

\$~8

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 03rd July, 2020

+ CRL.A. 276/2020 & CrI. M. (Bail) 438/2020, CrI. M.A. 5506/2020 & CrI. M. (Bail) 6383/2020

RAJENDER alias RAJU Appellant

versus

STATE Respondent

Advocates who appeared in this case:

For the Petitioners: Mr. Anuj Kapoor, Advocate (DHCLSC)

For the Respondent: Mr. Raghuvinder Verma, Addl. PP for the State

CORAM:-

HON'BLE MR JUSTICESANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. The hearing was conducted through video conferencing.
2. In view of order dated 23.06.2020, the next date of hearing i.e. 19.08.2020 is cancelled. The appeal is taken up for final disposal.
3. Appellant impugns judgement on conviction dated 21.11.2019 and order on sentence dated 27.11.2019 whereby appellant has been convicted of an offence under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act for short) and has been sentenced to undergo Rigorous

Imprisonment for a period of 5 years and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for a period of one month.

4. The case of the prosecution is that the victim girl, then aged 9 years, a student of Class-IV, made a complaint that on 21.08.2015 at 2.30 p.m. when she and her brother (then aged 7 years) were present in the house and were watching TV, the appellant came and enquired about the presence of the mother in the house. When the child victim informed that the mother was away to her job, the appellant came inside the house and removed her leggings and started feeling/rubbing his hand on her thighs. The victim became frightened, tried to run out of the house but the appellant pulled her 2/3 times inside the house. Somehow, the victim managed to free herself and went to the house of one Auntie in the neighbourhood. When she found that she was not at home, the victim returned to her house.

5. At about 3.30 p.m. the appellant once again came into the house of the victim and asked the victim to play songs on TV. The victim told the appellant to go away upon which the appellant left. At about 4.00 p.m. when the victim was going to her tuition class, the appellant once again met her on the way and asked her as to at what time she would return. She did not respond and proceeded to her tuition. At about 8.00 p.m., when she came home, she informed her mother and thereafter the police was called.

6. Based on the complaint made by the victim, the FIR was registered. Pursuant to the FIR, the statements of the victim and mother were recorded.

7. As per the prosecution, the child victim, her brother and mother of the victim remained consistent in their respective statements given to the police as also in their testimonies before the trial court.

8. Based on the evidence led by the prosecution, trial court found the appellant guilty of the offence under Section 10 of the POCSO by the impugned judgment.

9. Learned counsel appearing for the appellant has referred to the testimonies of the witnesses. Learned counsel contends that there was discrepancy in the statement of the victim. He further contended that the entire complaint seems to be an offshoot of a loan transaction between the appellant and the mother of the victim and when appellant demanded his loan amount, the complaint was registered.

10. Learned counsel further contended that the officer who had recorded rukka as well as the child counsellor who was alleged to be present when the police officer responded to the first call made was not recorded shows that prosecution story is not believable.

11. Learned Addl. PP appearing for the State submits that the child victim, her brother and mother have been consistent in their

testimonies and there are no discrepancies in the statement of the witnesses.

12. Learned Addl. PP further submits that the testimonies of the child victim and her brother are of sterling quality and there is no discrepancy in their statements. He further contends that there is no material to show that there was ever any loan transaction between the appellant and the family of the child victim. He further submits that the appellant was a mere worker and was not capable of extending any loan.

13. In support of the case, prosecution had produced 8 witnesses. Prosecution had also examined ASI Santo (PW3) who had deposed that she had gone to the house on receipt of the complaint and she was part of the investigation and being an Investigating Officer she had gone to the house of the victim and had recorded her statement, on which rukka was prepared and case was registered.

14. At this juncture, it may be appropriate to notice that the testimonies of the two children and their mother as recorded by the trial court. In her evidence, the victim child deposed as under:-

“Q. Beta batao kya hua tha?”

Ans. 21.08.2015 ko hum apne school se ghar aaye they, ye 2.30 pm ki baat hai. Hum apne bhai M... ke sath TV dekh rahe the. Wo uncle hum ek hidki se dekh rahe the aur puchh rahe the ki tumhari mummy kitne baje aayegi.

Q. Wo uncle kon hain?

Ans. Wo hamare ghar ke paas main hi rehte hain.

Q. Beta fir kya hua?

Ans. Maine un uncle ko kaha ki mummy kaam per gai hui hai.

Q. Beta fir kya hua?

Ans. Ye baat sun kar wo hamara bahar wala gate khol kar andar aa gaye. Andar aa kar wo kamre ke gate ko andar se undkane lage (gate band karne lage). Wo mujh se puchhne lage ki meri mummy jaldi aaye gi ya der se aayegi, to maine bola ki mummy, jaldi nahi aayegi. Fir wo uncle mere bhai ko paise de kar bahar bhejne lage per mera bhai nahi gaya.

Q. Beta fir kya hua?

Ans. Fir wo uncle meri legging utarne lage aur mere yaha per hath fairne lage (the witness is pointing towards her both thighs).

Main darr gai thi aur bachne ke liye main bahar ki taraf bhag ne lagi per wo uncle mujhe jaane nahi de rahe the per main bhag kar pados wali aunty ke ghar chali gai. Per aunty apne ghar main nahi thi aur unke bhi bachhe hi ghar main the. Kuchh der baad main aunty ke ghar se wapis aa gai.

Q. Beta fir kya hua?

Ans. Fir wo uncle dubara aaye aur mujh se paani mangne lage. Maine unhe paani de diye. Fir wo hamare TV per gaane chalane ke liye kehne lage. Maine unhe kaha ki uncle aap apne ghar jao to wo wahan se chale gaye.

Q. Beta fir kya hua?

Ans. Meri tuition ki class 4.30 baje shuru hoti hai per us din main darr ki wazah se 4 baje hi ghar se nikal gai. Hum jaan bhujh kar dusri-dusri galiyon se jaa rahe the per wo uncle ek gali main cycle le kar aate hue mujhe mil gaye aur bole ki tuition se kitne baje aayegi. Maine un ko kuch nahi bataya aur main apne tuition chali gai.

Q. Beta fir kya hua?

Ans. Jab hum tuition se padh kar wapis aaye tab wo uncle hume nahi mile aur raat ko jab 8 baje meri mummy kaam se wapis aai tab maine apni mummy ko sab kuchh bata diya aur unhone police ke paas phone kar diya.

Q. Beta fir kya hua?

Ans. Police 10-15 minutes ke baad aai thi per tab tak wo uncle bhaag chuke the.

Q. Beta police ne kya kiya?

Ans. Hum se puchh-tachh kari aur saari baatein likhi thi.

At this stage the witness has been shown the statement/ complaint from the judicial file, on which she identifies her signatures at point A. The said statement is now Ex. PW1/A.

Q. Beta kya aap pehle bhi court main apne bayan dene aaye the?

A. Haan, wo ek aunty thi jin hone mere bayan apne kamre main likha the.

At this stage, a sealed envelope duly sealed with the seal of SBT has been taken out from the judicial file and proceedings U/S 164 Cr. P.C are taken out from it. The said statement/proceedings U/S 164 Cr. P.C has been shown to this witness on which she identifies her signatures on all pages at point A. The said statement is now Ex. PW1/B.

Q. Beta fir kyahua?

A. Police ne case kar ne ke bead un uncle ke makaan malik ne meri mummy ko bola ki case wapis le la nahi to wo hum sabko maar daale ga.

Q. Beta aap un uncle ka naam jante ho?

Ans. Un uncle ka naam Raju hain.

Q. Beta kya aap un ko pehchan sakte ho?

Ans. Haan.

Accused Rajender @ Raju is present in the court today (correctly identified by the witness through the design of wooden partition).

Court observation: After seeing the accused the witness has turned white and she has started weeping profusely. The mother of the witness has been called inside the court and she has been asked to console the witness. She has been asked to have a glass of water but she has refused to have it."

Brother of the victim child deposed as follows;

"Q. Beta batao kya hua tha?

Ans. Ek din ki baat hai ki main aur meri behan school se aane ke baad ghar mai akele the aru TV dekh

rahe the to Raju uncle wahan aaye aur khidki se hum se puchha hai ki hamari mummy ghar per hai ya nahi.

Q. Beta Raju uncle konhai?

Ans. Raju uncle hamare pados main rehte hai.

Q. Beta fir kyahua?

Ans.- Raju uncle hamare ghar ke andar aa gaye aur unhone peene ke liye paani manga. Maine paani unhe de diya. Fir wo bole ke TV per gaane laga do. To humne unhe gaane laga ne se mana kardiya. Unhone mujhe ek rupey ka sikka pakda kar kaha ki jaa bahar cheez kha aaya, per maine mana kar diya.

Q. Beta fir kyahua?

Ans. Raju uncle ne meri behan ki legging ghutno tak uttar di aur wo uske upper hath fairne lage. Jab meri behan bahar ko bhagne ki koshish karne lagi to wo use pakad rahe the. Fir meri behan ne kaha ki Raju uncle aap apne ghar chale jao, to wo waha se chale gaye.

Q. Beta fir kyahua?

Ans. Hamara 4 baje shaam ka tuition hota tha per us din hum dono bhai behan 4:30 baje tuition gaye to raaste main Raju uncle hume apni cycle per mile aur unhone hum se puchha ki tuition se kitne baje aaoge per humne unhe time nahi bataya.

Q. Beta fir kyahua?

Ans. Fir humne raat ko mummy ko saari baat bata di.

Q. Beta fir mummy ne kyakiya?

Ans. Mummy Raju uncle ke ghar gai aur police ko bula liya.

Q. Beta kya aap Raju uncle ko pehchan sakte ho?

Ans. Haan.

Accused Rajender @ Raju is present in the court today (correctly identified by the witness through the design of wooden partition)".

15. Mother of the child victim had also deposed that when she returned home at about 8.00 p.m. she was informed about the incident by the child victim and immediately she went to the house of the appellant and confronted him which led to a fight and thereafter police was called.

16. Trial Court has noticed that nothing substantial could be brought in the cross-examination of the victim, her brother or her mother to disbelieve the creditworthy and veracity of their statements, in any manner. The brother of the victim is an eye-witness to the incident and has corroborated each and every incident and completely supported the case of the prosecution.

17. Trial court has found no reason as to why the minor children would depose against the accused. Trial court has not found any contradiction in the testimony of the two children. Even before this

Court, no material contradiction has been pointed out in the testimony of the two children.

18. Further, learned counsel for the appellant has not been able to show any reason as to why the testimony of the two children should be disbelieved. Perusal of the testimony of the children shows that they is of sterling quality and no discrepancy has been pointed out to disbelieve the testimony of the two children. The child victim has been consistent in her rukka statement, her statement recorded under Section 164 Cr. P.C. as well as in the testimony before the Trial Court.

19. Under Section 29 of POCSO Act raises a statutory presumption against the accused. Accused has not been able to dispel the presumption or discharge the onus. It is established from the testimony of the child victim and her brother that the appellant/accused had pulled down the leggings of the child and touched her thighs. Pulling down the leggings of the child victim and touching of the thighs is evident of sexual intent and accordingly constitutes an offence of sexual assault in terms of Section 7 of POCSO Act.

20. In terms of Section 9 (m) of POCSO Act since sexual assault was committed on a child below the age of 12, it would amount to aggravated sexual assault punishable under Section 10 of POCSO Act.

21. Nothing has been pointed by the learned counsel for the appellant which would show that the conclusion arrived at by the trial court is erroneous or suffers from any material irregularity.

22. I find that the trial court has passed a well-reasoned order after examining the evidence and the law. I find no infirmity in the view taken by the trial court in holding the appellant guilty under Section 10 of POCSO Act.

23. In so far as the sentence under Section 10 POCSO is concerned, it is noticed that the minimum awardable sentence for aggravated sexual assault is 5 years which may be extended upto 7 years and fine. Trial court has awarded the minimum sentence which is awardable under Section 10 of POCSO Act. Accordingly, on that aspect also the order does not suffer from any infirmity.

24. In view of the above, I find no merit in the appeal. The appeal is accordingly dismissed.

25. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email.

SANJEEV SACHDEVA, J

JULY03, 2020
'rs'