

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

Judgment Reserved on: January 16 , 2018

% *Judgment Delivered on: September 12, 2018*

+ **CRL.A. 426/2017**

KAMAL

..... Appellant

Represented by: Mr.Anwesh Madhukar, Mr.Pranjal
Shekhar and Mr.Pravesh Misra,
Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr.Ashok Kumar Garg, APP for the
State with SI Ajay Kumar, PS
Bawana

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal, the appellant challenges the impugned judgment dated 15th December, 2016 convicting him for offence punishable under Section 4 of Protection of Children against Sexual Offences Act, 2012 (in short 'POCSO Act') and in the alternative under Section 376 IPC and offences punishable under Sections 363/366/368/34 IPC and the order on sentence dated 21st December, 2016 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/-, in default whereof to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 4 of POCSO Act and rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- and in default to undergo simple imprisonment for a period of 30 days for the

offences punishable under Sections 363/366/368 IPC.

2. Learned counsel for the appellant, while placing reliance on the decision reported as AIR 2011 SC 715 Alamelu and Anr. v. State, Represented by Inspector of Police, submits that the learned Trial Court erred in returning a finding on the date of birth of the victim on a transfer certificate without the basis on which age was entered in the certificate. As per the prosecution, the victim was 13 years old at the time of incident, however, no witness knew about the exact age of the victim. Victim has exonerated the appellant in her statement recorded under Section 164 Cr.P.C. The landlord of the place where she was residing has not been examined. It is nowhere reflected in the testimony of the victim that she was kept in confinement, rather she was moving freely. Further as per the testimony of Dr.Geetanjali (PW-13), there was no sign of sexual assault belying the prosecution version.

3. Learned APP for the State on the other hand contends that there is no illegality in the impugned judgment and order on sentence. Appellant has been rightly convicted on the basis of testimony of the victim. Victim was recovered from the house of the appellant. There was no ulterior motive to falsely implicate the appellant. No question was put to the prosecutrix regarding her age in her cross-examination, hence her version in the examination in chief has gone unrebutted.

4. Briefly stated, prosecution case is that a missing complaint was lodged by the father of the victim stating that on 8th November, 2012 at about 7:00 AM, victim 'S' went to school and did not return. On the basis of the aforesaid statement, FIR No.378/2012 was registered at PS Bawana under Section 363 IPC. Efforts were made to search the victim. Hue and

cry notices were published. During investigation, it was revealed that accused persons (Kamal and Sonu) who were neighbours of victim were also missing. Address of Kamal was obtained from his call records. On 16th January, 2013, a raiding team went to the house of the accused persons and recovered the victim. Accused persons namely Kamal and Sonu were arrested. Victim was medically examined. Her statement was recorded under Section 164 Cr.P.C. After completion of investigation, charge sheet was filed. Charge was framed for the offences punishable under Sections 376/363/366/368/34 IPC and in alternative under Section 6 of POCSO Act against the appellant. Charge for offences punishable under Sections 363/366/368/34 IPC was framed against Sonu. Sonu was also convicted for the offences punishable under Sections 363/366/368/34 IPC, however, she was released on the period undergone.

5. Victim was examined as PW-1 in Court. She deposed that two/three months before the incident, Kamal was also residing in another room near their room in the same building along with his wife/co-accused Sonu. She knew them since then. Thereafter, they left the said room and started residing somewhere else. Sonu used to talk to her on phone thereafter. Two/three days prior the incident, Sonu gave her a call and stated that she cannot live without her and that she was coming to pick her up from the school. Victim also asked her to come to the school. On 8th November, 2012, she left for school at about 6:45 AM. Sonu came at about 8:00 AM and took her to her house in Mangolpuri. She stayed with Sonu in her house for two days when behaviour of Kamal and Sonu was cordial with her. Thereafter, Kamal started doing '*galat kaam*' with her. Upon being asked what does she mean by '*galat kaam*', she stated that Kamal committed

sexual intercourse with her. Thereafter, Kamal again tried to do sexual intercourse with her but she did not allow. She told him that she wanted to go back to her house, however, he stated that in case she would go back to her mother's house, then her mother would beat her. She further stated that Kamal and Sonu kept on changing houses because of fear of police. However, after two months, she was recovered by her father and police officials. She also stated that accused persons used to make her do household work.

6. Raj Singh (PW-2) proved the date of birth of the victim as 15th March, 2000 as per school records Ex.PW-2/A and Ex.PW-2/C.

7. Father of the victim (PW-3) proved the missing complaint of the victim lodged by him vide Ex.PW-3/A. He stated that the victim was recovered on 16th January, 2013.

8. Mother of the victim (PW-6) deposed that the victim went missing and was recovered nearly after two months, however, she did not support the prosecution case.

9. Dr.Geetanjali (PW-13) proved medical examination of the victim vide MLC Ex.PW-13/A. She deposed that on local examination, no signs of external injury (fresh) were found.

10. Dr.Saroj Aggarwal (PW-17) proved medical examination of victim as per MLC Ex.PW-17/A. As per the MLC, hymen was ruptured and penetration on victim was attempted by penis/finger.

11. Contention of learned counsel for the appellant that the evidence of age of the prosecutrix cannot be relied upon in view of the decision in Alamelu (supra) deserves to be rejected. In Alamelu (supra), the prosecution only proved a transfer certification without the examination of the

headmaster of the school, who made the entry. Further in the said case though the witness therein was examined however he made no reference to the transfer certificate and did not mention the age or date of birth as noted in the certificate. Further even the prosecutrix made no reference to her age or to the transfer certificate. The said document surfaced after an application under Section 311 Cr.P.C. was filed by the complainant seeking permission to produce transfer certificate and recall the witness. On being recalled the witness merely stated that she had signed the transfer certificate issued by the school and accordingly her date of birth was noted as 15th June, 1977.

12. In the present case Raj Singh appeared in the witness box along with the school records Ex.PW-2/A and Ex.PW-2/C to prove that the victim got admitted in the said school in Class VI and her date of birth recorded therein was 15th March, 2000. Further though the victim in her statement under Section 164 Cr.P.C. stated that no sexual intercourse took place with her however in her deposition in the Court she was categorical that sexual intercourse was performed with her daily which fact is corroborated by the statement of the victim recorded by the doctor in the MLC by Dr.Saroj Aggarwal vide Ex.PW-17/A. The version of the victim recorded therein on 16th January, 2013 immediately after recovery and even prior to the recording of the statement under Section 164 Cr.P.C. was *'patient was taken by some lady, sexual assault done by that lady and by some male person. She was residing with them since 2-3 months, sexual contact against her once daily, last intercourse 3 days back.'*

13. This version of the prosecutrix is also corroborated by her MLC EX.PW-17/A and opinion of Dr.Saroj Aggarwal who stated that the hymen of the victim was ruptured and the penetration on the victim was from a

penis and not by a finger.

14. Considering the evidence on record, this Court finds no illegality in the impugned judgment of conviction and order on sentence. Appeal is accordingly dismissed.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and information to the appellant.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 12, 2018

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