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

% ***Judgment reserved on: 13.05.2026***
***Judgment pronounced on: 16.05.2026***

\+ **CRL.A. 189/2025**

NABI HASAN .....Appellant

Through: Mr. Shivek Trehan, (DHCLSC) with Ms. Manika Pandey, Advocate.

versus

THE STATE (GOVT.OF NCT) DELHI & ANR. .....Respondents

Through: Mr. Utkarsh, APP for the State.
Ms. Vasundhara Nongmeikapam, (DHCLSC), Advocate for R-2/Victim.

**CORAM:**
**HON'BLE MS. JUSTICE CHANDRASEKHARAN SUDHA**

**JUDGMENT**

**CHANDRASEKHARAN SUDHA, J.**

1. In this appeal filed under Section 415(2) read with Section 528 Bhartiya Nagarik Suraksha Sanhita, 2023 (the B.N.S.S.), the sole accused, in Sessions Case No. 623/2017 on the file of the Additional Sessions Judge, Special Court (PoCSO), South District, Saket Court, New Delhi, assails the judgment dated

02.09.2024 and the order on sentence dated 14.10.2024 as per which, he has been convicted and sentenced for the offences punishable under Section 377 of the Indian Penal Code, 1860 (the IPC) and Section 6 read with Section 5 of the Protection of Children from Sexual Offences Act, 2012 (the PoCSO Act).

2. The prosecution case is that in the morning of 21.08.2017 between 08:00 AM to 10:15 AM, at the house of 'R', a minor boy aged about 6 to 7 years, the accused, taking advantage of the mental and physical disability of the boy, committed sodomy. Hence, as per the charge-sheet/final report dated 14.11.2017, the accused was alleged to have committed the offences punishable under Section 377 IPC and Sections 4 and 6 of the PoCSO Act.

3. On the basis of Ext. PW1/C FIS/FIR of PW1, the mother, given on 21.08.2017, crime no. 310/2017, Malviya Nagar Police Station, that is, Ext. PW7/B FIR dated 21.08.2017 alleging

the commission of offences punishable under Section 377 IPC and Sections 4 and 6 of the PoCSO Act was registered by PW7, Assistant Sub-Inspector. PW17 conducted the investigation into the crime and on completion of the same, submitted the charge-sheet/final report dated 14.11.2017 before the Court, alleging the commission of the offences punishable under the aforementioned sections.

4. When the accused was produced before the trial court, all the copies of the prosecution records were furnished to him, as contemplated under Section 207 of the Code of Criminal Procedure, 1973 (the Cr.P.C.). After hearing both sides, the trial court, *vide* order dated 05.04.2018, framed a charge under Section 6 read with Section 5 of the PoCSO Act and Section 377 IPC, which was read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PWs 1 to 18 were examined and Exts. PW1/C, PW1/H, PW7/B, and PW12/A were marked in support of the case.

6. After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all those circumstances and maintained his innocence. He claimed that he had been falsely implicated. PW1, the mother of the victim, used to indulge in gambling and used to take money from him. PW1took about ₹70,000/- from him on different occasions. After demonetization (note bandi), when he demanded his money back, the same led to quarrels. On the date of the incident, he was called by PW5, the father of the victim. A quarrel took place between them after which he was brutally beaten by them and thereafter, this false case of sexual assault was registered against him.

7. After questioning the accused under Section. 313(1)(b) Cr.P.C., compliance of Section 232 Cr.P.C. was mandatory. In the case on hand, no hearing as contemplated under Section 232 Cr.P.C. 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 with 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.

8. No oral or documentary evidence were adduced on behalf of the defence.

9. Upon consideration of the oral and documentary evidence on record, and after hearing both sides, the trial court, *vide* the impugned judgment dated 02.09.2024, held the accused guilty of the offences punishable under Section 377 IPCand

Section 6 read with Section 5 of the PoCSO Act. *Vide* order on sentence dated 14.10.2024, the accused has been sentenced to undergo rigorous imprisonment for a period of 10 years, along with fine of ₹25,000/-, and in default of payment of fine, to simple imprisonment for a period of 1 year for the offence punishable under Section 6 of the PoCSO Act. No separate sentence has been awarded for the offence punishable under Section 377 IPC. Aggrieved, the accused has come up in appeal.

10. It was submitted by the learned counsel for the appellant/accused that the prosecution case will have to be rejected for the sole reason that the victim was never examined by the prosecution. The non-examination of the victim has caused considerable prejudice to the accused. The prosecution has not placed on record any evidence to satisfy the court that the victim was incapable of being examined or that the victim was completely incapable of communicating either through gestures or sign

language. The only document placed on record to prove the disability of the victim is Ext. PW1/H Disability Certificate, which states the disability to be ‘Locomotor Disability’ at 73.3% which means that the person has very low muscle function or motor skills, that is, restricted use of arms, hands, legs, limbs, etc. The disability certificate does not say about any speech impairment or about the extent of the victim’s cognitive disability. PW11, who issued the disability certificate at no point, has deposed that the victim is completely incapable of communicating. In addition, there are several inconsistencies and contradictions in the testimony of the witnesses examined. The learned counsel also took serious exception to the opinion recorded by the doctor in Ext. PW12/A MLC. Further, it was also pointed out that going by the prosecution case the police seized various articles from the scene, that is, a bed sheet, 500ml plastic bottle containing oil, the pant of the accused, the victim’s diaper, etc. However, Ext. PX

FSL report says that DNA analysis could not be conducted as no biological fluid, that is, blood/semen had been detected. It was lastly submitted that PW3, a cousin of the victim, in his testimony deposed that when he had peeped inside the *jhuggi*, he had only seen the accused lying beside the victim. PW3 never has a case that he had seen the accused sexually assaulting the victim. The aforesaid aspects, according to the learned counsel, are more than sufficient to doubt the prosecution case and acquit the accused.

11. *Per contra*, the learned Additional Public Prosecutor supported the impugned judgment and order on sentence and submitted that it does not suffer from any legality or infirmity calling for an interference by this Court.

12. Heard both sides and perused the records.

13. The only point that arises for consideration in the present appeal is whether there is any infirmity in the impugned judgment calling for an interference by this court.

14. I shall briefly refer to the evidence on record relied on by the prosecution in support of the case. Ext. PW1/C FIS/FIR dated 21.08.2017 of PW1, the mother of the victim, recorded in Hindi roughly translated, reads thus: - “I work as a maid in A-115, Shivalik, Malviya Nagar, New Delhi. On 21.08.2017 at 8:00 AM in the morning, I went for work; at which time, my husband, my sister's son, who had come from Calcutta on 09.08.2017, my middle son (the victim aged 7 years), and my youngest son (aged 4 years) were at home. My middle son has been disabled since birth and cannot speak, sit, eat or drink on his own; he always remains lying on the bed. His treatment has been ongoing at AIIMS Hospital, Delhi, since after three months of his birth. At approximately 10:15 AM, while I was at work, my brother-in-law came to me and said that Nabi Hassan (the accused) had entered my house, locked the door from inside, and was not opening it, and that my disabled son (the victim)is also inside. Hearing this, I ran

to my home. The door was locked from inside. I started banging on the door loudly, after which Nabi Hassan opened the door. My son was lying on the bed, and the diaper I had put on him was missing. There were faeces on and around his anal area. There was swelling and redness around his anal area. When I saw this, I realised that Nabi Hassan (the accused) had committed a wrong act on my child, who was crying. I raised an alarm. The public who gathered there beat up Nabi Hassan, causing injuries on his body and face. My husband also arrived home and called the police. The police arrived and apprehended Nabi Hassan. Medical examination of my son was done at AIIMS Hospital. I handed over the bed sheet spread to the police who seized it. Nabi Hassan is a distant brother-in-law of my husband and lives in the slum behind us. Nabi Hassan and his wife Naini often visit us."

15. PW1, when examined before the trial court, stood by her version in the FIS/FIR. PW1 in her cross-examination admitted

that prior to the incident, her family had cordial relations with the accused and that he used to visit her house regularly. Her younger son used to remain at the house for taking care of the victim. Her place of work is situated near her house and so she used to come back home during work hours to check on her disabled child. She also admitted that the accused used to join PW5, her husband in taking the victim for treatment. She denied having taken money from the accused. She further denied the suggestion that she has falsely implicated the accused because he had been demanding repayment of his money.

16. PW2, uncle of the victim, deposed that on 21.08.2017 after he reached his workplace at about 09:00 AM, PW3 came to him and informed that the accused after consuming alcohol had entered PW1's *jhuggi* and had bolted the door from inside. He accompanied PW3 to PW1's *jhuggi*. The door was found bolted from inside. They knocked on the door. He heard the victim's

cries. He instructed PW3 to remain there and proceeded to inform PW1, at her work place situated nearby. He returned with PW1, who knocked on the door. After some time, the accused opened the door. In the meantime, neighbours also gathered. The accused came out of the *jhuggi*. He did not see the victim as he did not enter the *jhuggi*, but he heard the victim crying. According to PW2, the victim aged about 7 years is a child with disability who cannot speak, walk or do any daily task. PW2 in his cross-examination admitted that the accused, his brother-in-law, prior to the incident had cordial relations with the family of the victim. When PW3 informed him that the accused was inside the house of the victim, he did not then intimate PW1, but instead went to the house of the latter. When he along with PW1 reached the *jhuggi*, the brother of the victim and PW3 were already there. He is unaware of any financial dealings between the accused and the father of the victim.

17. PW3, cousin brother of the victim, deposed that on 21.08.2017, at approximately 09:00 - 09:30 AM, he noticed the victim's younger brother crying, who informed him that the door of his *jhuggi* was bolted from inside. Despite knocking on the door, no response came from inside, but he heard the victim's cries. The victim is a differently-abled child (both mentally and physically). So, he thought that the boy might have fallen down and hence crying. Therefore, he removed the grill of the cooler near the door and looked inside. He found the victim lying on the bed with the accused lying beside him. He asked the accused to open the door, but he did not open. He found PW2 present there and so informed him. PW2 knocked on the door, but to no avail. PW2 instructed him to stay there and went to call PW1. After some time PW1 and PW2 reached there. PW1 knocked on the door and raised her voice. Thereafter the accused opened the door and came out from the *jhuggi*. PW3 in his cross-examination admitted

that he had not entered the *jhuggi* after the accused opened the door. He was unable to recall whether PW5, the father of the victim had beaten the accused or a fistfight had occurred between them. PW3 denied the suggestion that as there was a fight between the parents of the victim and the accused over some financial issues, the accused has been falsely implicated.

18. PW5, the father of the victim, deposed that his second child, the victim, approximately 7 years old at the time of the incident, from birth has been unable to walk, eat, or speak. On the morning of 21.08.2017, the accused came to his house at about 08:00 AM. He left for work at about 09:00 AM, requesting the accused to take care for his son. At 10:30 AM, he received a call from his wife informing him that the accused had committed "*galat kaam*" with their son. He reached his *jhuggi* at around 11:00 AM. His family members had apprehended the accused. He noticed that his son's diaper had been removed and there was an

open bottle of mustard oil on the slab. He informed the police. The police had seized a bed-sheet, diaper and the bottle of mustard oil from his house. The bed sheet and bottle were marked as Ext. P1 and P2 respectively. PW5 in his cross-examination admitted that the accused, a distant relative used to visit his home frequently, though he denied any quarrels between the accused and his family. PW5 categorically denied suggestions of prior money transactions with the accused or that the accused used to consume liquor at his residence. PW5 denied the suggestion that his wife had taken a loan of ₹1 lakh from the accused and that they had falsely implicated the accused due to a financial dispute.

19. PW11, Dr. A.K. Mishra, the then Chairman of Disability Board, G.B. Pant Hospital deposed that as per records, the victim aged about 5 years had been examined and a disability certificate (Ext. PW1/H) issued on 28.12.2015. The victim had been examined by a neurologist also. The patient was a case of

cerebral palsy having 73.3% permanent physical and mental disability. The date of birth of the victim is 01.01.2011. PW11 in his cross-examination deposed that there is no separate prescribed range to describe the disability as permanent or temporary. In the present case, as the patient was a case of cerebral palsy, resulting in permanent disability of 73.3%, making it impossible for the patient to walk or perform daily routine activities. According to PW11, cerebral palsy is a disease which mostly affects the patient from birth. Normally, cerebral palsy is diagnosed by a neurologist. By seeing a patient itself, the doctor can say that the patient is suffering from cerebral palsy for which no separate test is required. A patient of cerebral palsy is normally not able to express himself by speaking or by making proper gestures. A person with such disability would be able to make some gestures, but it would depend on case to case. PW11 denied that the disability mentioned in the certificate was given on the basis of his personal opinion and

not as per proper medical rules or established medical practices. PW11 further denied the suggestion that a patient having the above-said disability can normally make gestures and indications to express himself.

20. PW12, Dr. Adarsh Kumar, Professor, Department of Forensic Medicine, AIIMS, New Delhi, deposed that Dr. Pooja Prajapati and Dr. Rajesh Kumar had left the services of the hospital and their current whereabouts are not known. Both the doctors had worked under him and so he can identify their handwriting and signature. As per Ext. PW12/A MLC, the victim was brought to the hospital on 21.08.2017 with a history of sexual assault. Dr. Rajesh Kumar had recorded the brief history of the case. Dr. Rajesh Kumar has also opined that there was insertion of penis or penis like object. The exhibits of the victim were sealed and handed over to the police.

21. The question is, whether the aforesaid evidence is sufficient to find the accused guilty of having committed the offences punishable under Section 377 IPC and Section 6 read with Section 5 of the PoCSO Act beyond reasonable doubt. One of the main arguments advanced by the learned counsel for the appellant/accused is regarding the non-examination of the victim. The argument is that the prosecution has not placed on record any material indicating the victim's speech impairment, that is, the victim was unable to communicate in any manner, either by sign language or gestures, or with the help of an interpreter. The non-examination has caused great prejudice to the accused. The prosecution relies on Ext. PW1/H disability certificate of the victim, which says that it is a case of cerebral palsy and that the victim suffers from locomotor disability, resulting in 73.3% permanent mental and physical impairment. It is true that apart from the locomotor disability recorded, the other columns in the

certificate are seen left blank. Therefore referring to this, the argument advanced relying on the dictums in **Sampath vs. State 2018 SCC OnLine Mad 14515**, **Bhim Bahadur Basnett vs. State of Sikkim**, **Crl.A.No.03/2022 dated 06.12.2023 (The High Court of Sikkim: Gangtok)** and **State of Rajasthan vs. Darshan Singh (2012) 5 SCC 789** is that there is absolutely no materials to conclude that the victim was unable to speak and hence in such circumstances the victim ought to have been examined.

22. PW1, the mother of the victim, in her Ext. PW1/C FIS/FIR has stated that her son is disabled since birth and that he cannot speak, sit or eat. It is true that PW1, when examined did not specifically state in the box that her son cannot speak. But PW2, the uncle of the victim, and PW5, the father of the victim, have categorically deposed that the victim is disabled and unable to speak, walk or eat. This part of the testimony of PW2 and PW5 was never cross-examined. Their testimony is corroborated by the

testimony of PW11, the doctor who also deposed that a patient with cerebral palsy is normally not able to express himself. Their testimony has not been discredited in anyway and hence I find no reason(s) to disbelieve them. Further, the accused neither during the trial or during the questioning under Section 313(1)(b) Cr.P.C. has a case that the victim was capable of expressing himself. When the testimony of PW11, the doctor that the victim is suffering from cerebral palsy was put to the accused, the latter only feigned ignorance. He never had a case that though the victim was capable of expressing himself, the prosecution had deliberately kept the child away from the Court.

23. The argument of the learned counsel for the appellant/accused that the prosecution could have resorted to the provisions of Section 119 of the Evidence Act or engaged an interpreter or special educator for the purpose of examining the victim cannot also be accepted. As held in **Bhim Bahadur**

**Basnett** (*supra*) relied on by the learned counsel, so far as the question of interpreter, special educator or person familiar with the manner of communication with the victim is concerned, the background from which the victim is coming must also needs to be kept in mind. Apparently, the victim was about 6 to 7 years old. There is no case for the accused that the victim was formally educated in sign language. Therefore, even if a special educator or interpreter was appointed, they would have been incompetent to translate the gesticulations of the victim, as the victim was never formally educated with sign language. It is only in cases where the victims have been educated in sign language that the assistance of a special educator would be of any assistance to the Court in interpreting the gesticulations. That being the position, the decisions relied on by the learned counsel for the appellant/accused are not applicable to the facts of the present case. As far as attempting to record the testimony of the victim

through sign language is concerned, materials have come on record through the testimony of PW2 and PW5 that the victim is unable to do so. In the absence of any other evidence on record, there is no ground for the Court to hold otherwise that the prosecution had deliberately kept the child away from the Court.

24. Here, it would be apposite to refer to the dictum in the Apex Court in **State of Karnataka v. N.G. Naik, 1992 KHC 236: AIR 1992 SC 2043**. In the said case the accused was acquitted of the offence punishable under Section 376 IPC as the victim was never examined due to her non-availability. About two months after the incident, the victim committed suicide. The question arose was whether the case of the prosecution could be thrown overboard because of the non-availability of the victim for examination on account of her death or whether the court could record a conviction for any offence that was made out from the available evidence addressed by the prosecution. The Apex Court

found from the testimony of the witnesses coupled with the medical evidence on record that there was an attempt of rape if not the offence of rape, and so merely because the victim was dead and consequently could not be examined could never be taken as a ground to acquit the accused if there was evidence otherwise available in proving the criminal act of the accused. On an assessment and evaluation of the evidence on record, it was found that the accused therein was liable to be punished for the offence of attempt to commit rape, that is, Section 511 read with Section 376 IPC. Holding so, the appeal was allowed.

25. In the case on hand, as noticed earlier the testimony of PW2 and PW5 that the victim was unable to speak is not seen disputed or discredited. Therefore, I find no reasons to disbelieve or discard the testimony regarding the speech impairment of the victim in this case. That being the position non-examination of the

victim in the case on hand is not fatal to the prosecution case in the facts and circumstances of this case.

26. It was further pointed out that there are inconsistencies and contradictions in the testimony of PW2 and PW3. PW2 deposed that PW3 had come to his workplace and informed him that the accused had locked the door of the *jhuggi*. In the cross-examination, however, PW2 admitted that when he along with PW1, the mother of the victim, reached the *jhuggi*, PW3 was present there. PW3 on the other hand deposed that on the date of the incident seeing the victim's brother crying he had gone to the *jhuggi*, where he found the door of the *jhuggi* bolted. Despite knocking the accused did not open the door. He then found PW2 present there and so informed him. This was pointed out as a major inconsistency in the testimony of PW2 and PW3.

27. There does not appear to be any inconsistency because PW2 deposed that it was PW3 who had come to his workplace and

informed him that the accused had locked the door of PW1's *jhuggi*, at which time, the victim was inside the *jhuggi*. He along with PW3 proceeded to the *jhuggi* of PW1 where he found the door of the *jhuggi* bolted from inside. Though he knocked, the accused did not open the door. Therefore, he instructed PW2 to remain at the scene and he proceeded to the workplace of PW1. He informed PW1 about the accused not opening the door and thereafter he along with PW1 proceeded to the *jhuggi* at which time PW3 was present there. PW3 also deposed that when he informed PW2 that the accused was not opening the door the latter directed him to stay there and then had proceeded to inform PW1 about the matter. Shortly thereafter, PW2 returned along with PW1. PW1 knocked on the door pursuant to which the accused opened the door. Therefore, it can be seen that there is no inconsistency as such in the testimony of PW2 and PW3. Even

assuming that there is an inconsistency, that has not in any way affected the core of the prosecution case.

28. The learned counsel for the appellant took strong exception to the opinion expressed by the doctor in Ext. PW12/A MLC. The doctor in the certificate has opined thus:-"*After thorough medical examination of the above-mentioned child. I am of the considered opinion that insertion of penis or penis like object is present.*"Referring to this it was submitted that the doctor could never have given such a conclusive opinion and normally doctors only opine that there is possibility or probability of penetration by penis or some other object. On the other hand, the doctor in this case has asserted that penetration with penis or some object had taken place. This was beyond the powers and authority of the doctor and hence, the same cannot be relied on, argued the learned counsel.

29. The opinion that is given by a doctor, an expert, admissible under Section 45 of the Evidence Act is only opinion evidence and not binding on the Court. It is for the Court to decide on the basis of the materials on record whether the offence charged against the accused has been made out or not. In Ext. PW12/A MLC the following injuries are noted: - "*Reddish abrasion of skins around anal and perianal region are present with tear at 6 & 7 o'clock position (fresh in nature). Pain and tenderness is present around perianal and anal region.*"

30. The injuries noted on the victim are not seen disputed by the accused. The presence of the accused inside the locked *jhuggi* at the time of the incident is also not disputed. It is true that none of the witnesses had actually witnessed the accused committing penetrative sexual assault on the victim. Even according to PW3, he had only seen the accused lying beside the victim on the bed inside the *jhuggi*. But the fact that when the door

of the *jhuggi* was opened by the accused, there was no one other than the accused inside the *jhuggi* at the relevant time is proved through the testimony of the prosecution witnesses. This coupled with the other circumstances like the child found with injuries on his private part and the medical examination conducted immediately thereafter, corroborates the prosecution case of penetrative sexual assault.

31. It was further pointed out that the prosecution failed to examine the doctors who had actually examined the victim in this case. Admittedly PW12 had not examined the victim and therefore his testimony is insufficient to prove Ext. PW12/A MLC.

32. PW12 in his examination-in-chief itself deposed that the two doctors who had examined and issued the certificate are no longer in the services of the hospital and that their present whereabouts are not known. This part of the testimony of the doctor has not been challenged, discredited or disproved. In this

context I refer to Section 32 of the Evidence Act which reads thus:-

> ***32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.***
> *Statements, written or verbal, or 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 the following cases:*
> *Xxxxxxx*
> *(2)Or is made in course of business - When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.*
>
> (Emphasis supplied)

32.1 **Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702**, it has been held that Section 32 of 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.

32.2 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.

32.3 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.

33. As noticed earlier PW12 has clearly deposed that the present whereabouts of the doctors who had examined the victim

and issued the MLC are not known. Hence, their presence could not have been secured without an amount of delay or expense. This part of the testimony of PW12 has never been challenged by the appellant/accused. Therefore, the prosecution has succeeded in establishing one of the circumstances contemplated under Section 32 of the Evidence Act, that is, the attendance of the doctors who had examined the victim could not be procured without an amount of delay or expense. Ext. PW12/A MLC had been prepared by the doctors in discharge of their official duties. In such circumstances, the certificate 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 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.

34. PW12 has deposed that he is familiar with the handwriting and signature of the two doctors who had examined and issued the MLC. PW12 also identified the handwriting and signature in the MLC. Therefore even in the absence of the doctors who had examined and issued the MLC of the victim, the prosecution has proved the MLC by resorting to the provisions of Section 32(2) read with Sections 47 and 67 of the Evidence Act, which is permissible and therefore, the arguments to the contrary are liable to be rejected.

35. Another argument advanced is that Ext. PX FSL report does not support the prosecution case. The report says that DNA

analysis could not be performed, as no biological fluid, that is, blood or semen was detected on the victim's exhibits. This was pointed out as yet another defect in the prosecution case.

36. To constitute an offence of penetrative sexual assault, ejaculation of semen is not necessary. Penetration to any extent is sufficient. Absence of seminal stains on the clothes, etc. is not evidence of absence of penetrative sexual assault. As held by the Apex Court, that the mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case [See **Prithi Chand** (*supra*)]. Hence, the absence of semen is not a ground to disbelieve the case of the prosecution.

37. That being the position, I am of the considered opinion that the trial court has rightly convicted and sentenced the accused for the offences punishable under Section 377 IPC and Section 6 read with Section 5 of the PoCSO Act. Hence, I find no infirmity in the impugned judgment calling for an interference by this court.

38. In the result, the appeal, *sans merit*, is thus dismissed. Application(s), if any, pending shall stand closed.

**CHANDRASEKHARAN SUDHA**
**(JUDGE)**

**MAY 16, 2026**
*mj/p'ma*