

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A No.57/2020**

Judgment reserved on : 30.9.2020

Date of decision : 14.10. 2020

RAJEEV KUMAR Appellant
Through: Ms. Mallika Parmar, Advocate
with appellant in J.C.
versus

STATE Respondent
Through: Mr.Ashok Kumar Garg,APP for
State with SI Neeraj PS Pandav
Nagar.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant, vide the present appeal assails the impugned judgment dated 16.5.2019 of the learned Special Judge (POCSO Act), East District, Karkardooma Courts, and the impugned order on sentence dated 30.5.2019 whereby the appellant having been convicted for the commission of offences punishable under Section 451 read with Section 354 of the Indian Penal Code, 1860 and Section 8 of the POCSO Act, 2012, was sentenced:

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- to undergo rigorous imprisonment(RI) for a period of 3 years and a fine of Rs.1,000/- for the offence punishable u/s 8 of the POCSO Act and in default of payment of fine to further undergo simple imprisonment(SI) for a period of 1 month;
- to undergo rigorous imprisonment (RI) for a period of 1 year and a fine of Rs. 500/- for the offence punishable u/s 451 of the Indian Penal Code, 1860, and in default of payment of the said fine to undergo simple imprisonment (SI) for a period of 1 month;
- to undergo rigorous imprisonment (RI) for a period of 1 year and a fine of Rs. 1,000/- for the offence punishable u/s 354 of the Indian Penal Code, 1860, and in default of the payment of the said fine, to undergo simple imprisonment (SI) for a period of 1 month

with all the sentences having been directed to run concurrently with the benefit under Section 428 of the Cr.P.C. having been given to the appellant. The fine imposed of Rs. 2500/- in *toto* is indicated to have been paid by the appellant before the learned Trial Court. Compensation to the tune of Rs.25,000/- was also awarded to the victim to be paid by the Delhi State Legal Services Authority, East District to the victim.

2. The notice of the appeal was issued to the State vide order dated 20.1.2020. The application CrI.M.B. No. 106/2020 filed by the appellant seeking suspension of sentence during the pendency of the appeal was declined vide order dated 20.01.2020.

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3. The Trial Court Record was requisitioned both in the physical form and in the *e form* vide order dated 20.1.2020 and has since been received.

4. Vide order dated 30.06.2020, the prayer made by the appellant vide Crl.M.B. No. 7532/2020 seeking interim suspension of sentence during pendency of the appeal for a period of 45 days on the ground of the prevailing pandemic was also declined. It was however considered appropriate in view of the spirit of the POCSO enactment that the appeal is set down for hearing expeditiously. The written submissions have been submitted on behalf of the appellant. On behalf of the State it was submitted that oral arguments would be addressed. Submissions have also been made orally on behalf of the appellant and on behalf of the State on 30.9.2020. The appellant was also directed to be produced through Video Conferencing for the hearing of the appeal on 30.9.2020 and was so produced by the jail authorities.

5. The FIR in the instant case is indicated to have been lodged on 4.11.2013 at 12:05 hours on the complaint of 'J' d/o R under Section 451 read with Section 354 of the Indian Penal Code, 1860, in relation to an incident which took place at 6 a.m. at house No. 250, First Floor, Kotla Village, Mayur Vihar Phase-I , Delhi at the residence of the complainant

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herself with the accused having been named in the FIR as being Rajeev Kumar S/O Anant Ram, R/o 349, Kotla Village, Delhi. Along with the FIR placed on the record of the Trial Court is the information given vide Ex.PW8/A to the Delhi Police Control Room at 6:19:45 a.m. on 4.11.2013 in relation to a complaint of eve teasing where it was recorded to the effect:

“

*Resident: MAYUR VIHAR PH 1 GUJAR BHAWAN KE PASS
Incident info: EK LADKA BADTIMIZI KAR RAHA THA
JISKO PAKAR RAKHA HAI.*

DCR NO. Received 275

Report Received from VAN

*04/11/2019 06:59:2 IPCD 5 MIN. 04/11/2013 07:17:29
PADOSI LADKA RAJEEV S/O HANS RAM AGE 25 YRS R/O
949 KOTLA VILL. NE LADKI JYOTI D/O RAGHUNANDAN
AGE 14 YRS R/O 250 KOTLA VILL APANE KAMARE SO
RAHI THI JISKO ABOVE LADKE NE MUH DABA THI
SHOR MACHANE SE GHARWALO NE LADKE KO PAKAD
KAR I.P KE HAWALE KAR DIYA HAI”.*

6. The charges were framed against the appellant herein on 16.7.2014 qua the alleged commission of offences punishable under Section 451 read with section 354 of the Indian Penal Code, 1860, and Section 8 of the POCSO Act to which the appellant pleaded not guilty and claimed trial.

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7. The contents of the said FIR as put forth by J d/o R were to the effect that she was then a student of Standard VIII of the School S and on that day i.e., on 4.11.2013 at about 6 a.m. she was sleeping in her room when the appellant herein, Rajeev Kumar, S/o Anant Ram R/o 349, Kotla Village, Delhi, came into her room and with one hand he pressed her mouth and laid down on her and attempted to do a wrong act with her and she made an attempt to save herself and slapped the boy and started screaming and she also called out to her brother Sudama Sharma and woke him up and just as her brother tried to apprehend that boy, he left her and started running and jumped from the roof of the house and got injured and could not run and her brother then ran and apprehended that boy and in the meantime several persons came and the crowd collected and beat up that boy and her brother called up the police at No.100 and produced the appellant herein before the police and the complainant stated that the appellant had misbehaved with her. On the basis of this complaint made by the complainant J, the FIR is indicated to have been registered with the MLC of both the appellant and the complainant having been got conducted at the Lal Bahadur Shastri Hospital. Through the MLC it was mentioned that there was no physical or sexual assault nor any handling or touching of any private parts and the mother of the

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complainant also declined any internal examination of the complainant being conducted.

8. The appellant herein was arrested and the statement under Section 164 Cr.P.C. of the prosecutrix was also recorded. The school records qua the age of the victim were also obtained by the Investigating Officer examined as PW1 which brings out that the date of birth of the prosecutrix was 2.12.1999 and thus on the date of the occurrence, i.e., 4.11.2013, she was less than 16 years of age. The MLC of the complainant Ex.PW-9/A indicates that it was mentioned therein that there was a history of some boy having entered the home of the complainant and of having tried to strangle her but there was no physical or sexual assault or handling or touching of the private parts. The MLC of the convict, i.e., the appellant herein, shows that he had pain and swelling over the right foot and abrasions over the right knee and abrasions on the lower lip, EX.PW-9/B and Ex.PW-9/C of the examination conducted of the appellant at the LBS hospital on 4.11.2013.

9. The statement under Section 164 of the Cr.P.C. of the complainant prosecutrix dated 7.11.2013 recorded on oath by the learned MM, Karkardooma East, after ascertaining the voluntariness of the victim to make her statement indicates that she stated therein that on

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4.11.2013 at about 6 a.m. a boy whom she did not know from before but whose name was perhaps Rajeev had quietly entered into their house and there was no latch on the door and there was only a brick and her entire family was sleeping and she was sleeping near her brother and that boy came and laid down on her and just as she opened her eyes he pressed her mouth and started shouting but despite the same that boy was not removing his hand from her mouth and then she gave a slap to that boy and separated his hand and mouth from herself and shouted out 'Bhaiya' and just as her brother woke up then the appellant ran and jumped down from the roof of the house and then the appellant started running and the brother of the complainant followed him and apprehended him in a lane and that she could identify the appellant and that after her brother had apprehended the accused he telephoned the police at no.100 and the police had come to the spot and had taken the appellant away.

10. The charges were framed against the appellant on 16.7.2014 to which the appellant pleaded not guilty and claimed trial.

11. The prosecution produced 10 witnesses in support of the prosecution version. The appellant herein apart from denying the incriminating evidence led against him claimed that he had been falsely implicated in the instant case because he had asked for return of

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Rs.5,000/- from the brother of the victim which he had given to the brother of the victim on the occasion of Diwali which he had asked the brother of the victim to return because he had to go to his native village at Bagpat but the brother of the victim did not return the money and rather implicated him falsely and had asked him to accompany him to his house but before reaching his house he had pushed him and had beaten him when the appellant had asked for return of his money and because of that he had sustained injuries in his leg.

12. The appellant also led evidence in his defence by producing the witness DW-1, Suresh Kumar S/o Jaswant Singh who stated that on 4.11.2013 the appellant had come to him at about 7:30 a.m. and told him that he was going to the house of the brother of the victim to receive back Rs.5,000/- as borrowed by the brother of the victim and also stated that he would go to Bagpat to the house of his sister on the occasion of Bhaiya Duj and that the appellant stayed at his house for about 20 minutes and left for the house of brother of the victim and after 2-3 days the father of the appellant herein informed DW-1 that when Rajeev Kumar had gone to the house of the brother of the victim to receive Rs.5,000/- the brother of the victim had started quarrelling with him and got him falsely implicated him in the case.

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13. It was stated by the witness in his cross-examination on behalf of the State that the appellant had left his house at about 8 a.m. on foot and was walking properly when he left his house and denied that he had concocted a false story in order to save his friend, i.e., the appellant herein, and denied that he had testified falsely.

14. Written submissions and oral submissions on behalf of the appellant by the learned legal aid counsel were to the effect that there were various contradictions and improvements in the statement of the victim under Section 161 of the Cr.P.C. EX.PW-3/A and her statement under Section 164 of the Cr.P.C EX.PW-3/C and her testimony before the learned Trial Court submitting thus to the effect that:

“That in her statement u/s 161 CrPC (Ex.PW3/A), the victim has stated-
“*That today dated 4/11/13 in the morning time around 6.00 AM I was sleeping in the room when one boy Rajeev S/o Anantram R/o 349 Kotla Gaon, entered the room and this boy pressed my mouth with one hand. And he lay on me and tried to commit wrong act with me. I tried to rescue myself and gave slaps to this boy and that I started screaming loudly.*”

That in her statement u/s 164 CrPC (Ex.PW3/C), the victim stated,
“*That boy came and lay down on me. When I opened my eyes, he shut my mouth. I was trying to scream but he did not remove his hand. Then I gave him a slap on his cheek and removed his hand from my mouth.*”

That on the contrary, during her examination in chief the victim has stated, inter-alia,

“*Accused lie down upon me. I was trying to scream but he did not remove his hand from my mouth. I hit accused with my leg. I wake my brother who was sleeping adjoining to me.*”

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and thus it was submitted on behalf of the appellant that there was no mention of any attempt to do any wrong act, i.e., sexual act, through her statement under Section 164 of the Cr.P.C. and there was a contradiction as to whether the victim had slapped the appellant or had hit him on the leg and that even in her testimony on oath during the cross-examination she had stated as under:

“For the last two months prior to this incident, accused used to follow me, whenever I used to go out and used to ask me to talk to him but I used to refuse.”

which was an improvement and there was no such assertion of such fact through her statement under Section 161 of the Cr.P.C. nor in the statement under Section 164 of the Cr.P.C. wherein she stated *“On the morning of 4/11/13 at 6 AM one boy whom I didn’t know from before, whose name is maybe Rajeev, entered the house sneakily.”*. It was thus submitted on behalf of the appellant that it was clear that the complainant had tried to falsely implicate the appellant at the behest of her brother PW-10. It was further submitted on behalf of the appellant that significantly the mother of the victim had stated that she did not notice the appellant lying on the victim and reiterated the same despite being cross-examined on behalf of the State and stated to the effect:

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“It is wrong to suggest that I had told to the police that I noticed the accused lying on the victim.”

15. Inter alia, it was submitted on behalf of the appellant that there were about 6 people sleeping in a small room of 6' X 8' at the time of the incident along with the victim and the victim, her mother and her brother had testified to that effect and thus it was unbelievable that a person entering into a small room of six persons sleeping could go unnoticed till the victim screamed. It was further submitted on behalf of the appellant that even the aspect of the door of the room being closed or unclosed was not established and rather the victim had stated that her father had woken up at 6 a.m. in the morning and had opened the room from inside and thereafter had gone to sleep which was not probable and it was thus submitted on behalf of the appellant that the statement under Section 164 of the Cr.P.C. of the victim had stated that ***“The house’s door was not bolted, only a brick was there.”***, and thus the said contradictory assertion was made by the complainant that there was a brick there in as much as the brother of the victim had stated that there was no provision to bolt the room at all. It was thus contended on behalf of the appellant that there was no offence punishable under Section 451

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of the Indian Penal Code, 1860, i.e., the commission of house trespass as put forth even remotely established and thus as a consequence thereof the consequential offences alleged to have been committed by the appellant under Section 354 of the Indian Penal Code, 1860, & Section 8 of the POCSO Act, 2012 had not even taken place.

16. It was further submitted on behalf of the appellant that the sexual intent and desire under Section 7 of the POCSO Act, 2012 was not even remotely brought forth and thus the appellant could not have been convicted under Section 8 of the POCSO Act, in view of the MLC of the injured which indicated that there was neither a sexual assault nor any handling or touching of private parts. It was submitted by the appellant that the MLC of the accused/appellant is consistent with his defence and that his presence at the house of his friend DW-1 Suresh Kumar stood established through his testimony which ought to have been believed by the learned Trial Court.

17. Reliance was further placed on behalf of the appellant on the verdict of this Court in ***State of NCT of Delhi Vs Baljeet Singh*** CrI. Rev.

P. No. 666/2017 wherein it was observed to the effect:

“8. Perusal of the record as also the statement given by the prosecutrix does not prima facie show that any act was done by the respondent with any sexual intent. The Trial Court has rightly

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appreciated the facts of the case and held that that there was nothing on record to show that the respondent had done anything with any sexual intention. The allegations against the respondent, who is the first cousin of the victim, showed that he was upset with the victim not talking to him.

9. The substantive offence (Section 11) for which punishment is prescribed under Section 12 POCSO, clearly indicates that the precondition for the section to be attracted is that an act, as enumerated therein, is done with sexual intent. Clearly in the subject case, from the allegations against the respondent, no such intention even prima facie is coming forward.”

Reliance was also placed on behalf of the appellant on the verdict of ***Shanta Kumar vs. Council of Scientific and Industrial Research (CSIR) and Ors.*** (31.10.2017 - DELHC)

“15. Undoubtedly, physical contact or advances would constitute sexual harassment provided such physical contact is a part of the sexually determined behaviour. Such physical contact must be in the context of a behaviour which is sexually oriented. Plainly, a mere accidental physical contact, even though unwelcome, would not amount to sexual harassment. Similarly, a physical contact which has no undertone of a sexual nature and is not occasioned by the gender of the complainant may not necessarily amount to sexual harassment.”

It was thus submitted on behalf of the appellant that the prosecution version had not been established beyond a reasonable doubt and rather the possibility of the brother of the victim having assaulted the appellant was in fact borne out and it was only to save himself and his family members from the clutches of law that a false story has been

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concocted and that the appellant herein has been falsely implicated in the instant case.

18. On behalf of the State, the learned APP for the State by rebutting the contentions raised on behalf of the appellant submitted that the testimonies of the prosecution witnesses were consistent in relation to all material particulars and established the factum of the commission of the offences punishable under Sections 451/354 of the Indian Penal Code, 1860, and Section 8 of the POCSO Act, 2012 by the appellant against the complainant.

19. It was further submitted on behalf of the State that the testimony of the complainant corroborated the information given by her through her statement first made to the police as recorded in the FIR, copy of which is EX.PW-7/A, of the appellant having entered her house and shut her mouth on 4.11.2013 and then having laid down on her and attempted to do some wrong act to her and when she removed the appellant and shouted, her brother woke up and ran after the appellant and in order to save himself, the appellant jumped from the roof of the house of the complainant and was injured. It has thus been submitted on behalf of the appellant and on behalf of the State that the commission of the offences

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punishable under Section 451/354 read of the Indian Penal Code, 1860 and Section 8 of the POCSO Act,2012 stood wholly established.

20. On a consideration of the submissions made on behalf of either side and on a perusal of the Trial Court Record inclusive of the deposition of the witnesses examined and the testimony of the Investigating Officer, it is borne out clearly through the record that the occurrence as stated in the FIR dated 4.11.2013 of the appellant herein having entered the house of the complainant J and of his having laid down on the complainant and then pressing the mouth of the victim was wholly probable and rather stands established through the consistent testimonies of the prosecution witnesses.

21. As regards the contention raised on behalf of the appellant that there were discrepancies in the prosecution version, it is essential to observe that the said discrepancies in the prosecution version do not affect the veracity of the prosecution version in any manner as the aspect of the entry of the appellant into the house of the complainant on 4.11.2013 at 6 a.m. and of the aspect of the appellant having caught hold of the mouth of the victim, and also of the appellant having laid down on the complainant/victim stand established beyond a reasonable doubt.

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22. Though undoubtedly in the MLC of the victim it has been mentioned that there is no sexual assault and no touching of any private parts or organs of the victim, the factum that the appellant had pressed her mouth with his hand and lay down on her though the mother of the victim did not say so but the same was so stated by the victim herself as well as by her brother examined as PW-10 that when he opened his eyes at the hearing of the voice of his sister he saw the appellant herein lying on the victim and he saw that the appellant had put his palm on the mouth of his sister, it cannot be contended that the appellant had put his hand on the mouth of the victim and laid down on her without any sexual intent in terms of Section 7 of the POCSO Act, 2012 which reads to the effect:

“Sec. 7. 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.”

and of thus having committed the offence punishable under Section 8 of the POCSO Act, 2012 as well as under Section 354/451 of the Indian Penal Code, 1860, having committed house tress pass into the house of the victim with an intent to outrage her modesty with sexual intent.

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Furthermore, in terms of Section 29 of the POCSO Act, 2012 which reads as under:-

“Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved”.

the necessary presumption of the appellant having committed the offences described under Section 7 of the said enactment and punishable under Section 8 thereof has to be drawn in the instant case, and the appellant has been unable to dislodge and disprove the said presumption.

As regards the contention raised on behalf of the appellant that there was no inspection of the house of the appellant conducted by the Investigating Officer and that the occurrence thus as claimed by the witnesses of the prosecution could not have taken place, the said aspect does not in any manner detract from the occurrence itself of the appellant having entered into the house of the victim to outrage her modesty and having so done by use of criminal force by putting his hand on her mouth and then having laid down on her with sexual intent.

In the circumstances, there is no merit in the appeal and in as much as Section 8 of the POCSO Act, 2012 prescribes for a minimum sentence

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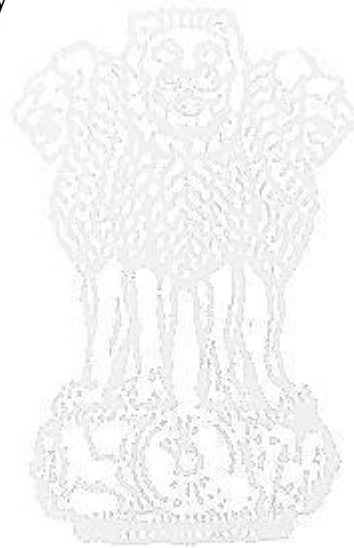
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of three years, there can be no variation of the sentence imposed also vide the impugned order on sentence and thus there is no infirmity in the impugned sentence.

The appeal is dismissed.

ANU MALHOTRA, J.

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