

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

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Decided on: 20th March, 2017

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CRL.A. 1567/2014

CHHOTU

..... Appellant

Represented by: Mr.Krishan Kumar with
Ms.Vidushi Sharma, Advs.

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP for State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By the present appeal, the appellant challenges his conviction for offences punishable under Sections 8 & 10 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and order on sentence directing him to undergo rigorous imprisonment for a period of 3 years and 5 years and to pay a fine of ₹5,000/- in default to undergo simple imprisonment of 3 months on each count for offences punishable under Sections 8 & 10 POCSO Act respectively.

2. Assailing the conviction, learned counsel for the appellant submits that though charged for offence defined under Section 5(m) and punishable under Section 6 POCSO Act, he has been convicted for offence punishable under Sections 8 & 10 of POCSO Act. There are material contradictions in the testimony of the victim PW-2 and her father PW-3. The place of occurrence was not visible from where he was standing in view of the fact that the bus

was parked in between. Thus, the occurrence as unfolded by PW-3 is highly improbable. The appellant has been falsely implicated. In any case, the appellant has undergone nearly 4 years and 8 months of imprisonment out of 5 years awarded and in the alternative, he be released on the period already undergone.

3. FIR No. 67/2013 under Section 377 IPC and Section 6 of the POCSO Act was registered at PS Parliament Street, Delhi after receipt of wireless message vide DD No.29A on 29th April, 2013 at about 10.45 AM informing that a man had been apprehended while doing wrongful act with a girl child aged about 8 years behind Gurudwara Bangla Sahib at Jai Singh Road. Statement of PW-2 victim was recorded who stated that she was studying in 3rd standard in NDMC school, Hanuman Road and while she was sleeping on the footpath along with her friend, the appellant who resides on the footpath nearby came and covered her with a blanket. After coming under the blanket, her removed her undergarments and started touching his penis with her anal portion. In the meanwhile, her father took off the blanket and caught hold of the appellant.

4. During the course of the trial, statement of PW-1 In-charge Primary School Hanuman Road was recorded who deposed that as per the admission record (Ex.PW1/A and PW1/B), the date of birth of the prosecutrix was 4th March, 2004. The alleged incident being of 29th April, 2013, the prosecutrix was 9 years old at the time of incident and hence, provisions of POCSO Act were applicable.

5. Before Court, the prosecutrix deposed in sync with the statement on the basis of which FIR was registered. She stated that the appellant lay by her side, that is, on her right side and not between the two girls. After

covering himself and her with the blanket, he tried to touch his penis with her anus. In the meantime, her father came and took off the blanket. In cross-examination, she stated that she did not feel anything and it was when her father raised the alarm, she came to know what appellant was doing with her.

6. PW-3 the father of the prosecutrix deposed that on 29th April, 2013 at about 10.30 AM, one bus was parked on the right side of YWCA footpath. He could not see what was happening on the back side of the bus where his daughter was sleeping. When he went to search his daughter, he could see the head of his daughter but could not see who the person was sleeping besides her under the blanket. Since there was some movement under the blanket, he pulled off the blanket and saw that the appellant had removed his pant and pyjama of his daughter and was touching his private part with the back portion of his daughter. He got infuriated and beat the appellant. In the meantime public persons also came and started beating him. The PCR van arrived at the spot and apprehended the appellant.

7. It is not the case of PW-3 that he saw the incident from the opposite side. He went to search his daughter and when he crossed the road and came behind the bus, he saw someone else besides the girls sleeping and movement under the blanket so he pulled off the blanket. Thus, the contention of counsel that as per the site plan, PW3 could not have witnessed the incident deserves to be rejected. There are no contradictions in the testimony of PW-2 and PW-3, the main prosecution witnesses much less any material contradictions.

8. The appellant was charged for offence defined under Section 5(m) and punishable under Section 6 POCSO Act which is aggravated penetrative sexual assault but convicted for offences punishable under Sections 8 & 10

of POCSO being minor offences of Section 6 POCSO Act. Thus there is no illegality in the conviction of the appellant on this count.

9. Section 7 of the POCSO Act defines sexual assault as under:-

“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”.

10. Section 9(m) provides that whoever commits sexual assault on a child below 12 years would be committing offence of aggravated sexual assault. As per the testimony of the prosecutrix, she did not feel anything and came to know when she heard the alarm raised by her father but from the evidence of the father he saw the appellant touch the anus of the prosecutrix with his penis though there was no penetration. Hence, the appellant has rightly been convicted for offences punishable under Sections 8 and 10 of the POCSO Act.

11. Section 8 POCSO Act prescribes for a minimum punishment for 3 years imprisonment which may extend to 5 years and Section 10 provides for a minimum imprisonment for a period of 5 years which may extend to 7 years. The appellant has been awarded the minimum sentence prescribed on both the counts. Hence, the sentence awarded to the appellant cannot be reduced.

12. Finding no merit in appeal the same is dismissed.

13. Copy of this order be communicated to the Superintendent, Tihar Jail for updation of record and intimation to the appellant.

14. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

MARCH 20, 2017
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