

## Mukesh Kumar Vs State (Nct Of Delhi)

**Court:** Delhi High Court

**Date of Decision:** Nov. 12, 2021

**Acts Referred:** Protection Of Children From Sexual Offences Act, 2012 " Section 6, 9, 10  
 Code Of Criminal Procedure, 1973 " Section 164, 313  
 Indian Penal Code, 1860 " Section 376

**Hon'ble Judges:** Mukta Gupta, J

**Bench:** Single Bench

**Advocate:** Inderjeet Sidhu, Jai Prakash, Tarang Srivastava

**Final Decision:** Dismissed

### Judgement

Mukta Gupta, J

1. By the present appeal, appellant challenges the judgment dated 5th September, 2020 convicting the appellant for offence punishable under Section 6

of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act") as also the order on sentence dated 1st October, 2021

awarding him sentence of rigorous imprisonment for a period of ten years and to pay a fine of Rs. 10,000/- (Rupees ten thousand only), in default

whereof to undergo simple imprisonment for a period of one month and to pay a compensation of Rs. 25,000/- (Rupees twenty five thousand only) to

the victim and in default whereof to undergo simple imprisonment for a period of two months.

2. Learned counsel for the appellant contends that as per the statement of the prosecutrix recorded under Section 164 Cr.P.C. no penetrative sexual

assault took place and the statement made by her in the Court was an improvement. The child being of tender age could not contemplate the

distinction between a penetrative sexual assault and touch. On a perusal of her statements, the appellant cannot be convicted for offence punishable

under Section 6 POCSO Act. Appellant has also taken the plea of false implication which was not considered by the learned Trial Court. Further the

version of the minor victim is also not corroborated by the MLC. Even if the statement of the prosecutrix is to be believed in totality at best an offence

defined under Section 9 punishable under Section 10 of POCSO Act is made out for which the minimum sentence prescribed is five years which may

extend to seven years. The appellant has now been in custody for more than five years imprisonment with no interim bail in between and hence he be

released on the period already undergone. The appellant is a young boy aged 19 years. Conduct of the appellant in the jail is satisfactory and he has no

criminal antecedents.

3. FIR No.362/2016 was registered at PS Nangloi, Delhi for offence punishable under Section 376 IPC and Section 6 of POCSO Act on the

statement of the minor victim aged five years who stated that her parents were residing as tenants and she was studying in the school. Her mother

works at home whereas her father runs a barber shop. The appellant resided in the adjoining room. One day when it was Sunday, she was playing in

his room. Mother of the appellant was outside the room. The appellant ejaculated on her clothes thereafter he took off her underwear and put his

organ into from where she urinates due to which she had pain. When she said that she had to go home appellant stated that she should not tell this to

anybody. Thereafter, one day she did not know that the appellant was alone in his room when he again took off her underwear and ejaculated inside

her underwear. He put on her underwear and she came back to her room. She did not tell her mother as she felt that her mother would beat her. On

that date her brother stated that lets go to the house of the appellant for studying on which she stated to her brother that she would not go to the

appellant as he does wrong acts. Her mother was in the kitchen who heard her say so. Thereafter, her mother asked her what was the wrong act

done by the appellant, on which she told her mother everything. Thereafter her father called the police. MLC of the prosecutrix was conducted on the

same date wherein she stated that the appellant removed her underwear and put his penis into her underwear and ejaculated on her chest twice one

week back. He also threatened not to tell anyone. Because the MLC notes no vaginal, oral or anal intercourse, learned counsel for the appellant

contends that no case for offence punishable under Section 6 POCSO Act is made out.

4. Statement of the victim was recorded under Section 164 Cr.P.C. on 7th August, 2016 wherein she stated that appellant resided in the adjoining

room. He took off her underwear, pressed her, told her not to tell her mother and that she should say that he was getting her cursive writing done. She

further stated that he also did toilet on her, thereafter wiped it and that he asked her to hold his penis.

5. In her deposition before Court the prosecutrix on 28th March, 2018 who had attained the age of seven years stated that at the time of incident she

was studying in UKG and that day she had gone to the appellant to do cursive writing. She had gone to the appellant's house all alone when the

appellant asked her to play which she did not understand. Thereafter, appellant took off her underwear as also his own and started doing something.

He ejaculated on her stomach and wiped it. She did not tell this to anybody in the house as the appellant had told her not to say so. After a few days

she again went to his house with her brother. Initially she was sitting with her brother thereafter she got separated as her brother and another boy

started playing with the toys. The appellant called her inside and made her sit with him. She further stated that the first time the appellant took off her

underwear and inserted his penis into her vagina and second time he ejaculated on her stomach.

6. Considering the fact that the victim was of tender age of five years as proved by the prosecution from the school certificate the prosecutrix was

consistent in her version that two incidents took place and in one incident the appellant inserted his penis in the vagina of the prosecutrix which she

explained in her own language that "usne apni susu karne wali jagah meri susu karne wali jagah me dali thee" and second time he ejaculated on

the stomach which she expressed as "mere uppar toilet kar diya tha". In the MLC without noting the entire sequence of events if the doctors had

noted no history of vaginal, anal or oral intercourse, the same would not be a reason to discard the consistent version of the prosecutrix.

7. In his statement under Section 313 Cr.P.C. the appellant had stated that he had been falsely implicated as his family had a quarrel with the family of

the victim regarding the use of the bathroom in their premises. This was put to the prosecutrix in cross-examination who clarified that when police

came, her parents and the appellant had a quarrel however, before that there was no quarrel.

8. Mother of the prosecutrix also appeared in the witness box as PW-2 and deposed what was stated to her by the prosecutrix on her asking.

9. Considering the statement of the prosecutrix which is consistent except that in her statement under Section 164 Cr.P.C. she did not elaborate the

two incidents but specifically stated so in the statement on the basis of which FIR was registered as also before the Court, this Court finds no error in

the impugned judgment convicting the appellant for offence punishable under Section 6 POCSO Act or the order on sentence.

10. Appeal is dismissed.

CRL.M.B.183/2021

1. Application is disposed of as infructuous.

2. Order be uploaded on the website of this Court and be also conveyed to the appellant through Superintendent, Jail.