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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

CRIMINAL APPEAL No. 8359 of 2023

BETWEEN:-

FARID KHAN

.....APPELLANT

(SHRI NILESH MANORE - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH
STATION HOUSE OFFICER THROUGH
POLICE STATION NAGDA
DISTT. UJJAIN (MADHYA PRADESH)**
- 2. VICTIM X THROUGH P.S. NAGDA,
DIST. UJJAIN (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI RAJESH JOSHI - GOVT. ADVOCATE)

Reserved on :21.12.2023

Delivered on :23.01.2024

*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 Cr.P.C. by the appellant being aggrieved by the judgment dated 17.09.2021, passed by Special Judge (POCSO Act), District Ujjain, in S.T. No.94/2021, whereby the appellant has been convicted for the offence punishable under Section 354 of IPC, 1860 and Section 7/8 of Protection of Children from Sexual Offences Act, 2012 and

sentenced to undergo 2 years and 2 years R.I with fine of Rs.100/- under each sections and usual default stipulation.

2. As per the prosecution story, on 07.10.2020, at about 11.30 am when the prosecutrix was alone in her house, the appellant came there and finding her alone he started rubbing her chest with bad intention. When prosecutrix cried for help he ran away from the spot. Thereafter when prosecutrix's mother returned home the prosecutrix narrated the whole incident and along with her mother and uncle reported the incident.

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 Section 354 of IPC, 1860 and Section 7/8 of Protection of Children from Sexual Offences Act, 2012.

4. In order to bring home the charges, the prosecution has examined total 6 witnesses namely Kiran Rathore (PW-1), Shubam (PW-2), Victim (PW-3), Hemlatha Jaiswal (PW-4), Dr. Bharthi Lodhi (PW-5), Preethi Kanasha (P.W.6). 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 1 year and 26 days 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, 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 (Ex.P/7C) has been filed and as per the scholar register, date of birth of the prosecutrix is 08.04.2006 and therefore, at the time of incident i.e. 07/10/2020, the age of the prosecutrix is less than 18 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*** 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 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/7C) the date of birth of the prosecutrix is 18.04.2006, meaning thereby, she was only 14 years and 6 months on the date of incident. Hence, the petitioner's contentions regarding the age of prosecutrix, is turned down.

13. Now turning to the reliability of evidence procured by prosecution case, it is well fortified by the prosecution as well as other prosecution witnesses. Prosecutrix (P.W.3) elucidates that on the date of the incident accused came and knocked the door, when she opened the door, he scuffled with her and touched her chest and when she shouted he ran away. This statement of prosecutrix has not been rebutted in her cross examination. Her statement finds support from her father P.W.1, to whom she narrated the story and on that basis he lodged the FIR Ex.P/3. The statement of the prosecutrix

also find corroborated with the statement of Dr. Bharati Lodhi (P.W5). On the basis of the MLC report Ex.P/9, she asseverated that there was scratch on forearm just over wrist. There were also scratches on both sides of chest. This statement has not been even shaken in cross examination. As such the factum of molestation is clearly established.

14. 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* reported in *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)."

15. In this regard, the following ratio held by the Hon'ble Supreme Court in *Pundappa Yankappa Pujari v. State of Karnataka*, reported as *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.

16. Recently, the full Bench of Hon'ble Apex Court in *Ravasaheb @ Ravasaheb Gauda etc., vs. State of Karnataka* reported as *(2023)5 SCC 391* reiterated that "Evidence examined as a whole, must reflect ring of truth. The Court must not give undue importance to omission and discrepancies which do not shake the foundation of prosecution case".

17. 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.

18. So far as the demurrer of sexual intent is concerned, at the time of incident, the appellant was 40 years old person. He came inside the house and after getting aware that the prosecutrix is alone at her house, he started molesting her with bad intentions. 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."

19. 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.

20. 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* reported in (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. This ratio is recently endorsed by Full Bench of Hon'ble Apex Court in *Balram vs. State of M.P. (Criminal Appeal 2300/2019 decided on 08.11.2023)*. 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.

21. 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 7/8 of POCSO Act by the learned trial Court, has no infirmity or illegality.

22. 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, in this case Minimum sentence for offence under Section 7/8 of POCSO Act is of 3 years, however, in this case appellant has been awarded only 2 years R.I., which is on lesser side. 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 the punishment of 2 years R.I. cannot be reduced. Hence, the punishment of two years R.I and fine, does not warrant any interference.

23. 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.

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

Certified copy, as per rules. जयते

(PREM NARAYAN SINGH)
JUDGE