

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

% Reserved on: 28th April, 2017
Decided on: 2nd May, 2017

+ **CRL.A. 1232/2015**

STATE

..... Appellant

Represented by: Mr. Hirein Sharma, APP with
SI Nishu, PS Aman Vihar.

versus

SUNIL

..... Respondent

Represented by: Mr. Harsh Prabhakar with Mr.
Anirudh Tanwar and Mr. Jay K.
Bhardwaj, Advs. with appellant
in custody.

+ **CRL.A. 288/2017**

SUNIL

..... Appellant

Represented by: Mr. Harsh Prabhakar with Mr.
Anirudh Tanwar and Mr. Jay K.
Bhardwaj, Advs. with appellant
in custody.

versus

STATE (NCT) OF DELHI

..... Respondent

Represented by: Ms.Aashaa Tiwari, APP with SI
Nishu, PS Aman Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Sunil was convicted for offence punishable under Section 8 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act') vide judgment dated 25th February, 2015 and vide order on sentence dated 7th March, 2015, Sunil was released by giving benefit of probation on his filing

a personal bond of good behaviour and conduct in the sum of ₹10000/- with one surety of the like amount for a period of one year.

2. Aggrieved by the order dated 7th March, 2015 releasing Sunil on probation for offence punishable under Section 8 of the POCSO Act which provides for a mandatory minimum sentence of three years imprisonment, the State preferred Crl.A. 1232/2015. In the said appeal despite issuance of repeated notices and thereafterailable warrants, the respondent could not be served. Hence vide order dated 29th September, 2016, this Court issued non-bailable warrants against Sunil which were executed on 13th February, 2017 and Sunil was produced before this Court on 14th February, 2017. Since prima facie there was merit in the appeal filed by the State as Sunil had been convicted for offence punishable under Section 8 of the POCSO Act which prescribes for minimum sentence of imprisonment for three years and he was not easily traceable and no appeal challenging the conviction had been filed by Sunil, this Court sent Sunil to Tihar Jail.

3. Learned amicus curiae on the first date itself conscious of the legal position stated that he would prefer an appeal challenging the conviction of Sunil for offence punishable under Section 8 of the POCSO Act. Hence, Crl.A. 288/2017 was filed.

4. Thus before deciding Crl. Appeal No.1232/2015 this Court is required to deal with Crl. Appeal No.288/2017 filed by Sunil challenging his conviction under Section 8 of the POCSO Act.

5. Investigation was set into motion on receipt of DD No. 7-A exhibited as Ex.PW-10/A at 4.05 AM on 3rd June, 2013 informing that near Gali No.17, Block-B one boy has misbehaved with a girl and tried to commit wrong act. SI Bhupesh along with Constable Rakesh and woman Constable

Satya reached the spot where father of the victim produced Sunil in an injured condition. The victim was taken for medical examination and her statement Ex.PW-3/A was recorded. In her statement the victim stated that she was studying in 7th standard and was residing with her family. On 2nd June, 2013 at about 10.00 PM she slept outside the house on a cot along with her two sisters and on the adjoining cot her parents were sleeping. At night she felt that somebody touched her body and she woke up. She saw Sunil uncle was standing there and had put one hand in her skirt and was touching her body. She started crying and told the facts to her father. Thereafter Sunil uncle caught hold of her father and started fighting with him. Hearing noise neighbours gathered and beat Sunil. In the meantime, police came and her father handed over Sunil to the police.

6. Statement of the victim was also recorded under Section 164 Cr.P.C. wherein she spoke on the same lines. Before the Court also the victim deposed as per the statement on the basis of which FIR was registered. She clarified on being asked that she felt that somebody was touching her chest. She thought that hand of her sister touched her body so she continued sleeping. She realized when someone put hand in her underwear and she shouted and got up. Her father also got up and she went to her father and clung to him.

7. Age of the victim has been proved by PW-2, the Principal who brought the original records. As per the admission register and the original certificate, the date of birth of the victim was 30th April, 2002. Thus on the date of incident, that is, 3rd June, 2013 she was just above 11 years of age.

8. In his statement under Section 313 Cr.P.C. Sunil denied the prosecution case and stated that he had been falsely implicated on account of

quarrel between his father and the father of the victim. However, he led no evidence to substantiate this claim. Further though suggestions were given to both the parents of the victim and the victim as well in respect of the previous quarrel between the father of the victim and father of Sunil however, no specific time, date was mentioned when the quarrel took place.

9. Further Sunil was arrested immediately after the incident and his MLC Ex.PW-6/A was conducted at 6.30 AM on 3rd June, 2013. As per the MLC he received abrasion on the centre of the skull and lacerated wound on occipital region. There is no explanation by Sunil as to how he received injuries before the arrest however the same has been explained by the prosecution.

10. Considering the testimony of the victim duly corroborated by her parents and the apprehension of Sunil at the spot, this Court finds no infirmity in the impugned judgment dated 25th February, 2015 convicting the appellant for offence punishable under Section 8 of the POCSO Act.

11. As noted above, the age of the victim has been proved to be less than 12 years at the time of incident, thus Sunil has committed the offence of aggravated sexual assault defined under Section 9(m) and punishable under Section 10 POCSO Act. However, since neither any charge for offence punishable under Section 10 POCSO Act was framed against Sunil nor was he convicted thereof, without State having taken remedies in this regard, this Court cannot convict Sunil for offence punishable under Section 10 POCSO Act.

12. Vide order on sentence dated 7th March, 2015, the learned Special Judge released Sunil on probation for good conduct. Section 8 POCSO Act provides for minimum sentence of imprisonment for a period of three years

and fine. Hon'ble Supreme Court in the decision reported as 2014 (15) SCC 340 Shyam Lal Verma vs. Central Bureau of Investigation held that in case where minimum sentence is prescribed by the statute, the convict cannot be granted the relief under the Probation of Offenders Act. The impugned order on sentence dated 7th March, 2015 is thus liable to be set aside. Considering the mitigating factors noted by the learned Additional Sessions Judge though not awarding maximum sentence, this Court cannot award sentence less than the minimum prescribed.

13. Consequently, upholding the impugned judgment of conviction dated 25th February, 2015, order on sentence dated 7th March, 2015 is modified and Sunil is directed to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹1000/- in default whereof to undergo simple imprisonment for a period of one month. Sunil who is in custody will undergo the remaining sentence. He will be awarded benefit of the period of incarceration undergone during trial and also pursuant to non-bailable warrants executed on 12th February, 2017.

14. Crl. Appeal No. 288/2017 is dismissed and Crl. Appeal No. 1232/2015 is allowed.

15. Copy of the order be sent to Sunil in jail through Superintendent Tihar Jail and to be kept in record.

16. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

MAY 02, 2017
'vn'