

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

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Reserved on : 10.10.2014
Pronounced on :14.10 .2014

+ CRL.A. 1477/2013

JONGI @ RAVI

..... Appellant

Through : Ms.Inderjeet Sidhu, Advocate

versus

STATE

..... Respondent

Through : Mr.Neeraj Kumar Singh, APP for the
State with SI Kuldeep Yadav, PS
Connaught Place.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J

1. Being aggrieved by his conviction under Section 354 IPC and Section 9 of POCSO Act, 2012 and the sentence awarded to him for the aforesaid offence, the Appellant has impugned the judgment and order on sentence dated 06.05.2013 by learned ASJ in Session Case No.30/2013.

2. The case of prosecution runs as under:-

On 16.1.2013 at 5.40 pm vide DD entry 25A, an information was received at P.S. Connaught Place about a person being mercilessly beaten in front of Khadi Bhawan, Connaught Place. The DD entry was assigned to SI Ram Babu, who reached the spot along with Constable Satender Pal. Baban Chauhan, the complainant, is father of the child victim, who made statement Ex.PW3/A against the Appellant, accusing him of outraging the modesty of his daughter aged about 10-11 years. He also stated that when her daughter raised alarm, the public persons present there started beating him and that incident had been narrated to him by his daughter. On the basis of statement of Ex.PW3/A,

FIR was registered against the Appellant for committing the offence punishable under 354 IPC and Section 8 of POCSO Act, 2012.

The Appellant was charged for committing the offence punishable under Section 10 of POCSO to which he pleaded not guilty. The prosecution examined eight witnesses in all to prove its case against the Appellant, in his examination under section 313 Cr.P.C., while denying the case of prosecution, claimed himself to be innocent.

Learned ASJ considered the testimony of child victim and her parents to be inspiring confidence, credit-worthy, sufficient to prove the guilt of accused beyond reasonable doubt. While rejecting the plea of the Appellant of having falsely implicated in this case, learned trial court observed that the case of prosecution stands on the testimony of the child victim alone and that accused has not brought on record anything to rebut the presumption of his culpable mental state. Thus, holding the Appellant guilty of committing the act of sexual assault with the child within the ambit of Section 7 of POCSO, which is punishable under Section 8 of POCSO, the Appellant was ordered to undergo rigorous imprisonment for three years and to pay fine of Rs.5,000/- and in default to undergo further imprisonment for six months.

3. I have heard Ms.Inderjeet Sindhu, Adv. for the Appellant and Mr.Neeraj Kumar Singh, APP for the State.

4. On behalf of Appellant, it has been submitted by Ms.Inderjeet Sindhu that the place of incident is in front of Khadi Bhawan, Regal Cinema, which is a crowded place. She further submitted that the parents of the prosecutrix are not witnesses to the occurrence and child victim had made substantial improvement at various stages which is sufficient to conclude that she had tutored witnesses, making statement at the behest of her parents. It is further submitted that none

of the public person has been joined as a witness, who would have been natural witnesses of the incident, if any. She has further submitted that the Appellant had been beaten mercilessly, which is established from his MLC and in order to save their own skin they have falsely implicated the Appellant in this case.

5. On behalf of State, it has been submitted that merely because public persons have not been joined as witnesses, for whatever reason, is no ground to disbelieve the testimony of the child victim and her parents, who have fully supported the prosecution case. It is further submitted that in this case a young girl aged about 10-11 years was sexually assaulted by the Appellant and the offence being of serious nature, the Appellant has been rightly convicted under Section 7 of POCSO Act. Hence, the appeal may be dismissed.

6. I have considered the rival contentions and carefully gone through the record. Section 7 of POCSO Act deals with sexual assault, which is punishable under Section 8 of the said Act. In order to ascertain as to under which Section the act committed by the Appellant falls, it is necessary to refer to Section 7 as well as Section 11 of the said Act. Section 7 and Section 11 reads as under:-

Section 7. 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.

Section 11. Sexual harassment—A person is said to commit sexual harassment upon a child when such person with sexual intent,--

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such

- gesture or object or part of body shall be seen by the child; or*
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or*
 - (iii) shows any object to a child in any form or media for pornographic purposes; or*
 - (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or*
 - (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or*
 - (vi) entices a child for pornographic purposes or gives gratification therefor.*

Explanation.—Any question which involves “sexual intent” shall be a question of fact.

7. After referring to the above Sections, it is time to see as to in fact what is the Act which is attributed to the Appellant by the child victim. First of all, it is necessary to mention that despite the child being present and capable of narrating the incident himself, the I.O. preferred to record the FIR on the basis of statement of Baban Chauhan, her father, who was not even present in the vicinity when the incident has taken place.

8. As per the statement of Ex.PW3/A, Baban Chauhan, he along with his entire family survive on begging at the Mandir and sleep on pavement near Shivaji Stadium. On 16.01.2013 his daughter ‘S’ (name withheld) aged about 10-11 years was playing near Shivaji Stadium, when at about 5.30 pm, Jongi, a vagabond on the pretext of giving back her bag/*potli*, took her to one side, held her hand and lifted her shirt and started touching/massaging her breast. When her daughter raised alarm, the public persons started beating him. He also

mentioned in the FIR that the incident was narrated to him when his daughter came to him. PW-2 Surja, mother of the victim also made statement on identical lines.

9. Thus, it is clear that PW-3/A Baban Chauhan and PW-2 Surja are not witness to the occurrence. PW-1 'S' is the child victim who was questioned to test her understanding and after recording about her capability to understand the questions and answer them, the Court examined her on oath. She has stated that:-

'We live near Hanuman Mandir. It was winter when the accused called me for giving our potli about 2-3 months back. I was eating rice. Then I went to play near Shivaji Stadium, when the accused came to me. It was evening time. Sun had set. The accused asked to accompany him for getting our potli back. He took me to gali. He kissed me and he also hurt me on my cheek with small knife and asked to take off my underwear.

The accused had taken off my blouse and had caressed my chest. I had cried and shouted. The accused ran away. The accused did not give our potli back. The accused was apprehended by public persons. Police had also come. I had narrated to the police what did accused do with me. I had identified the accused in the police station.

I can identify the person. Witness has correctly identified the accused.'

10. The child victim was never produced before the Magistrate for getting her statement under Section 164 Cr.P.C. recorded. Thus, we have two versions before us i.e., one got recorded by her father, which formed basis of registration of an FIR and allegations levelled against him is only about rubbing her chest. It is specifically mentioned in the complaint by PW-3/A in presence of his daughter and as per the details of the incident given by her to him. However, when child victim herself appeared in the witness box, she stated that on the pretext of giving back her bag/potli, the accused took her to one side held her

hand, hurt her cheek with a small knife, lifted her shirt and started touching/massaging her breast. The MLC Ex.PW-5/A of the Appellant and his discharge summary show that he suffered multiple injuries for which he was hospitalized and remained admitted for two days. The MLC shows that Appellant was brought to Dr.Ram Manohar Lohia Hospital on 16.01.2013 at about 6.45 pm by Constable Amit and examined by Dr.Anil Kumar Chaudhary, PW-5; meaning thereby that the Appellant was very much present at the spot in an injured condition when the I.O. visited the spot. However, neither in the endorsement Ex.PW-5/A and PW-5/B, this fact is mentioned, nor in the arrest memo. Rather in the arrest memo, time of arrest has been given as 17.01.2013 at 10.20 am, but the place of arrest is not described. Even the name and address of the person to be informed about the arrest though mentioned as Subhash R/o vagabond Hanuman Mandir, Connaught Place, New Delhi, it is not clear as to how he is connected or related to the Appellant and through what mode i.e., personally or telephonically, this information was given to Subhash as referred to in Column No.7.

11. Though, the child victim in her statement has referred to the use of knife and the injuries being caused to her with knife, but neither such injury was noticed by the I.O. nor pointed out by her or her father at the time of reporting the matter to the Police. She was not subjected to medical examination for the purpose of treatment of so-called injuries. The only medical examination of child victim is to ascertain her bony age. She was estimated to be between 10-11 years.

12. After considering the version given by PW-3 Baban Chauhan as narrated to him by the child victim PW-1 'S', at the most, ingredients of Section 11 of POCSO Act can be said to have been proved against the Appellant.

13. Since the punishment provided for committing the offence under Section 11 of POCSO Act is up to three years and fine, learned counsel for the Appellant submitted that Appellant had been in custody since his arrest in this case, he is a young man aged about 22-23 years, he was beaten mercilessly on the date of incident, though no harm was caused to the child victim, she has prayed that in view of the above circumstances, the substantive sentence of the Appellant may be reduced. Further, since it is appearing on record that not only the Complainant but also the Appellant is a vagabond with no place to live or any means to earn their livelihood, keeping the Appellant in custody for six months in default of payment of fine of Rs.5000/- would cause serious prejudice to him. Hence, the period of sentence undergone in default of payment of fine may be reduced to facilitate his early release. It is further submitted by learned counsel for Appellant that as per the nominal roll and Jail Report, the medical condition of the Appellant is unfit even to the extent that he has not been assigned any work as he is suffering from orthopaedic/spine problem.

14. Though it has been the testimony of child victim that she was hurt on her cheeks or knife was shown to her, her statement can only be proved to the extent that the Appellant lifted her shirt and rubbed it. Looking into the facts and circumstances and the material emerging on record, I find that, at the most, the act of the Appellant i.e. lifting shirt of the child victim, can be termed as a case of sexual harassment. Thus, I find that the offence proved against the Appellant is under Section 11 of POCSO Act, which is punishable under Section 12 of the said Act and provides imprisonment of either description for a term which may extend to three years and shall also be liable to fine. .

15. In the facts and circumstances of the and the submissions made by learned counsel for the Appellant, the conviction of the Appellant under

Section 7 of POCSO Act is converted to Section 11 of POCSO Act and the substantive sentence awarded to him is reduced from three years to two years. The fine of Rs.5000/- imposed on him is maintained, however, it is ordered that in default of payment of fine, the Appellant shall undergo S.I. for seven days.

16. As per nominal roll of the Appellant, as on 28.09.2014, he has undergone one year, eight months and thirteen days and also earned remission of two months and twelve days. In the circumstances, on completion of sentence, the Appellant be set at liberty forthwith, if not wanted in any other case.

17. Appeal stands disposed of in above terms. TCR be sent back alongwith copy of this order.

18. A copy of this order be also sent to concerned Jail Superintendent for necessary compliance.

(PRATIBHA RANI)
JUDGE

OCTOBER 14, 2014
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