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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 3rd September, 2021

Decided on: 15th September, 2021

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CRL.A. 138/2020

RAJESH

..... Appellant

Represented by: Ms. Sunita Arora, Advocate/
DHCLSC.

versus

STATE

.... Respondent

Represented by: Mr. Ravi Nayak, APP for the State
with SI Uday PS S.P.Badli.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

JUDGMENT

1. By the present appeal, the appellant challenges the judgement dated 26th August, 2019 whereby the appellant was convicted for offences punishable under Sections 354/354A/323 IPC read with Section 10 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act') and the order on sentence dated 30th August, 2019 whereby the appellant was directed to undergo rigorous imprisonment for a period of five years and a fine of ₹5,000/- for offences punishable under Section 10, POCSO Act and rigorous imprisonment for a period of one year for offences punishable under Section 354 IPC and Section 354A IPC and rigorous imprisonment for a period of six months for offence punishable under Section 323 IPC and all the sentences were directed to run concurrently.

2. Learned counsel for the appellant contends that the conviction of the

appellant for offence punishable under Section 10 POCSO Act is not warranted and illegal for the reason the age of the prosecutrix has not been proved and in the absence of proof of age it cannot be held that the prosecutrix was a minor, thus one of the necessary ingredients of the offence punishable under Section 10 POCSO Act is missing. She further states that the appellant was the foster father of the prosecutrix and was interested in her well being. Even as per the prosecutrix, the appellant did not like her coming late from the school and going along with the boys. Thus the appellant was only disciplining her due to which she got annoyed and lodged the FIR in question. Conviction of the appellant is based on the sole testimony of the prosecutrix. The mother and the younger sister of the prosecutrix are not eye witnesses and their evidence is required to be discarded being hearsay. Since the offence under Section 10 POCSO Act is not made out and the unexpired portion of the appellant's sentence is now nearly three months only, the appellant be released on the period undergone in case this Court, on merits, finds that a case to uphold the conviction under Section 354/354A/323 IPC is made out.

3. Learned APP for the State countering the arguments of learned counsel for the appellant states that the age of the prosecutrix has been duly proved by the prosecution from school record vide Ex.PW-10A which shows that the prosecutrix was born on 20th January, 2002 and thus on the date of incident, that is, 23rd September, 2016 she was a minor. Soon after the incident, the prosecutrix made a PCR call and was medically examined which shows injury marks on her. After the alleged incident, the appellant was involved in one more case on which FIR No.970/2017 under Section 509 IPC and Section 12 POCSO Act was registered at PS Samaipur Badli on

the complaint of prosecutrix which offence was allegedly committed when the appellant was released on bail during the trial in the above noted case.

4. Case of the prosecution is based on the testimony of the prosecutrix (PW-1) who stated that she was a student of 10th standard, she had a brother aged 12 years and a sister aged 11 years. Her father was an alcoholic and on 23rd September, 2016 at about 1.00 PM when she came back from the school and her mother was not at home, her father was present at home in heavily drunken condition. He asked the prosecutrix as to why she had come late from the school on which she replied that she was not late and had come directly to the house after her examination. On this the appellant pulled her inside the house, started abusing her, grabbed her from behind and groped her breast. He closed the door and mercilessly assaulted her. She cried in immense pain. In the meantime, her younger sister came and knocked the door. When the appellant opened the door she went out and called the police. Her statement was recorded on the same day vide Ex.PW-1/A and she was medically examined. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. also wherein she reiterated her allegations which statement was exhibited as Ex.PW-1/B. The prosecutrix further stated before the Court that after consuming liquor the appellant used to touch her inappropriately taking benefit of his drunken condition.

5. The prosecutrix was cross-examined before the Court however, nothing material could be elicited. She stated that when her sister came and the door was opened, her sister noticed her crying and came to know that the appellant had beaten her. Her mother had directly come to the Police Station and her statement was recorded by the police even before the arrival of her mother. She stated that the appellant never touched her when he was

not in a drunken condition. She denied the suggestion that when she objected to the drinking habit of the appellant, he quarrelled with her. She also admitted that appellant regularly scolded her because of coming late though she never came late but the appellant kept her accusing of her being late and also scolded her not to be in the company of the boys even though she never remained in company of the boys. She denied the suggestion that her father never assaulted her sexually or that she had falsely implicated him due to his habit of drinking liquor.

6. Statement of the mother of the prosecutrix (PW-2) was recorded before the Court who stated that the prosecutrix told her that the appellant gave her beatings after bolting the main door of the room from inside and '*haath chalaya tha*'. On being asked by the learned Trial Court as to the meaning of '*haath chalaya tha*' the mother clarified that the appellant misbehaved with her daughter by touching her breast inappropriately and caused nail marks on her. She further stated that the appellant had threatened her by saying that '*pehle bhi tumne mujhe case mei band karaya tha, iss baar sachhi mei rape karke jail jaunga mai*'.

7. In her cross-examination, the mother of the prosecutrix stated that she did not witness the incident and that the appellant was her second husband, that is, the foster father of the prosecutrix and that she did not note the exact year of birth of the prosecutrix. She denied the suggestion that the prosecutrix did not listen or obeyed the appellant.

8. Statement of younger sister of the prosecutrix (PW-8) was also recorded who stated that on 23rd September, 2016 at about 1.00 PM when she came back to the house, the door was closed. She knocked the door which was opened by the appellant who was under the influence of liquor

and after opening the door he went out of the house. Her elder sister was in the room and was crying. She told her that the appellant caught hold of her hand, closed the door, misbehaved with her, hit her on her breast and abused her with objectionable words. She stated that when her mother came back home she told all these facts to her mother.

9. In his statement recorded under Section 313 Cr.P.C. the appellant denied all the facts and stated that a false complaint had been lodged against him. His explanation was that the prosecutrix had friendship with Salman and Ravi due to which he scolded her to mend her ways and asked her to break her friendship with those boys due to which she falsely implicated him in the case. As regards the deposition of the wife of the appellant is concerned, he stated that since she wanted to live separately from him she has deposed against him. The appellant led no defence evidence.

10. As per the case of the prosecution itself the prosecutrix had reached home by 1.00 PM when the incident took place. A mere fact that the prosecutrix reached home at 1.00 PM clearly shows that she came home on time after the school timing and hence the explanation of the appellant that the prosecutrix used to come late due to roaming around with boys cannot be sustained. The MLC of the prosecutrix was conducted on the date of the incident itself which noticed presence of bruise marks of bluish colour on the arms of the prosecutrix and the injury was opined to be simple in nature.

11. The main argument of learned counsel for the appellant is that the prosecution has not been able to prove that the prosecutrix was a minor and hence offence punishable under Section 10 of the POCSO Act is not made out.

12. The prosecution has examined PW-10 a teacher at the school where

the prosecutrix was studying, who brought the admission and withdrawal register along with the file of the school, maintained in regular course of all the students admitted in the school. As per the admission register the prosecutrix was admitted in first class on 6th July, 2007 in the school vide admission No.4575 and her date of birth was mentioned as 20th January, 2002. The attested copy of the relevant part of the admission register, admission form and the affidavit filed by the mother at the time of admission were exhibited as Ex.PW-10A, PW-10B and PW-10C respectively.

13. According to the learned counsel for the appellant, the age of the prosecutrix mentioned in the school is based on the affidavit given by the mother, which has not authenticity. Further in another document i.e. in the admission and withdrawal register, the date of birth of the prosecutrix is mentioned as 21st January, 2003.

14. Undoubtedly, there is a discrepancy in the running register of the school where it is noted that the prosecutrix was admitted in class-1 and that her date of birth was 20th January, 2002 based on the affidavit given by the mother however, in the admission and withdrawal register the date is mentioned as 21st January, 2003 which appears to be a typographical error but be that as it may, giving the margin in favour of the accused and taking the date of birth of prosecutrix mentioned in the school first admitted as 20th January, 2002 the prosecutrix was a minor at the time of alleged incident dated 23rd September, 2016. In view of the evidence led by the prosecution it cannot be said that it has not been proved that the prosecutrix was a minor. Further the appellant being the foster father of the prosecutrix, the offence of aggravated sexual assault as defined in Section 9(n) has been committed thereby punishable under Section 10 of the POCSO Act which provides for

minimum punishment of imprisonment for a period of five years which may extend to seven years. The appellant having been awarded rigorous imprisonment for a period of five years and the other allegations of the prosecutrix under Sections 354/354A/323 IPC also having been proved including by the MLC conducted soon after the incident, this Court finds no error in the impugned judgment of conviction and order on sentence.

15. Appeal is dismissed.

16. Copy of the order be conveyed to the Superintendent, Central Jail for updation of record and communication to the appellant.

CRL.M.(BAIL) 225/2020

1. Application is dismissed as infructuous
2. Order be uploaded on the website of this court.

**(MUKTA GUPTA)
JUDGE**

SEPTEMBER 15, 2021
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