

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

**RESERVED ON : 9th MAY, 2017
DECIDED ON : 22nd MAY, 2017**

+ CRL.A.540/2014

STATE NCT OF DELHI Appellant

Through : Mr.Amit Gupta, APP.
versus

GHASITA KHAN Respondent

Through : Mr.Mayank Jain, Advocate with
Ms.Madhu Jain, Advocate.

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

S.P.GARG, J.

1. State has preferred the instant appeal under Section 377 Cr.P.C. to challenge the legality and correctness of an order dated 01.11.2013 of learned Addl. Sessions Judge in Sessions Case No.36/2013 arising out of FIR No. 407/2012 PS Shahdara by which the respondent was released on probation for a period of three years for commission of offence punishable under Section 8 POCSO Act. The appeal is contested by the respondent.

2. I have heard the learned counsel for the parties and have examined the file. Learned APP urged that considering the gravity of the offence and serious allegations against the respondent, the Trial Court committed grave error to release the respondent on probation. The POCSO

Act specifies the minimum period of sentence i.e. three years and it cannot be reduced or altered.

3. Learned counsel for the respondent urged that the Trial Court had taken into consideration all the relevant aspects while granting probation to the respondent. The respondent aged around 75 years is to provide company to his wife aged around 74 years in her old age. The respondent is not a previous convict and has no criminal antecedents whatsoever. Learned counsel further urged that conviction recorded under Section 8 of POCSO Act is not sustainable as there are material inconsistencies and infirmities in the case of the prosecution. No independent public witness was associated at any stage of the investigation. The victim has given a false statement at her mother's behest with whom the respondent had dispute over non-payment of amount in the committee run by her. He further urged that the Investigating Officer did not follow the procedure laid down under the Act and statement of the prosecutrix was not got recorded under Section 164 Cr.P.C.

4. Admitted position is that the respondent lived in the neighbourhood of the complainant in the same vicinity. The occurrence took place on 20.12.2012 at around 08.00 p.m. The incident was reported to the police without any delay. PW-1 (Kamlesh) – victim's grand-mother made telephone call at 100 as a result of which DD No.73B (Ex.PW-4/A) came into existence at PS Shahdara at around 09.10 p.m. The Investigating Officer after recording statement of victim's grand-mother (Ex.PW-1/A) lodged First Information Report. In the complaint PW-1 (Kamlesh) gave detailed account of the incident and named the respondent to have

committed sexual assault upon her grand-daughter aged around 9 years when she had gone to his shop to make certain purchases.

5. In her deposition before the Court as PW-1, Kamlesh proved the version given to the investigating agency at first instance without any variation. She deposed that after her return from the shop, the prosecutrix 'X' (assumed name) aged around 10 years came weeping and apprised her about the entire incident. She rushed to the respondent's shop but he had gone upstairs after closing it. Many neighbours collected at the spot but the respondent did not come down. Thereafter, she made a call at 100. Her statement (Ex.PW-1/A) was recorded. In the cross-examination, she denied if she was operating and running any committee or that members of the committee were present in her house that time. She further denied if the respondent was implicated due to demand of committee amount from her. She further denied if a quarrel had taken place with the respondent in 2012 on issue of dry-cleaning of clothes.

6. Material testimony is that of PW-3 'X'. Before recording her statement, preliminary enquiry was made by the learned Presiding Officer to ascertain if she was capable to understand the questions put to her and was able to give rationale answers. After recording his satisfaction, the Trial Court recorded her statement without oath. She deposed that on 20.12.2012 at around 08.00 p.m. she had gone to the respondent's shop to buy Maggi. The respondent became nude and asked her to hold his penis and he would give her two packets of Maggi. She started crying and tried to escape but the respondent caught hold of her hand and asked her not to disclose the incident to anyone. She returned to her house and narrated the facts to her grand-mother who called the police. In the cross-examination, she admitted

that there were various shops nearby were open. She further admitted that their families were on visiting terms. She remained at the respondent's shop for about 4 or 5 minutes. She was unaware if her grand-mother was running any 'committee'.

7. On scanning the victim's statement, it reveals that no material infirmity or inconsistency has emerged to discard her natural version. No ulterior motive was assigned to the child to make serious allegations of sexual assault against the respondent who lived in the neighbourhood for the last two / three years. Material facts deposed by the witness remained unchallenged and uncontroverted in the cross-examination. The respondent did not deny victim's arrival at his shop to purchase Maggi. No cogent evidence has emerged to infer if victim's grand-mother was running any 'committee' or that the respondent was a member of it. The respondent did not examine any member of the 'committee' to buttress his claim that on 05.12.2012, he had lifted the 'committee' at a loss of ₹25,000/- or that the 'committee' was started on 05.06.2012 for an amount of ₹1,05,000/- or that he was to be paid ₹74,666/- by the victim's grand-mother on or before 10.12.2012. This specific defence was not put to PW-1 (Kamlesh) in the cross-examination. The respondent did not produce any document showing himself to be the member of the 'committee'. It is unbelievable that victim's grand-mother aged around 60 years would level false allegations of sexual assault to bring her own grand-daughter aged around 10 years to disrepute. For petty amount, the grand-mother is not expected to use her tiny child to settle score. The defence deserves outright rejection. Statement of the complainant is consistent throughout and no sound reasons exist to disbelieve her. Well settled position is that if the testimony of the child

witness is a voluntary expression and is an accurate impression of the same, no corroboration of testimony is required.

8. The prosecution has established that 'X' was below 12 years of age on the day of occurrence. Birth certificate (Ex.PW-1/F) has been proved on record showing X's date of birth as 22.02.2003. X's age has not been challenged in the cross-examination.

9. Learned counsel for the respondent has failed to show as to what mandatory procedure was not followed by the investigating agency during investigation. Recording of statements under Section 164 Cr.P.C. is not mandatory. Moreover, no prejudice is shown to have been caused to the respondent for not recording statement under Section 164 Cr.P.C. For remissness of the Investigating Officer (if any), otherwise cogent and natural statement of the victim cannot be suspected or doubted.

10. Respondent's conviction under Section 8 POCSO Act based upon fair appreciation of the evidence cannot be faulted and is affirmed. It is relevant to note that the respondent did not challenge conviction under Section 8 POCSO Act and this plea has been taken only in the present appeal under Section 377 Cr.P.C. filed by the State to challenge grant of probation.

11. Offence committed by the respondent is serious and grave. The unsuspecting child aged around 10 years had gone to buy eatables at the respondent's shop. The respondent aged around 75 years was akin to X's grand-father. He sexually assaulted the child exploiting her innocence. The act of victim's molestation was intentional. The respondent has betrayed the trust reposed by 'X' and her family members in him. 'X' had no reasons to suspect amiss as the families were having visiting terms. Though there were

mitigating circumstances regarding the respondent's age and other factors, considering the incident whereby a tiny child aged around 10 years was ravished for no fault of hers, the respondent does not deserve any leniency and there were no good grounds to release him on probation. The respondent was well aware of the consequence of his act; he being aged around 75 years having retired from a Government job. He attempted to shift the blame on victim's grand-mother and alleged false implication on non-payment of his alleged amount in a 'committee'. The respondent was not remorseful at any stage of trial.

12. Besides above, there is minimum sentence i.e. 3 years prescribed under Section 8 POCSO Act which cannot be modified or altered. Recently, in CrI.A.Nos. 1232/2015 '*State vs. Sunil*' and 288/2017 '*Sunil vs. State (NCT) of Delhi*' decided on 02.05.2017, the Co-ordinate Bench of this Court held that despite mitigating factors noted by the learned Addl. Sessions Judge, the convict could not have been granted the benefit of probation under the Probation of Offenders Act.

13. Consequently, affirming the impugned judgment on conviction dated 30.10.2013 holding the respondent's guilt under Section 8 POCSO Act Order on Sentence dated 01.11.2013 is modified and the respondent – Ghasita Khan is directed to undergo RI for a period of three years and to pay a fine of ₹10,000/-; default sentence being SI for fifteen days.

14. The appeal stands disposed of in the above terms.

15. The respondent shall surrender before the Trial Court on 05.06.2017 to serve the sentence awarded to him in the present appeal. He shall, of course, be entitled to the benefit under Section 428 Cr.P.C. and the

period (if any) already undergone by him in the case shall be counted and set off.

16. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MAY 22, 2017 / *tr*

