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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 10th February, 2021

Decided on: 6th July, 2021

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CRL.A.625/2017

PHAGUNI MAHTO @ PANKAJ KUMAR Appellant
Represented by: Mr.Adit S.Pujari, Advocate.

versus

STATE (GOVT OF NCT OF DELHI) Respondent
Represented by: Mr.Amit Gupta, APP for the State.

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CRL.A.869/2017

MADINA alias POOJA Appellant
Represented by: Ms.Manika Tripathy Pandey,
Advocate.

versus

STATE NCT OF DELHI Respondent
Represented by: Mr.Amit Gupta, APP for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeals, the appellants challenge the impugned judgment dated 1st May, 2017 convicting appellant Phaguni Mahto @ Pankaj Kumar for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and Section 363/376 (2) (i) (n) IPC and Madina @ Pooja for offence punishable under Section 17 read with Section 6 POCSO Act and Section 109 read with Section 376 (2) (i) (n) IPC and the order on sentence dated 5th May, 2017 whereby Phaguni Mahto has been directed to undergo rigorous imprisonment for a period of ten years and a fine of ₹5,000/- under Section

6 POCSO Act and rigorous imprisonment for a period of three years for offence punishable under Section 363 IPC and a fine of ₹5,000/- with no separate sentence for offence punishable under Section 376(2) (i) (n) IPC. Madina @ Pooja has been sentenced to undergo rigorous imprisonment for a period of ten years and a fine of ₹5,000/- for offence punishable under Section 17 read with Section 6 POCSO Act.

2. Case of the prosecution is based on the statement of the victim which was recorded after she was recovered before the learned Metropolitan Magistrate under Section 164 Cr.P.C. wherein she stated that about a year ago while she was returning back to her house from the house of her maternal uncle, on the way a boy named Pankaj caught hold of her hand and took her to Ibrahimpur. There he had his wife and two children. His wife Madina said that the victim should stay with them and that she would provide food, clothes etc. to her. When the victim did not agree Madina bolted the door. At the night they vacated the house and took her to Pankaj's mausi's house at Tronica slightly ahead of Khajuri where they stayed for two-three months. After two-three months, Pankaj kept her in a house at Puja Colony where besides Pankaj and herself, Madina and their children were also staying. At Puja Colony they stayed for two-three months however, Pankaj did no wrong act with her. Thereafter before Holi he left that room and took a room on rent at some other place. Two days after Holi he committed wrong act with her in which his wife Madina helped him. Madina caught hold of her legs and Pankaj established physical relations with her against her wishes. Thereafter Pankaj established physical relations with her many times. He used to confine her in his house and in case she went out of the house or spoke about her own house, Pankaj used to

beat her. One day when the victim told Pankaj that she would inform the police, Pankaj left her in a jungle near her house from where she came to her house and thereafter went to police station with her the parents, brother and maternal uncle. She stated that Pankaj established physical relations with her against her wishes by confining her in his house.

3. When the victim appeared in the witness box, victim reiterated the version stated by her in the statement under Section 164 Cr.P.C.

4. As regards the age of the victim is concerned which was refuted by the accused, the prosecution produced PW-9 who brought the school record which mentioned the date of birth of the victim as 5th February, 2004. Undoubtedly, the school record was not from the school first attended and was not based on any initial birth certificate issued however, in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 while conducting the age inquiry, the Court is first required to look into the certificate of the school or the equivalent certificate and if these two are not available then the birth certificate issued by the Municipal Authorities or Corporation, Corporation or Panchayat and in the absence of all these documents, a report of the medical board determining the age of the juvenile. The fact that the victim was a minor in the present case is not only borne out from her date of birth as mentioned in the school record Ex.PW-9/A to PW-9/D but her MLC Ex.PW-7/A which noted “*not yet attained menarche*”.

5. In the statement recorded under Section 313 Cr.P.C. Phaguni took the plea that the victim was beaten by her parents, whereafter she requested him to take her to his residence or else she would commit suicide. Thus out of fear, he took the victim to Nathupura and thereafter to Narela where other

tenants were also residing. According to Phaguni when he and co-accused Madina used to go for work the victim used to take care of the children of Madina. Thereafter when the victim wanted to go back to her parents, he took her to her parents. The parents of the victim told him that they will solemnise the marriage of the victim with him however, thereafter they falsely implicated him by tutoring the victim.

6. In his defence Phaguni Mahto examined his mother as DW-1 who deposed that her son was unmarried and she produced two certificates issued by the village head and Sarpanch in this regard as Ex.DW-1/1 and Ex.DW-1/2.

7. Defence of Madina in her statement under Section 313 Cr.P.C. was that Phaguni was residing in her neighbourhood and that the victim never stayed with her nor she knew about the relationship between the victim and Phaguni. Madina claimed that she was married to one Sanjay and that she never shifted to any place along with Phaguni Mahto.

8. Madina examined Salekh Chand as D2W-1 who produced school record Ex.DW-2/A in respect of her children where the parentage of her children was mentioned as Madina and Sanjay Malik.

9. Thus the case of both the accused was that Phaguni and Madina were not married to each other, the victim had voluntarily left her home and during her stay with the accused person, she did not make any attempt to leave the company of the accused nor she raised any alarm so as to indicate that she was enticed, kidnapped or sexually assaulted. Learned counsel for the appellant Phaguni Mahto states that the victim represented herself to be major, had voluntarily gone with him and the two intended to marry. Though the plea of the accused was that the victim was major but as noted

above the said plea could not be fortified.

10. In the present appeal, the main grievance of the learned counsel for the appellants is that the appellants were denied a fair trial. According to learned counsels for the appellants, the victim and her mother were the two material witnesses however, a perusal of the trial court record would reveal that there was hardly any cross-examination done of the victim and her mother who were examined as PW-1 and PW-3 respectively and further additional charges under the provisions of POCSO Act were framed at the time of hearing final arguments and thereafter the material witnesses were not recalled for cross-examination, thereby denying a fair trial to the appellants.

11. A perusal of the order sheets of the learned Trial Court would reveal that the victim appeared as PW-1 on 26th September, 2014 when she was cross-examined and discharged. The mother of the victim was examined and discharged on 9th March, 2015. On 26th September, 2014 and 9th March, 2015 Phaguni Mahto was represented by his counsel whereas Madina was represented by Amicus Curiae. Till PW-20 was examined the FSL result had not been received and only when PW-21 Inspector Kamal Duggal was being examined, his examination-in-chief was deferred as the FSL result had not been received. After the FSL result was filed on 20th August, 2016 Inspector Kamal Duggal was examined and cross-examined and finally discharged on 7th November, 2016 when the matter was listed for statement of the accused on 16th December, 2016. After all the witnesses were examined the Court noticed that charge under the relevant provisions of POCSO Act had not been framed against the accused and hence additional charge against Phaguni Mahto for offence punishable under Section 6 of the

POCSO Act in the alternative under Section 376 (2) (i) (n) IPC and against accused Madina under Section 17 POCSO Act read with Section 6 of the POCSO Act in alternative under Section 109 IPC read with Section 376 (2) (i) (n) IPC was framed. Learned APP stated that the prosecution does not wish to examine any witness. Learned counsels for the defence submitted that since the testimony of the witnesses has already been recorded, they do not wish to examine or re-examine any witness. The order dated 6th April, 2017 passed by the learned Trial Court reads as under:-

"After going through the record it has been noticed that the charge under relevant provisions of POCSO Act have not been framed against accused persons. Let the charge under relevant provisions of POCSO Act be framed against accused persons.

Additional charge has been framed against accused Phaguni Mehto for offence punishable U/S 6 POCSO Act in alternative U/s 376(2)(i) & (n) IPC and against accused Madina U/s 17 POCSO Act read with U/s 6 POCSO Act in alternative U/s 109 IPC read with U/s 376(2)(i)(n) IPC. Ld. Addl. APP submits that the prosecution does not wish to examine any witness. Ld. Defence Counsels also submits that since testimony of witness has already been recorded, they did not wish to examine or re-examine any witness.

Matter be listed for final arguments on 18.4.2017."

12. On the date this statement was made, Mr. Deepak Kumar, proxy counsel appeared for Phaguni Mahto and Ms. Sadhna Bhatia, Amicus Curiae appeared for Madina. Mr. Deepak Kumar, Advocate had been appearing for Phaguni Mahto even on prior dates. So it cannot be said that an opportunity to examine the witnesses was not granted after additional charge was framed resulting in denial of a fair trial.

13. A perusal of the order-sheets of the learned Trial Court would reveal

that though Madina was all through represented by an amicus curiae, however, learned counsel engaged by Phaguni Mahto appeared for him at the stage of framing of charge and when material witnesses i.e. the prosecutrix (PW-1), her mother (PW-3) and the investigating officer were examined who cross-examined the three material witnesses at length. Further when learned counsel for Phaguni did not appear, the learned Trial Court appointed an amicus curiae for him as well. Hence it cannot be held that there was a denial of fair trial to the appellants for want of legal assistance.

14. The defence of both the appellants is that they were not husband and wife. Even if the appellants were not married there is sufficient evidence on record in the form of the statement of the prosecutrix and Kiran Pal (PW-18) who stated that the two appellants were staying together on rent with the two children of Madina. Further in his statement under Section 313 Cr.P.C. even the case of the appellant Phaguni @ Pankaj was that the prosecutrix use to look after the children of Madina, when the two of them went for work.

15. Considering the evidence adduced by the prosecution and as the prosecutrix was a minor at the time of alleged offence, this Court finds no infirmity in the impugned judgment of conviction and order on sentence. Appeals are accordingly dismissed.

16. Copy of the judgement be uploaded on the website of this Court as also sent to the Superintendent jail for updation of record and for intimation to the appellants.

(MUKTA GUPTA)
JUDGE

JULY 06, 2021/‘vn’