

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

Judgment Reserved on: 18th May, 2018
% *Judgment Delivered on: 13th September, 2018*

+ **CRL.A. 242/2017**

MOHD. WASIM

..... Appellant

Represented by: Mr. Ajay Verma, Ms. Katyayani
and Ms. Sudha Reddy,
Advocates.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for the
State with SI Jasmer Singh, PS
Jahangir Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the appellant challenges the impugned judgment dated 5th December, 2016 convicting him for the offences punishable under Section 10 of Protection of Children against Sexual Offences Act, 2012 (in short 'POCSO Act') and Section 328 IPC and the order on sentence dated 8th December, 2016 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 10 of POCSO Act and rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 328 IPC.

2. Learned counsel for the appellant submits that no poisonous substance was found to be consumed by victim 'C' on her examination. The delay in lodging of FIR has not been explained. Sompal, the neighbour who called the police, has not been examined as a witness. As per the medical evidence also, hymen was found to be intact and no external injury was found, thus, not fortifying the prosecution case. There are contradictions in the testimony of victim 'C'. Furthermore, FSL report does not support the prosecution case. Since the conviction of the appellant is on the solitary testimony of victim 'C', the same needs to be examined carefully in the light of surrounding circumstances. In the alternative, he further states that the present case is at best a case of sexual assault and not of aggravated sexual assault wherein the minimum punishment is 3 years imprisonment.

3. Learned APP for the State on the other hand contends that the present case squarely falls under Section 9 (n) of POCSO Act punishable under Section 10 of POCSO Act. Delay in lodging of FIR was due to circumstances that the victim 'C' was at the mercy of the appellant who was staying in the same house, mother of victim having passed away, father of victim indulging in drinking and her younger brother aged only 4 years. FSL report does not support the prosecution case because the incident was reported after 4-5 days when the victim had already taken bath and had changed her clothes.

4. Process of law was set into motion on 24th May, 2014 around 9:07 A.M. when information was received with respect to commission of rape with a 12 year old girl by her chacha at K- Block Jahangir Puri in front of HP Gas godown. Aforesaid information was recorded vide DD No. 14A (Ex.PW-18/A) and was entrusted to W/SI Renu Bala (PW-18). She along

with Ct. Rahul (PW-17) and W/Ct. Rajesh (PW-4) went to the spot i.e. Jhuggi, in front of DDA Flats, Metro Apartments. Victim 'C' was present there along with her father. She inquired from the victim about the incident. Thereafter, she along with victim, W/Ct. Rajesh and Ct. Rahul went to BJRM Hospital for medical examination of victim. W/SI Renu Bala called NGO officials for counseling of the victim, thereafter, victim was medically examined. After medical examination of the victim, the concerned Doctor handed over the sealed pullanda to W/Ct. Rajesh, which was seized vide seizure memo (Ex. PW-4/A) by W/SI Renu Bala. Thereafter, statement of the victim was recorded vide Ex.PW-1/A.

5. The victim stated that she along with her father and brother stayed in a Jhuggi, at Jahangir Puri, Delhi. She did not go to school and her mother had passed away. Earlier they were staying at Shahbad Dairy and few days back they shifted to Jahangir Puri. She stated that her paternal uncle (chacha) used to stay with them and 4-5 days ago, her Chacha Wasim, appellant herein, offered her a tablet to eat. When she refused to consume the tablet, appellant gave a blow on the back of the victim with a danda. Thereafter, the victim took the tablet and threw it in the drain. While she was sleeping at night, the appellant took off her salwar and did wrong act. The victim woke up and started crying. She told her neighbour Sompal, who gave beatings to the appellant, where after the appellant ran away and didn't return home. Sompal called the police. Victim stated that on earlier occasions also, the appellant had made her consume tablets and committed wrong act.

6. On the basis of the aforesaid statement, FIR No. 380/2014 (Ex.PW-9/A) was registered at PS Jahangir Puri for offences punishable under

Sections 376(2)(f)/376(2)(i)/376(2)(n)/328 IPC and Section 6 of POCSO Act.

7. W/SI Renu Bala prepared the site plan (Ex.PW-4/B) at the instance of the victim. She recorded the statement of victim, her father and the public witness who called at 100 number. She along with Ct. Rahul searched for the appellant and at the instance of the informer, who pointed out towards a rickshaw puller, apprehended him. Appellant was interrogated and arrested vide arrest memo (Ex.PW-17/A) and his personal search was conducted vide memo Ex.PW-17/B. W/SI Renu Bala recorded disclosure statement of appellant vide Ex.PW-17/C. After the arrest, appellant was medically examined.

8. On 26th May, 2014, the victim was produced before learned Metropolitan Magistrate for recording of her statement under Section 164 Cr.P.C. On 1st July, 2014, further investigation was entrusted to W/SI Sangeeta (PW-19). She deposited the exhibits of the case with FSL through Ct. Aarish. After completion of investigation, charge sheet was filed.

9. Vide order dated 23rd February, 2015, charge was framed for the offences punishable under Section 6 POCSO Act and Section 328 IPC and in the alternative under Section 376(2)(f) IPC against the appellant.

10. During the course of trial, the date of birth of the victim was proved to be 10th July, 1999 on the basis of the original register brought in Court and returned vide Ex. PW-8/A, produced by Vijay Kumar (PW-8), Principal of School of the victim, at Bihar.

11. After preliminary examination and on being satisfied that the victim (PW-1) was capable of understanding the questions put to her and capable of giving rational answers, her statement was recorded in Court wherein she

stated that she was residing with her parents and brother at Shahbad Dairy. Her father was indulging in drinking and after the death of her mother, her Chacha (appellant) came to reside with them. She stated that the behavior of appellant was not good with her father and he used to beat her father and brother. Her father and brother used to sleep outside the room in the courtyard and the appellant used to sleep in the room, where she used to sleep. She stated that the appellant used to administer some tablets to her and after consuming the same, she used to feel drowsy and became unconscious. The appellant used to do wrong acts i.e. he used to lie on her and kiss her. In the morning, she used to find blood on the bed sheet. She stated that this happened many times with her. Once, when she refused to consume tablet and threw it in the drain, the appellant beat her with danda. In the night, appellant tried to do wrong act with her, but he did not succeed. The appellant could not remove her salwar, he only removed her shirt, which was slightly torn from her shoulder. Thereafter, she narrated the incident to an aunty residing in the adjoining house. She disclosed the incident to Sompal who called the police.

12. During her cross-examination, the victim stated that she did not remember the name of the aunty to whom she had narrated the incident initially. She did not disclose this fact to her father as her father used to be beaten by the appellant. She stated that she did not tell anything to anyone except the said neighbour aunty. She stated that there was only one room in their jhuggi and only when there were thunder storms, her father used to sleep inside, otherwise he used to sleep in courtyard. She stated that after consuming the tablet, she used to sleep and wake up only on the next morning. She stated that she felt pain when the appellant did wrong act with

her but she did not scream. Sometimes appellant's wife and children used to come and reside with them for 1-2 days.

13. Kalpana (PW-2), resident of Jahangir Puri, stated that she did not remember the exact date but the incident took place 1-1½ years ago. On that day, when she was going for her duty, she met the victim who told her that the appellant had committed wrong act with her and asked her to call on 100 number. She called 100 from her mobile number 9716228422. Thereafter, police arrived and the victim was handed over to the police officials, after which she went for her duty.

14. Dr. Gopal Krishna (PW-6), Medical Officer, BJRM Hospital stated that on 24th May, 2014, a patient /victim, aged about 12 years, was brought to hospital, who was examined by Dr. Ameen JR, under his supervision vide MLC Ex. PW-6/A. No external injuries were found on the victim. Thereafter, the victim was referred to gynecologist. He further stated that he had been deputed by MS, BJRM Hospital to depose in respect of MLC Ex. PW-6/B prepared by Dr. Khalillullah Khan for patient Wasim. He stated that he was acquainted with the said Doctor's handwriting and his observations on the MLC were from point 'X' to 'X1'.

15. Dr. R. Kappu (PW-15), Medical Officer, BJRM Hospital deposed that the MLC Ex. PW-6/A was prepared by Dr. Kanchan, SR Gynae and he can identify her signatures. On local examination, the hymen was found intact and there was no sign of any fresh or old injury.

16. Dr. Avnish Tripathi (PW-7), CMO, BJRM Hospital stated that on 25th May, 2014, the appellant was examined by Dr. Dalip JR Casualty, under his supervision vide MLC Ex. PW-7/A. As per MLC, no fresh external injury was seen at the time of examination.

17. Appellant in his statement recorded under Section 313 Cr.P.C. stated that he used to reside in the house of father of the victim along with his family comprising of his wife and his children. He has not committed any sexual assault on the victim. He stated that victim has named him in the present case on the instigation of his neighbour Sompal, who was working with him in the factory. He stated that he was innocent and has been falsely implicated in the present case.

18. From the deposition of the victim in the Court it is clear that the appellant used to give her tablets and when she became unconscious victim alleges that he used to lie on her and kiss her. In the morning she would find blood on the bed sheet however, she does not state about the penetration amounting to the offence under Section 5 of POCSO Act being aggravated penetrative sexual assault. Even on the day when she refused to take the tablet it is alleged that the appellant attempted to do 'galat kaam' with her however, he did not succeed as he was not able to remove her payjama/salwar and only removed her shirt which was slightly torn from the shoulder. In view of this testimony of the victim, learned trial court rightly convicted the appellant for offence of aggravated sexual assault defined under Section 9 of the POCSO Act.

19. Contention of learned counsel for the appellant that delay in lodging the FIR has not been explained deserves to be rejected for the reason the victim clearly stated her circumstances, her mother having passed away, brother being a young infant and her father indulging in drinking, thus the appellant was the dominating figure in the house. Further the appellant has not been convicted for offence punishable and defined under Section 5 of the POCSO Act being aggravated penetrative sexual assault. Thus the

FSL report not supporting the prosecution case or the hymen being found intact is meaningless for the reason in her testimony also the victim did not speak about any penetrative sexual assault on her.

20. As regards offence punishable under Section 328 IPC is concerned, the case of the victim was that her uncle used to give her tablets everyday due to which she felt drowsy and unconscious. Since the report was lodged after a few days and immediately medical examination was not conducted and gastric lavage not preserved, there would be no evidence besides the evidence of the victim to support this contention. In her cross-examination also the victim reiterates that after consuming tablets given by the appellant she used to sleep and wake up in the next morning. She stated that prior to the day when she threw the tablet in the drain and refused to eat it she was not aware that her uncle was committing any wrong act with her or anything wrong had happened to her. However, she is categorical about her being given the tablets everyday and to this extent her testimony remains unchallenged. Thus the conviction of the appellant for offence punishable under Section 328 IPC is upheld.

21. Considering the evidence on record, the appellant has been rightly convicted for aggravated sexual assault punishable under Section 10 of POCSO Act on the basis of the sole testimony of the victim corroborated by the chain of events. Appellant has been awarded minimum sentence of imprisonment for a period of five years under Section 10 POCSO Act. Consequently, there is no illegality in the impugned judgment of conviction or the order on sentence.

22. Appeal is dismissed. Appellant is directed to undergo the remaining sentence.

23. Copy of this order be sent to Superintendent Central Jail Rohini for updation of the Jail record and intimation to the appellant.

24. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 13, 2018

‘vn’

