1/A where it is not so recorded) ……..."*

28. Is this contradiction or omission, if so, have they been proved? Here again, I refer to Section 162 Cr.P.C. which reads –

"162. Statements to police not to be signed: Use of statements in evidence.—

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or

otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act."

(Emphasis Supplied)

29. Now, the question is how is a contradiction or an omission amounting to contradiction proved? As held in **Tahsildar Singh v. State of U. P., AIR 1959 SC 1012: 1959 KHC 577 : 1959 CriLJ 1231**, the object of Section 162 CrPC as the history of its legislation shows and the decided cases indicate is to impose a

general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by S.145 of the Evidence Act. While it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by S.145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the

exception cannot obviously be used to cross the bar. Further, the contradiction under Section 162 is between what a witness asserted in the witness box and what he stated before the police officer, and not between what he said he had stated before the police officer and what he actually made before him. The procedure for contradicting a witness is by resort to Section 145 of the Evidence Act. S.145 of the Evidence Act is in two parts : the first part enables the accused to cross examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross examination assumes the shape of contradiction : in other words, both parts deal with cross examination; the first part with cross examination other than by way of contradiction, and the second with cross examination by way of contradiction only. Resort to S.145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the

former statement was reduced to writing, then S.145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Apex Court has explained the procedure by way of an illustration also:- A says in the witness box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer.

30. I also refer to a Division Bench decision of the High Court of Kerala **in the State of Kerala v. Thomas, 2005 KHC 1823: 2005 (4) KLT SN 103** wherein it was held thus- S.162 CrPC. deals with the use of statements in evidence. The statements given by any person and reduced to writing under S.161 CrPC. by a Police Officer can be used only to contradict the statement of the witness. Under the Evidence Act, a former statement made by a witness can be used to contradict him, to impeach his credit, to corroborate him, or to refresh his memory. S.162 CrPC. imposes an absolute bar to the use of the statements. The intention behind S.162 CrPC. is to protect the accused from being prejudicially affected by any dishonest or questionable methods adopted by an overzealous police officer. Under S.145 of the Evidence Act, proof of statements follows the putting up of it to the witness. S.162 CrPC. states that a previous statement to the police can be used to contradict a witness if it is duly proved. A combined reading of S.161 and 162 CrPC. shows that the attention of the witness is to

be called to the previous statement before the same can be proved. If the witness admits the previous statement or explains the discrepancy or contradiction, it obviously makes it unnecessary for the statement thereafter to be proved by marking it. If the statement still requires to be proved, that can be done later by calling the police officer before whom the statement was made. It is well settled position of law that before using the statement, the witness must be afforded a reasonable opportunity of explaining the contradictions, after his attention has been drawn to such statements, in a fair and reasonable manner. The entire statement recorded under S.161(3) CrPC. is not admissible in evidence. So, the entire statement cannot be marked as an exhibit. The correct procedure to contradict a witness is to draw his attention to the relevant part of the contradictory statement which he had made before the Police Officer and to question him whether he did make that statement. If he replies in the affirmative, that admission establishes the contradiction. When the particular sentence or

assertion in the statement under S.161 CrPC. is put to the witness it must be marked by being underlined or enclosed in a circle and exhibited. That admission is to be recorded in the deposition. If he denies that part of the statement, that is to be proved in accordance with the provisions of the Evidence Act. If he denies having made such a statement or states that he does not remember having made the assertion or spoken the sentence, the officer who recorded the statements will have to be called to prove that he had made or spoken it. When a statement is put to a witness, he may admit it. He may deny having made such a statement or he may admit a part or portion of the statement and deny the rest of it. The admission if it amounts to a contradiction is to be recorded and it needs no further proof and rest of it alone is to be proved. He may also plead lack of memory and state that that he does not remember. If the witness states that he does not remember, then also the statement has to be properly proved. An omission may amount to a contradiction. Before the police a witness may state that A and B

committed the murder. But in court he may state that A, B and C took part in the commission of the offence. That omission is in the form of a positive contradiction. If the witness admits that he did not state the name of C before the police officer that admission proves the omission. But if the witness asserts that he had stated the name of C also to the police officer that omission is to be proved by putting that omission to that officer during his examination. He must be asked whether a certain statement was made by the witness before him. The records must show that the statement of the witness recorded under S.162 CrPC. was read out to him and his attention was drawn to the non-existence of a certain statement therein.

31. The aforesaid is the procedure to be followed for proving a contradiction or omission between the testimony of a witness before the court and the 161 statement of the witness. As far as section 164 statements are concerned, the proviso to S. 162(1) CrPC has no role to play in eliciting the contradiction because the

said proviso will be attracted only in cases where the statement is recorded by a Police officer conducting an investigation under Chapter XII of CrPC and not by a Magistrate. Admission of such statements in evidence are governed and controlled by the provisions of the Evidence Act. It can be used for the purpose of cross examining him and to discredit the evidence of the maker of the same, but the same cannot be used as a substantive piece of evidence. It is well settled that the statement of a witness recorded by a Magistrate under S.164 of the Code is not substantive evidence and the most that can be used of it is only for corroboration of the testimony of that witness as provided in S.157 of the Evidence Act or for contradicting the witness in the manner provided in S.145 of the Evidence Act. (**State of Delhi v. Shri Ram Lohia, AIR 1960 SC 490; Ram Kishan v. Harmit Kaur, AIR 1972 SC 468 and Sawal Das v. State of Bihar, AIR 1974 SC 778**).

32. In the testimony of PW1 above referred to, the

contradictions or omissions amounting to contradictions in the Section 164 statement was attempted to be brought out. But the procedure contemplated under law for proving the same has not been complied with and hence the defence cannot take advantage of the same.

33. Be that as it may, the Section 164 statement of PW1, i.e. Exhibit PW1/A, has been marked by prosecution, apparently to corroborate the testimony of PW1. I have already referred to Exhibit PW7/A FIS of PW7; Exhibit PW1/A 164 statement of PW1 as well as the testimony of PW1 and PW7. In the FIS of PW7 and in the 164 statement of PW1, there is no case of penile penetration. Therefore, the case of penile penetration made by PW1 in the box is apparently an improvement of her case stated in the 164 statement. Exhibit PW7/A FIS which is the first statement made relating to the crime given by PW7 states that the accused had rubbed his body against the body of the victim. ("..... *aur mere shareer pr ragdne laga* .....”). This at best can be taken

as rubbing of the penis of the accused against the genital of PW1. This explains the mild inflammation and bruise noted in Exhibit PW5/B MLC.

34. Now, the question is whether the aforesaid act would constitute penetrative sexual assault as contemplated under Section 3 of the PoCSO Act? Section 3 of the PoCSO Act which reads thus:-

"A person is said to commit "penetrative sexual assault" if—

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

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

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

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

(Emphasis supplied)

35. The rubbing of the penis of the accused against the private part of PW1 does not apparently come within clauses (a) to (d) of Section 3 of the Act. Therefore, the case of penetrative sexual assault under Section 3 or aggravated penetrative sexual assault as contemplated under Section 5 of the PoCSO Act cannot be held to have been made out from the materials available on record.

36. When this aspect was pointed out to the learned Additional Public Prosecutor, the attention of this Court was drawn to Exhibit PW14/A FSL Report. The conclusion in Exhibit PW14/A FSL Report reads thus:-

"The DNA fingerprinting (STR analysis) performed on the source of exhibits 'lh' (underwear of victim),'3' (Blood in gauze of accused) &'Sa' (underwear of accused) is sufficient to conclude that the biological stains i.e. seminal stains present on the source of exhibit' lh' (underwear of

victim) & '8a' (underwear of accused) are from the source of exhibit '3' (Blood in gauze of accused).”

37. Neither in the FIS nor in the 164 statement or in the testimony, the witnesses have a case of ejaculation by the accused. From a reading of all the materials available on record, it appears that the accused had just about commenced his act of sexual assault, when PW7 walked into the room resulting in the assault coming to an abrupt stop. In such circumstances, semen stains in the underwear of the accused is doubtful. However, the materials on record certainly make out a case of sexual assault as contemplated under Section 7 of the Act. Admittedly, PW1 was below 12 years at the time of the incident. Therefore, the offence that is made out is under Section 9(m) of the Act which deals with aggravated sexual assault on a child who is below 12 years. The offence under Section 9(m) of the Act is punishable under Section 10 which says that aggravated sexual assault is liable to be

publishable with imprisonment which shall not be less than five years but which may extend to seven years and also fine.

38. In case on hand, the trial court found the accused guilty of the offence under Section 6 of the PoCSO Act and so convicted him to rigorous imprisonment for ten years. The offence under Section 6 is not made out. The offence under Section 9(m) alone is made out and therefore, the maximum sentence that can be awarded for the same is seven years. The accused in this case was a doctor to whom the child was sent for medicine. The accused was in a position of authority and trust, and it was such a position that had been misused by him. The accused is seen to have been old enough to be the grandfather of PW1. In such circumstances, no leniency is called for.

39. It is brought to the notice of this Court by the learned counsel for PW1, the victim, that the compensation that has been ordered by the trial court has not been disbursed to the victim so far. The Delhi State Legal Service Authority is directed to disburse

the compensation awarded at the earliest, at any rate, within two months from the date of receipt of a copy of this judgment.

40. In the result, the appeal is partly allowed. As the appellant/accused has been found guilty of the offence punishable under Section 9(m) of the PoCSO Act, the sentence awarded by the trial court is modified to rigorous imprisonment for 07 years. The sentence for the offence under Section 342 IPC and fine are confirmed.

41. Application(s), if any pending, shall stand closed.

CHANDRASEKHARAN SUDHA
(JUDGE)

JANUARY 15, 2026
p'ma