$~

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

RESERVED ON : FEBRUARY 15, 2017
**DECIDED ON : FEBRUARY 17, 2017**

\+ **CRL.A. 1178/2015**

RAJNISH @ SONU ..... Appellant

Through : Mr.R.K.Gupta, Advocate.

versus

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

Through : Mr.Arun K.Sharma, APP.

**CORAM:**
**HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. Challenge in this appeal is a judgment dated 11.09.2015 of learned Addl. Sessions Judge in Sessions Case No. 188/2013 arising out of FIR No. 228/2013 PS Bharat Nagar by which the appellant-Rajnish @ Sonu was held guilty for committing offence punishable under Section 10 POCSO Act. By an order dated 15.09.2015, he was sentenced to undergo Rigorous Imprisonment for five years with fine Rs. 5,000/-. In default of payment of fine, he was directed to undergo Simple Imprisonment for six months.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 29.08.2013, at about 03.30 p.m., at House No. A-102,

J.J.Colony, Wazirpur, the appellant committed aggravated sexual assault upon the prosecutrix 'X' (changed name) aged around ten years.

3. On 29.08.2013, victim's mother-Maya (PW-4) had gone to Lady Harding Hospital to get medicine. On her return, she found that her daughter 'X' was scared and neighbours had gathered at the spot. She came to know that the appellant had entered inside the house and on hearing 'X's screams the neighbours had arrived there. She made a call at 100 informing that a quarrel had taken place in her house. Subsequently, when the victim disclosed the incident, the matter was reported to the police. The Investigating Officer after recording statement of victim's mother-Maya (Ex.PW-4/A), lodged First Information Report. X was medically examined; she recorded her 164 Cr.P.C. statement. The appellant was arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation a charge-sheet was filed in the Court. In order to establish its case, the prosecution examined ten witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and plead that his false implication was due to a quarrel on account of non return of ₹10,000/- given to victim's mother. The trial resulted in conviction as aforesaid. The instant appeal has been preferred to challenge it.

4. I have heard the learned counsel for the parties and have examined the file.

5. The appellant's counsel urged that the Trial Court did not consider the evidence in its true and proper perspective and ignored the material infirmities without cogent reasons. The prosecution was unable to establish victim's age around ten years. No independent public witness in the neighbourhood was associated during trial. The victim had declined for

internal medical examination. Learned Additional Public Prosecutor urged that no sound reasons exist to disbelieve the testimony of a child witness.

6. The occurrence took place on 29.08.2013 at around 3.30 p.m. when 'X' was watching television in her house and her mother had gone to Lady Harding Hospital to take medicine. The appellant who lived in the neighbourhood entered into the house. When PW-4 Maya returned after fetching medicine, she found that 'X' was scared and neighbours had collected at the spot. Promptly, she made a telephonic call at 100. Since she was not aware of the actual incident, she disclosed that it was a 'quarrel' for which the call was made to the police. Subsequently, when 'X' narrated the true story, the FIR was lodged.

7. In FIR (Ex.PW-2/B), MLC (Ex.PW-4/B) and 164 Cr.P.C, statement (Ex.PW-5/A) the victim had claimed herself to be around ten years on the day of occurrence. The prosecution examined PW-1 (Ms.Preet Sharma), Teacher, MC Primary School, who brought the school record, and proved various documents, photocopy of which were exhibited as Ex.PW-1/A to Ex.PW-1/D; date of birth recorded therein was 14.10.2003. In the cross-examination, genuineness and correctness of these documents was not challenged. Since date of birth i.e.14.10.2003 came to be recorded much prior to the incident, there was least possibility of its manipulation. Victim's parents did not anticipate that time if any such incident would happen in future to furnish incorrect date of birth. Nothing has emerged on record if the prosecutrix was above 12 years of age on the day of incident. No such date of birth has been suggested by the appellant in the corss-examination of any witness.

8. The appellant was named in the FIR (Ex.PW-2/B); specific role was assigned to him in the incident. Since the FIR was lodged promptly, there was least possibility of false implication. In her 164 Cr.P.C. statement recorded on 30.08.2003 (Ex.PW-5/A) the victim disclosed to the learned Presiding Officer that the appellant had entered inside the room when she was watching TV and her mother had gone along with her younger brother to a doctor. The accused pressed her breasts and kissed her cheeks; he also put off her panty. When the appellant started to open the chain of his pant; she raised alarm and the neighbours collected there. The appellant fled the spot.

9. In her Court statement, the victim proved the version given in her 164 Cr.P.C.statement without any variation. She identified the appellant to be the perpetrator of the crime and had assigned a definite role to him in the occurrence. Before recording her Court statement, the learned Presiding Officer had put various questions to ascertain if she was a competent witness and was able to give rational answers to the questions put to her. After recording satisfaction that 'X' was a competent witness and was making her statement without any fear or pressure, the learned Presiding Officer recorded her statement. It was in question-answer form. In response to a question “"Phir Kya hua?" she responded "usne meri chhati par hath lagaya tha aur mere gaal par chumma liya tha”. Again she was asked "Phir Kya hua?" she responded "usne mujhe litakar meri kachhi khol di aur apni pant ki chain khol raha tha toh mein chilayi”. The accusations are very specific, certain and clear. Nothing more can be expected from a child aged around ten years. Her statement on material and vital facts remained unchallenged. In the cross-examination, she reiterated that she was not a tutored witness

and had described what had happened with her. No suggestion was put to the witness if the appellant had not entered inside the room at the relevant time. No ulterior motive was assigned to the child for making a false statement.

10. PW-4 (Maya), victim's mother, has corroborated her testimony on material particulars. Nothing has emerged if the appellant had advanced a loan of ₹10,000/- to her. No specific date and purpose for which the said loan was allegedly given to the victim's mother has been disclosed. PW-4 (Maya) disclosed that the accused had come to stay with her relative one or two months prior to the incident and she knew him being a neighbour. Since the appellant had recently come to stay with his sister in the neighbourhood, there was no possibility of the victim's mother to borrow ₹10,000/- from him. The appellant did not elaborate as to when a quarrel had taken place over non-return of money. The victim had nothing to do with any animosity over any issue with her parents. Sexual assault on a tender aged girl is bound to create a permanent impact and impression on the mind of such a girl, which may permanently affect her adversely. The parents are reluctant to involve their children over such trivial issues. Victim's mother is not believed to 'use' a child to settle score. At the first instance, the victim's mother had not implicated the appellant for sexual assault and had merely informed about a quarrel to have taken place inside her house. Had there been any mala fide, the victim's mother would have involved him for sexual assault at first instance.

11. Minor contradictions, discrepancies and infirmities regarding the exact spot where the occurrence took place are inconsequential as they do not affect the core of the prosecution case. The appellant, finding a small child aged around ten years alone inside the house gained access and

committed aggravated sexual assault. Incidents of sexual assault are sometimes suppressed and concealed for various reasons and even not reported to the police due to fear of loss of reputation. Merely because 'X' did not give consent for internal medical examination, it did not cause dent in her statement about sexual assault. The accused, aged around 22 years, had no occasion or reason to visit the victim clandestinely in the absence of her parents without any specific reason or purpose. Victim's consent (if any) was of no relevance as she was below 12 years of age.

12. The impugned judgment based upon fair appreciation of the evidence deserves no intervention.

13. The sentence order is based upon fair reasoning. Minimum sentence prescribed under Section 10 of POCSO Act cannot be altered. The sentence order is, however, modified to the extent that default sentence for non-payment of fine of ₹5,000/- will be Simple Imprisonment for one month instead of six months. Other terms and conditions of the sentence order are left undisturbed.

14. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

**(S.P.GARG)**
**JUDGE**

**FEBRUARY 17, 2017/s**a