



**IN THE HIGH COURT OF MADHYA PRADESH**

**AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

**CRIMINAL APPEAL No. 13981 of 2023**

***ANOO P***

***Versus***

***THE STATE OF MADHYA PRADESH AND OTHERS***

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**Appearance:**

Shri Nilesh Manore - advocate for the appellant.

Shri Anand Bhatt, learned Government Advocate for the respondent/State.

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**Heard on : 14.08.2024**

**Pronounced on : 20.09.2024**

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This criminal appeal is preferred under Section 374 of the Code of Criminal Procedure, 1973 by the appellant being crestfallen by the judgment dated 20.12.2022 passed by the learned Special Judge, (POCSO Act), District Dhar in Sessions Case No. 47/2018 whereby the appellant has been convicted for the offence punishable under Section 7/8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act')



and sentenced to undergo 03 years R.I. with fine of Rs.1,000/- and usual default stipulations.

2. As per the prosecution story, on 28.08.2018, the victim alongwith her mother appeared at Pithampur police Station and gave an oral report that on the said date at around 6:00 pm, when she and her friend Roshni were playing nearby the house, one Anoop uncle, who lives in the same locality, called her and her friend Roshni and asked them to come upstairs with him to his room by pretending that he had some work. The prosecutrix and her friend Roshni went to Anoop Uncle's room and as soon as they went upstairs, Anoop Uncle closed the door of the room and with bad intentions caught hold of the prosecutrix and started to press her chest. When she screamed loudly, Anoop uncle told her that if she told this to anyone, he would kill her and Roshni. By saying that, he run away from there. The prosecutrix and her friend Roshni also run away from there and came home. Afterthat, when her mother came home, she told about the incident. A report of this, an FIR bearing Crime No. 393 dated 28.08.2018 for the offence punishable under Section 7/8 of POCSO Act was registered against the appellant.

3. The police party, following due procedure, arrested the appellant, registered the case against him. After necessary investigation, charge-sheet was filed against the appellant under Sections 7/8 of POCSO Act, and charges were framed. In turn, the accused/appellant abjured his guilt and prayed for trial.

4. In order to bring home the charges, the prosecution has



adduced as many as six witnesses namely mother of the prosecutrix (PW-1), father of the prosecutrix (PW-2), prosecutrix (PW-3), Chandni Singar, Sub-Inspector (PW-4), Teacher (PW-5) and Roshni (PW-6). On behalf of defence, no witness was furnished.

5. The learned trial Court having relied upon the testimonies of the prosecution witnesses and other documents like FIR and scholar register, convicted the appellant for the offence under Section 7/8 of POCSO Act for 3 years R.I. with fine of Rs.1,000/- and default stipulation.

6. Being disgruntled from the findings of conviction and sentence, the appellant has preferred this appeal on various grounds. Learned counsel for the appellant has submitted that the impugned judgment is perverse in view of the law and facts. The learned trial Court has erred in passing the order of conviction and sentencing the accused on the basis of contradictory evidence of prosecution. The age of the prosecutrix is also not properly pondered. There is no sexual assault instincts on part of the appellant established by the prosecution. Hence, prayed for acquittal in this case. It has also been submitted that the appellant has falsely been implicated in this case on the basis of some old animosity. Therefore, the appellant is liable to be acquitted.

7. In backdrop of the contentions, the question for determination is as to whether the appellant has assaulted the prosecutrix to outrage her modesty with sexual instinct.

8. At the outset, in view of the rival contentions, testimony of prosecutrix (PW-3) is required to be ruminated. The prosecutrix has testified that she and her friend Roshni were playing outside the house. When Anoop uncle called her and her friend Roshni and



closed the door from inside, he started to press her chest. Whereupon, she started screaming, appellant uncaged her and also threatened her by saying if the prosecutrix told to her mother about the incident, he would kill her. The aforesaid statement recorded in examination-in-chief, has not been shaken in her cross-examination.

9. In this regard, mother of the prosecutrix (PW-1) and father of the prosecutrix (PW-2) have also stated that when they returned from work, the prosecutrix narrated the whole incident to them. It finds support from FIR (Exhibit-P/1) which was supported by Chandni Singar, Sub Inspector (PW-4). Teacher (PW-5) has furnished scholar register (Exhibit-P/ 6) for ascertaining the age of prosecutrix and according to scholar registered the date of birth of the prosecutrix is 09.10.2007. the statement of these witnesses have not been controverted in their cross-examination.

10. Now, the question is as to whether the prosecutrix is coming under the purview of 'child' who is below the age of 18 years. In this context, the scholar register has been filed before the Court by Teacher (PW-6) and as per the scholar register, date of birth of the prosecutrix is 09.10.2007 and therefore, at the time of incident i.e. 28.08.2018, the age of the prosecutrix is less than 12 years.

11. So far as the determination of age is concerned, the learned trial Court has placed reliance on the landmark judgment of ***Jarnail Singh Vs. State of Haryana*** reported in (2013) 7 SCC 263 in which it is mandated that the age of prosecutrix is 14 years and 8 months which is less than 18 years. Parties were at loggerheads on the aspect of determination of age, it is contended before this Court that the prosecution has not properly proved the age of prosecutrix. Neither the mark-sheet nor any certificate has been filed in this



respect. Hon'ble the Apex Court in the case of **Jarnail Singh (supra)** basing the rules of the **Juvenile Justice (Care and Protection of Children) Act, 2015**, ordained that the age of prosecutrix should be determined on the following grounds :-

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

12. On this point, the Division Bench of this Court reported in the case of **Ramswaroop Vs. State of Madhya Pradesh 2023 Lawsuit (MP) 435** has recently, after considering the catena of cases, viewed as under :-

34. This is trite that a document becomes admissible under Section 35 of Indian Evidence Act, if three conditions are fulfilled. We have examined the Admission Register and date of birth



Register alongwith the statement of Headmaster (PW-9) who produced them before the Court below. We are satisfied that (i) entry relating to date of birth was made in the Register in discharge of public duty (ii) the entry states a relevant fact and (iii) the entry was made by a public servant in discharge of his official duty. Thus, School Register is a relevant and admissible document as per Section 35 of the Act. The School Register was held to be admissible for the purpose of determination of age in the later judgments of Supreme Court in Shah Nawaz, Ashwani Kumar Saxena, Mahadeo and Ram Suresh Singh (supra).

35. Pertinently, in Ashwani Kumar Saxena (supra), the Apex Court made it crystal clear that Admission Register of the school in which a candidate first attended, is a relevant piece of evidence for determining the date of birth. It was poignantly held that the argument that parents could have entered a wrong date of birth in the Admission Register is erroneous because parents could not have anticipated at the time of entry of date of birth that their child would commit a crime or subject to a crime in future.

13. In view of the aforesaid, the scholar register would be taken into account for deciding the age of prosecutrix. Since, in the scholar register (exhibit-P/6) the date of birth of the prosecutrix is 09.10.2007, meaning thereby, she was less than 12 on the date of incident. Here, it is noticeable fact that despite the age of prosecutrix was less than 12 years, the learned trial Court has



framed the charges only under Section 7/8 of POCSO Act, rather than Section 9/10 of POCSO Act. Nevertheless, at this stage, neither the charges can be enhanced nor the matter can be remanded back for re-framing of charges and for re-trial. However, considering the aforesaid facts and available evidence, the appellant's contentions regarding age of prosecutrix is turned down.

14. Learned counsel has also renmostrated that in this case, independent witness, friend of prosecutrix (PW-6), has not supported the prosecution case, therefore, only on substrantum of prosecutrix's statement, appellant cannot be convicted. Certainly, the independent witness has not supported the prosecution case but only on that basis, the statement of prosecutrix /victim of the case, cannot be overboarded, specially, when she has status of injured witness.

15. Learned counsel has also submitted that the age of prosecutrix is only 11 years at the time of statement, so her statment regarding commission of offence cannot be taken without any corroboration. On this aspect, the law laid down by Hon'ble Apex Court in the case of **State of U.P., Vs. Krishna Master and other, 2010 LawSuit, 521** is worth to be referred wherein, Hon'ble Apex Court has held that when a child of tender age witnesses gruesome murder of his father, mother, brothers etc., he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of so many years. In this case, the prosecutrix herself stated the whole incident before the Court as a victim of the incident. Hence, her statement cannot be discarded only on the basis of her age, specially when it is related to the



sexual molestation.

16. So far as the contentions regarding omissions, contradictions and embellishment in testimonies of prosecution witnesses are concerned, learned counsel for the appellant is unable to point out any material, contradiction or omission which is going to the root of the case. In this regard, the attention of this Court has been drawn towards the Judgment of the ***Hon'ble Supreme Court rendered in Takdir Samsuddin Sheikh vs. State of Gujrat and another AIR 2012 SC 37***, wherein the Hon'ble Apex Court, endorsing its earlier Judgment, held as under:-

"9. We are of the view that all omissions/contradictions pointed out by the appellants' counsel had been trivial in nature, which do not go to the root of the cause. It is settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions/ improvements/ embellishments etc. had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not be made the court to reject the evidence in its entirety. The court after going through the entire evidence must form an opinion about the credibility of the witnesses and the appellate court in natural course would not be justified in reviewing the same again without justifiable reasons. (Vide: Sunil Kumar





Sambhudayal Gupta (Dr.) & Ors. v.  
State of Maharashtra, (2010) 13 SCC  
657)."

17. In this regard, the following ratio held by the ***Hon'ble Supreme Court in Pundappa Yankappa Pujari v. State of Karnataka, 2014 LawSuit (SC) 516***, is worth to quote here :-

"[9] xxx xxx xxx The evidence on record has to be read as a whole and it is not proper to reject one or other evidence on the ground of certain contradictions and omissions which do not go the roots of the case. If the testimony of the eye-witnesses are found trustworthy and remained unchanged, ignorance of such testimony can be held to be perverse."

18. In view of the aforesaid settled position of law, the testimonies of prosecutrix as well as other witnesses cannot be wiped out on the basis of trivial contradictions. Virtually, the testimony of prosecutrix should be regarded as an injured witness of the case and it is well settled that criminal jurisprudence attaches great weightage to the evidence of a person injured in the incidence. Such a testimony comes with a in-built guarantee of truth, specially when it is a case of molestation or sexual assault. Such type of witness cannot spare the actual culprit in order to foist an innocent person.

19. So far as the demurrer of sexual intent is concerned, at the time of incident, the appellant was 33 years old person. He pressed the breast of the prosecutrix. This conduct clearly signified the sexual instinct of the appellant. On this aspect, Section 30(1) of



POCSO Act, is worth referring here:-

"In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution."

20. In view of the aforesaid, legal proposition, any prosecution for any offence under this Act, requires a culpable mental stage on the part of the accused, shall be presumed by the special Court in such type of offences.

21. On this aspect, the following ratio held by Full Bench of Hon'ble Apex Court in the case of *State of Punjab Vs. Major Singh* reported in *AIR 1967 SC 63*, is worth of quote here :-

*"15. The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define "modesty". What then is a woman's modesty?"*

*16. ....the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force*



*to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.*

*A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex."*

22. Virtually, what constitutes to outrage female modesty is nowhere defined. The essence of a woman's modesty is her sex. However, culpable intention of the appellant is crux of the matter. In this case, as per allegation, the appellant pressed the breast of



prosecutrix and she screamed also. Therefore, the intention to outrage the modesty of child has clearly been evinced from the evidence of the case.

23. Learned counsel has also placed his demurrer that the appellant was implicated in this crime due to enmity. On this aspect, it is mandated by Hon'ble the Apex Court in the case of ***Ramesh Baburao Devaskar and others Vs. State of Maharashtra [(2007) 13 SCC 501]*** that enmity, as is well-known, is a double edged weapon. Whereas, existence of a motive on the part of an accused may be held to be the reason for committing crime, the same may also lead to false implication. In the case at hand, the evidence available on record evinced the facts that mere existence of a previous dispute will not demolish the case of prosecution, if the prosecution is otherwise able to prove its case on merits.

24. In view of the aforesaid deliberation and analysis of evidence in entirety, this Court is of the considered view that the conviction of the appellant under Section 7/8 of POCSO Act by the learned trial Court, has no infirmity or illegality.

25. So far as the sentencing part is concerned, this case is related to sexual offence and looking to the age of the appellant and age of prosecutrix, no leniency is required in the circumstances of the case.

26. As such, the learned trial Court has correctly punished the appellant for the offence under Section 7/8 of POCSO Act, inasmuch as, the punishment under Section 7/8 of POCSO Act is on higher side. Section 8 provides that whoever commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may



extend to five years, and shall also be liable to fine. Hence, the punishment of three years and fine, does not warrant any interference.

27. With the aforesaid, the present criminal appeal being sans merit is dismissed and the order of the learned trial Court is hereby affirmed. The appellant is in custody. After completion of aforesaid sentence and depositing the fine amount, he shall be released forthwith, if not required in any other case.

28. A copy of this order be sent to the concerned trial Court for necessary compliance.

Certified copy, as per rules.

**(PREM NARAYAN SINGH)**

**JUDGE**

Vindesh