

**IN THE HIGH COURT OF MADHYA
PRADESH**

**AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 4702 of 2024

JITENDRA

Versus

THE STATE OF MADHYA PRADESH

Appearance:

Shri Javed Khan, learned counsel for the appellant.

Shri Vishal Panwar, learned Panel Lawyer for the respondent/State.

Heard on : 24.07.2024

Pronounced on : 05.08.2024

This criminal appeal having been heard and reserved for judgment, coming on for pronouncement this day, the court passing the following :

JUDGMENT

1. This criminal appeal under Section 374 read with Section 383 of the Code of Criminal Procedure, 1973 has been filed by the

appellant being aggrieved by the judgment dated 04.08.2021 passed by the learned Special Judge, Protection of Children from Sexual Offences, 2012 (hereinafter referred as to 'POCSO Act'), District-Mandleshwar in Sessions Trial No. 40/2018, whereby the appellant has been convicted for the offence under Section 9(m)/10 of the POCSO Act for 5 years R.I. with fine of Rs.2,000/- and default stipulation.

2. The Prosecution case in a nutshell is that on 20.07.2018 at about 21:52, the complainant lodged a report that he is residing at village Khodi and doing agriculture work. He has three children. His elder daughter about about 11 years, younger daughter/victim aged about 9 years and a boy. On 15.07.2018, victim/daughter went to village for playing with other children. She did not take food in the evening and looked very sad and was scared. From 16.07.2018 to 20.07.2018, she was silent and scared. Being asked, she said on 15.07.2018 (Sunday), being holiday of the school, she was playing on road with the children of Jitendra Sirvi at about 2 in afternoon, Jitendra Sirvi proposed chocolate her with other children and took her to his home. Thereafter, he said her to take water from fridge. As soon as, she went to give water to Jitendra, he got naked. The appellant caught the prosecutrix and started patting on her back. Due to which, she got scared, freed her hand and run away from there and reached her home. The whole story told by the prosecutrix to her parents. On this complaint, in Police Station-Badwah, District-Khargone, offences under Section 354 of the Indian Penal Code,

1860 (in short 'IPC') and Section 9(m)/10 of POCSO Act, were registered against the appellant. After completing the investigation, charge-sheet was filed and on the basis of available record, charges under Section 354 of IPC and Section 9(m)/10 of POCSO Act were framed. In turn, the accused/appellant abjured his guilt and prayed for trial.

3. In order to bring home the charges, the prosecution has adduced as many as seven witnesses namely the prosecutrix (PW-1), Pratapsingh, father of the prosecutrix (PW-2), Anil Ghodela, Medical Officer (PW-3), Ramkishan, Principal (PW-4), R.S. Rajput, Sub-Inspector (PW-5), Prakash (PW-6), R.S. Mandloi, S.I. (PW-7). On behalf of defence, no witness has been adduced.

4. 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 354 of IPC and Section 9(m)/10 of POCSO Act and only sentenced for the offence under Section 9(m)/10 of POCSO Act for 5 years R.I. with fine of Rs.2,000/- and default stipulation.

5. Being disgruntled from the findings and conviction of 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.

6. 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.

7. At the outset, in view of the rival contentions, testimony of prosecutrix (PW-1) is required to be ruminated. The prosecutrix has testified that she was playing with the children of appellant/Jitendra Sirvi, where he took the prosecutrix at his home by offering her chocolate. In this sequence, he was patting his hand on her back and at that time the appellant was naked. Whereupon, she scared and ran away from there to her home. The aforesaid statement recorded, has not been shaken in her cross-examination.

8. In this regard, father of the prosecutrix (PW-2) has also stated that after the incident, his daughter was looking like very sad and did not take her food. On being asked, the prosecutrix narrated the whole incident to him alongwith her mother. It also finds support from FIR (Exhibit-P/1) which was supported by R.S. Mandloi, Sub-Inspector (PW-7). Ramkishan, Principal of the School (PW-4) has furnished scholar register (Exhibit-P/4) for ascertaining the age of prosecutrix. With reference to this, R.S. Mandloi, Investigating officer (PW-7)

also supports the prosecution case. The statement of these witnesses have not been controverted in their cross-examination.

9. 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 Ramkishan (PW-4) and as per the scholar register, date of birth of the prosecutrix is 10.01.2009 and therefore, at the time of incident i.e. 15.07.2018, the age of the prosecutrix is less than 10 years.

10. 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.

11. 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.

12. In view of the aforesaid, the scholar register or admission register would be taken into account for deciding the age of prosecutrix. Since, in the scholar register (exhibit-P/4) the date of birth of the prosecutrix is 10.01.2009, meaning thereby, she was near about 09 years on the date of incident. Hence, the appellant's contentions regarding the age of prosecutrix, is turned down.

13. So far as the contentions regarding omissions, contradictions and embellishment in testimonies of prosecution witnesses are

concerned, learned counsel for the petitioner 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)."

14. 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."

15. 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, it is well settled that criminal jurisprudence attaches great weightage to the evidence of victim 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.

16. So far as the demurrer of sexual intent is concerned, at the time of incident, the appellant was 32 years old person. He got naked himself and patting his hand on the back 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.”

17. 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. Learned counsel has also placed his demurrer that the appellant was implicated in this crime due to enmity.

18. 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. Be that as it may, it cannot

be envisaged by a prudent mind that a father would use his girl child of 9 years for implicating an innocent person with intention to take vengeance or to satisfy his political enmity. 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.

19. 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 354 of I.P.C. and Section 9(m)/10 of POCSO Act by the learned trial Court, has no infirmity or illegality.

20. 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. As such, the learned trial Court has correctly punished the appellant only for the offence under Section 9(m)/10 of POCSO Act instead of punishment made under Section 354 of I.P.C., inasmuch as, the punishment under Section 9(m)/10 of POCSO Act is on higher side. Since the age of child prosecutrix is less than 12 years, the said offence comes into purview of Section 9(m) of POCSO Act, which is punishable under Section 10 of POCSO Act. Section 10 of POCSO Act provides that whoever commits aggravated sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. Hence, the punishment of five years and fine, does not warrant any interference.

21. 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.

22. 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