

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

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Reserved on: 20th August, 2019

Decided on: 30th August, 2019

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CRL.A. 01/2017

GAURI SHANKAR SHUKLA

..... Appellant

Represented by: Ms. Rakhi Dubey, Advocate

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Gauri Shankar challenges the impugned judgment dated 17th October 2016 convicting him for offence punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and the order on sentence dated 20th October 2016 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹5,000/-, in default whereof to undergo simple imprisonment for a period of six months.

2. Assailing the conviction, Learned Counsel for the appellant contends that the prosecutrix is a tutored witness and has falsely implicated the appellant due to the landlord tenant dispute. Version of the prosecutrix is not corroborated by her MLC which does not show any injury. It is contended that even if held to be proved, the case of the appellant does not fall under the purview of Section 9(m) of the POCSO Act but under Section 7 of the POCSO Act and the appellant should be released on period already

undergone.

3. Learned APP for the State on the other hand submits that it is not the case of the prosecutrix that the appellant committed rape on her. Her case is that the appellant put his hand in her underwear and when she raised alarm the appellant fled away. Thus, there would be no injury inflicted, to be noted in the MLC. Despite the prosecutrix being minor she has been consistent in her testimony. Her version is duly corroborated by her mother who was sleeping by her side. Since the prosecutrix was aged less than 12 years offence committed by the appellant falls within the ambit of Section 9(m) of POCSO Act and he has been rightly convicted for offence punishable under Section 10 POCSO Act, which prescribes a minimum sentence of imprisonment for a period of five years which has been awarded.

4. Prosecution case ensues from 21st May 2014 at about 8:10 P.M., when the complainant along with her daughter went to the Police Station Aman Vihar and informed that son of her landlord namely Gauri Shankar (appellant herein) has committed “*ched-chad*” with her daughter. Aforesaid information was recorded vide DD No.63 B (Ex.PW-1/A) and assigned to WSI Ritu. She made inquiry from the victim and her mother. Thereafter, she recorded the statement of child victim wherein she stated that on the previous night she was sleeping with her parents and brothers. She felt thirsty at night and she woke up to drink water. She and her mother drank water and slept. Her mother was sleeping with her back towards her. Suddenly at night, Gauri Shankar came and slept beside her. He put his hand in her underwear. She raised alarm and called her mother on which her mother and father woke up and the appellant got up and fled to his cot. She stated that “*mere sath koi galat kaam nahi hua, par Gauri Shankar ne mere*

sath galat harkat kari”.

5. On the basis of the aforesaid statement, FIR No. 503/2014 (Ex.PW-4/A) was lodged at PS Aman Vihar for the offence punishable under Section 354 IPC.

6. WSI Ritu along with Ct. Pinki took the victim and her mother to SGM hospital for her medical examination. The victim was medically examined vide MLC Ex. PW-5/A. Mother of the victim refused internal gynecological examination as the victim did not allege commission of rape. On 22nd May 2014, she prepared the site plan at the instance of the complainant Ex. PW-7/B. Further investigation of the case was handed over to WSI Manisha.

7. On 3rd September 2014, Gauri Shankar was arrested vide arrest memo Ex. PW-10/B. His disclosure statement was recorded vide Ex. PW-10/C. Thereafter the appellant was sent to SGM hospital with Ct. Kailash for his medical examination and was medically examined vide MLC Ex. PW-2/A. On 8th September 2014, investigating officer collected age proof documents of child victim which are collectively Ex. PW-10/E.

8. On completion of investigation, charge sheet was filed. Charge was framed for offences punishable under Sections 9(m) of POCSO Act and Section 354 IPC against the appellant vide order dated 10th December 2014.

9. After ascertaining that she was capable of understanding the questions put to her and was capable of giving rational answers thereof, the victim deposed that she was 11 years old. On 21st May 2014 she was sleeping with her family consisting of her mother, father and two brothers. On that night she woke up to drink water when Jitender who was the tenant asked her for glass of water, after giving him the glass of water, she went and slept next to her mother. After sometime the appellant came beside her and put his hand

in her underwear. She raised alarm on which her mother got up and her mother informed her father. In the meantime, the appellant Gauri Shankar fled from there and slept on his *charpai*. She further stated that she informed her mother about the incident and her father tried to catch hold of the appellant but he managed to fled away. In her cross examination she stated that she along with her family used to live on the 2nd floor. She further stated that after consuming alcohol Jitender slept on the ground floor and her father slept on the bed of the appellant.

10. Mother of the victim was examined as PW-8 in the court. She stated that the victim was sleeping next to her by covering herself with half of her saree. She stated that she was sleeping with her back towards the victim when the appellant came and slept alongside the victim. Thereafter, when the victim raised alarm, she saw accused going towards his *charpai*. She made inquiry from her daughter on which she stated that the appellant put his hand in her underwear. She stated that she called public persons from gali who made enquiry from the appellant but he did not accept his guilt. The appellant was given beating by said public persons and he managed to escape from there. She further stated that till morning they waited for the father of the appellant to come and upon his arrival he was informed about the said incident when he did not give any response, then she along with the victim went to police where statement of the victim was recorded.

11. Dr. Mahipal Singh (PW-5), CMO, Sanjay Gandhi Memorial Hospital stated that on 21st May 2014 at around 9:16 P.M. the victim was brought by police for her medical examination with alleged history of sexual assault by boy named Gauri Shankar. The victim was examined vide MLC Ex. PW5/A. On examination, no external injury was seen. He stated that after initial

examination he referred the victim to Obs. and Gynae Department for detailed examination.

12. Dr. Sarika (PW-6), Senior Resident, (Obs.& Gynae), Sanjay Gandhi Memorial Hospital, Mangolpuri stated that she has been working in Obs. & Gynae department, SGM Hospital since two and a half years and she has been deputed to depose in place of Dr. Khusboo with whom she has worked. She further stated that she was well conversant with the handwriting and signature of Dr. Khusboo's and also identified the MLC in Dr. Khusboo's handwriting. She further stated that as per the MLC the victim's mother denied internal gynecological examination of the victim.

13. Dr. Vipin (PW-2), CMO, Sanjay Gandhi Memorial Hospital, Mangolpuri stated that on 30th September 2014 at about 01:41 P.M. the appellant was brought by Ct. Kailash for his medical examination. He was examined by Dr. Nitin, Junior Resident vide MLC Ex. PW-2/A. He stated that he can identify the handwriting of Dr. Nitin as he has worked under him. On examination, no fresh external injuries were seen.

14. The appellant in his statement recorded under Section 313 Cr.P.C. stated that he has been falsely implicated in the present case by the child victim at the instance of her parents, as there was a landlord-tenant dispute between him and father of child victim. He further stated that police obtained his signatures forcibly on blank papers and printed performa which were used against him. He stated no such incident ever took place.

15. As noted above, the alleged incident took place on the intervening night of 20th and 21st May, 2014 when the prosecutrix was sleeping with her mother at night and the appellant also slept by her side on her bed and put his hand in her underwear. Even though in her cross-examination the

prosecutrix stated that her father had slept on the cot of appellant, the same cannot be a reason for the appellant to sleep on the cot of the prosecutrix. Further immediately on the incident happening, the prosecutrix shouted on which her parents got up and her father tried to catch hold of the appellant who fled away. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 22nd May, 2014 and there is no contradiction or improvement in the testimony of the prosecutrix before Court.

16. Section 7 and 9(m) of POCSO Act read as under:

“7. 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.

9. Aggravated sexual assault.-

m. whoever commits sexual assault on a child below twelve years;”

17. As per the certificate issued from the school exhibited as Ex.PW-10/E the date of birth of the prosecutrix was 25th March, 2014 and thus on the day of incident she was just above 10 years of age. Even otherwise the age of the prosecutrix has not been disputed by the appellant. The prosecutrix being less than 12 years old, the offence committed by the appellant falls under Section 9(m) of the POCSO and is punishable under Section 10 of the POCSO Act.

18. In view the discussion above, this Court finds no error in the impugned judgment of conviction and the same is upheld. As regards the order of sentence, appellant has been awarded rigorous imprisonment for a

period of five years and to pay a fine of ₹5000/- in default whereof to undergo simple imprisonment for a period of six months. Under Section 10 POCSO Act the minimum sentence prescribed is imprisonment for 5 years which has been awarded to the appellant. The sentence awarded in default of payment of fine is excessive and is thus altered to simple imprisonment for a period of three months in case the fine of ₹5000/- is not paid.

19. Appeal is accordingly disposed of.

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

21. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 30, 2019
'sk/ga'

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