

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 5599 of 2022

BETWEEN:-

PRAHALAD GUJAR S/O DHANNALAL GUJAR, AGED
ABOUT 32 YEARS, OCCUPATION: LABOUR MALI
MOHALLA, LOTKHEDI BHANPURA DISTRICT
MANDSAUR (MADHYA PRADESH)

.....APPELLANT

(BY SHRI RITU RAJ BHATNAGAR, ADVOCATE)

AND

THE STATE OF MADHYA PRADESH STATION HOUSE
OFFICER THROUGH POLICE STATION BHANPURA
DISTRICT MANDSAUR (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SURENDRA GUPTA, GOVERNMENT ADVOCATE)

.....
Reserved on : 25.01.2024

Delivered on : 16.02.2024
.....

*This criminal appeal having been heard and reserved for orders,
coming on for pronouncement this day, the court passed the following:*

JUDGMENT

This criminal appeal is preferred under Section 374 of the Code of Criminal Procedure, 1973 by the appellant being crestfallen by the judgment dated 13.09.2021 passed by the learned Additional Sessions Judge, Bhanpura, District-Mandsaur in Sessions Trial No. 46/2020 whereby the appellant has been convicted for the offence punishable under Section 363 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 9(M)/10 of the

Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and sentenced to undergo 5 years R.I. and 5 years R.I. with fine of Rs.1,000/- and Rs.2,000/- and usual default stipulations.

2. As per the prosecution story, on 31.01.2020, the complainant mother of the prosecutrix alongwith her husband lodged a report stating that her daughter is studying in Saraswati School and on that day at about 5:30 pm, when she was playing in the courtyard, the present appellant abducted her (prosecutrix) and took her to his home where the appellant touched the prosecutrix illegally to outrage her modesty. When neighbours and other person saw that the appellant was taking prosecutrix to his home, they informed the mother of prosecutrix about the incident, thereafter, an FIR for the offence punishable under Sections 363 & 354 of IPC and Section 9(M)/10 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 363 & 354 of IPC and Section 9(M)/10 of POCSO.

4. In order to bring home the charges, the prosecution has examined total 8 witnesses namely prosecutrix/victim (PW-1), Annu, mother of the prosecutrix (PW-2), Samrath, father of the prosecutrix (PW-3), Dulichand Mali, Principal, Saraswati Shishu Mandir (PW-4), Nitesh Mali (PW-5), Kalu (P.W.-6), Madhu Bansal (PW-7) & Arjun Singh Bhadoriya (PW-8). No witness has been examined in support of the defence. The appellant abjured his guilt and he took a plea that he is innocent.

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 offences as mentioned in para-1 of this judgment.

6. 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. It has also been submitted that the appellant has falsely been implicated in this case on the basis of some old animosity. The appellant has already undergone more than 3 years of jail incarceration, therefore the sentence be reduced to the period already undergone. It is further submitted that the appellant deserves some leniency as he has already suffered the ordeal of the trial since 2020 i.e. for a period of 04 years. It is further submitted that this appeal be partly allowed and the sentence awarded to the appellant be reduced to the period already undergone by enhancing the fine amount.

7. Learned counsel for the State on the other hand supports the impugned judgment and prays for dismissal of this appeal.

8. 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.

9. Now, as to whether the prosecutrix comes under the purview of child who is below the age of 12 years. In this context, the statement of mother of the prosecutrix (PW-2) and father of the prosecutrix (PW-3) are significant. The mother of prosecutrix (PW-2) has specifically stated in her examination-in-chief

that her daughter/prosecutrix was studying in Saraswati School and she was entering into the age of 7 years. The aforesaid statement finds support from the statement of father of prosecutrix (PW-3) in cross-examination. These witnesses, who are the parents of the prosecutrix, have not been challenged on the point of age of prosecutrix. That apart, the prosecution has produced Dulichand Mali, Principal of Saraswati School Lautkhedi who has also specifically stated that in scholar register of school as well as admission card, the date of birth of prosecutrix was written as 25.09.2014. The statements of these witnesses have also not been demurred.

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*** reported as **2023 Lawsuit (MP) 435** has recently, after considering the catena of cases, viewed as under :-

35. 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 aforesaid law laid and propositions, the scholar register as well as admission card are sufficient to prove the age of prosecutrix. Since in the scholar register (Exhibit-P/5), date of birth of the prosecutrix is mentioned as 25.09.2014, meaning thereby, at the time of incident, she was only 6 years old. Under these circumstances, the age of prosecutrix is proved as less than 10 years.

13. Now, turning to the reliability of evidence procured by the prosecution, the prosecutrix is aged about only 7 years at the time of deposition of her testimony and she has clearly stated in examination-in-chief that the appellant was rubbing his hand on her thigh, he wanted to give bite but prosecutrix declined and thereafter, Nitin (PW-5) came there and pulled her from the lap of appellant, the statement of prosecutrix has not been rebutted in any way. Nitesh Mali (PW-5) has not stated regarding rubbing of thigh, but he stated that when he went to the place of incident, he saw that the appellant was standing by holding the prosecutrix in his lap. Although, this witness has not narrated the story of touching thigh but statement of this witness is sufficient to corroborate the statement of little child of 6 years old, the other witnesses namely Kalu (PW-6), is hearsay witness, hence, his statement is not in issue for prosecution. Madhu Bansal (PW-7), Sub-Inspector in her statement stated that anklet was recovered from the possession of the appellant. Further, A.S. Bhadoriya Nayab Tehsildar (PW-8), who is the witness of identification memo regarding seizure of anklet (payal) seized from the appellant and as per statement of mother of prosecutrix, the same has rightly been identified.

14. Learned counsel for the appellant has submitted that only on account

of touching or rubbing thigh, presumption of sexual intention cannot be established. On this aspect, respective provisions of concerned act is worth to quote here :-

"Section 29. Presumption as to certain offences -
Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

15. In this case, the age of the prosecutrix is 6 years, as per prosecution witnesses, the appellant was rubbing hands on her thigh, the appellant was not able to controvert the aforesaid statement regarding rubbing hands on prosecutrix's thigh.

16. In this case, the appellant took the prosecutrix and went to his closed room, therein, he took the prosecutrix in his lap and wanted to give her a bite, during that time, he was rubbing in her thigh. This act of appellant is sufficient to gather his sexual intention, hence, contention of learned counsel for appellant regarding sexual intention is found unsubstantial.

17. 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."

18. 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. The reaction of the woman is certainly relevant but its absence is not always decisive. Here, is the case of 6 years old child, hence, in order to gather the intention of accused to outrage the modesty, the act and conduct of the appellant would be relevant.

19. In view of the aforesaid law laid down by Hon'ble Apex Court, the act and conduct of the accused is sufficient to prove the intention regarding outraging the modesty of the prosecutrix which is punishable under Section 354

of IPC. So far as the findings of learned trial Court regarding Section 354 of IPC is concerned, the aforesaid discussion clearly indicates that the appellant has used criminal force upon the child to outrage her modesty. Since the appellant is liable to be convicted under Section 9(m)/10 of POCSO Act, he is not required to be punished under Section 354 of IPC.

20. So far as the offence punishable under Section 363 of IPC is concerned, it is also well proved, when prosecution witnesses clearly narrated that the appellant took the minor child/prosecutrix in his closed room. Under these conditions, the findings of learned trial Court regarding offence punishable under Section 363 of IPC and Section 9(M)/10 of POCSO Act, are found infallible and immaculate.

21. 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. Be that as it may, it is also pertinent to mention here that as such, in this case, minimum sentence for offence under Section 9(M)/10 of POCSO Act is of 5 years, however, appellant has been awarded 5 years R.I., which is correct. Since no appeal has been filed on behalf of the complainant or State, hence the said sentence cannot be enhanced so also in any way, punishment of 5 years R.I. cannot be reduced. Hence, the punishment of five years R.I. and fine, does not warrant any interference.

22. 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.

23. A copy of this order be sent to the concerned trial Court for necessary information.

Certified copy as per rules.

(PREM NARAYAN SINGH)
JUDGE

Vindesh

