



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 29th DAY OF MARCH, 2022

BEFORE

HON'BLE MR. JUSTICE VIVEK SINGH THAKUR

CRIMINAL APPEAL NO.349 OF 2019

Between:-

RAJESH KUMAR
AGE 38 YEARS,
SON OF LATE SHRI MAST RAM,
RESIDENT OF VILLAGE AND POST OFFICE,
ANDRETTA, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.

.....APPELLANT

(BY MS.KIRAN KANWAR, ADVOCATE AS
LEGAL AID COUNSEL)

AND

STATE OF HIMACHAL PRADESH

...RESPONDENT

(BY SH.HEMANT VAID, ADDITIONAL
ADVOCATE GENERAL)

Whether approved for reporting? Yes

Reserved on: 26.02.2022

Decided on: 29.03.2022

*This appeal coming on for pronouncement this day,
the Court passed the following:*

J U D G M E N T

Instant appeal has been preferred by convict Rajesh Kumar (hereinafter referred to as the appellant) against judgment/order dated 26.06.2019/29.06.2019, passed by learned Special Judge, Kangra at Dharamshala, H.P., in Sessions Case R.B.T. No.20-P/VII/19/14, titled as *State of Himachal Pradesh vs. Rajesh Kumar*, in case FIR No. 248 of 2013, dated 13.12.2013, registered in Police Station Palampur, District Kangra, H.P., under Sections 354-A, 506, 509 of the Indian Penal

Code (in short 'IPC') and Sections 9(m), punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'), whereby appellant has been convicted under Section 10 of POCSO Act as well as Sections 354-A, 506, 509 IPC and sentenced to undergo rigorous imprisonment for five years with fine of ₹25,000/-; six months with fine of ₹5000/-; one month with fine of ₹1000/-; and three months with fine of ₹2000/- respectively and in case of default of payment of respective fine, to further undergo simple imprisonment for one month, three months, fifteen days and/or one month respectively. The substantive sentences have been ordered to run concurrently.

2. Prosecution case is that on 12.12.2013, 12 years old victim went to Andretta bazaar alongwith other children namely Shivani, Ayush and PW.3-Piyush. Ayush and Piyush were rolling a scooter tyre which on the way rolled inside the house of appellant and Ayush and Piyush went inside the house of appellant to bring that. Thereafter, Ayush came back but Piyush did not. Whereupon, victim went inside the house of appellant to bring Piyush. At that time, appellant, who was lying on the bed caught victim from her arm and opened zip of his pants and showed his private part to the victim. Victim managed to release her from clutches of appellant by giving teeth bite on the hand of the appellant and ran out of the room. At that time appellant had also shown currency note of ₹100/- to the victim. This incident was narrated by the victim to her Aunt (Bua) PW.2-Sandhla Devi, who reprimanded the accused, who was following

the victim. On next day, Sushma Devi, elder sister of Sandhla Devi came home after attending marriage and entire episode was narrated by the victim to her also. Whereupon, Panchayat Pradhan Rajni Devi was informed about the incident and thereafter, matter was reported to the police and FIR was registered.

3. After completion of investigation, challan was presented in the Court and on conclusion of trial, appellant has been convicted and sentenced as stated supra.

4. Prosecution has examined twelve witnesses, whereas, no defence witness has been examined by the appellant.

5. I have heard learned counsel for the appellant as well as learned Additional Advocate General and also gone through the entire record.

6. Learned counsel for the appellant has submitted that statement of PW.1-victim, that accused had shown his private part to her by opening zip, has not been corroborated by another alleged spot witness PW.3 Piyush; and as other witnesses of the spot Ayush and Shivani have not been examined by the prosecution, thus, adverse inference deserves to be drawn against the prosecution. It has been canvassed that as a matter of fact Ayush and Piyush had gone inside the house of appellant with a view to commit theft, but they were caught red-handed by wife of accused and to counter the said allegation false case has been registered against the appellant. It has further been contended that incident is alleged to have occurred on

12.12.2013 at 5.00 p.m. whereas complaint to the police was submitted on 13.12.2013 at 10.00 p.m. as is evident from Rukka (Ex.PW.1/A) and during this period of delay in lodging the FIR, a concocted story has been cooked by the complainant party, and further that child witnesses were tutored not only to make statement before police, but also to depose before the Magistrate and trial Court. It has been contended that appellant is 42 years old married person having his family with him and he was residing in a rented accommodation and there was neither occasion nor possibility of commission of offence by the appellant as alleged by the complainant party and being only family of different caste in the village, residing in a rented accommodation, he has been implicated in order to pressurize to leave the locality in order to get rented accommodation vacated from him.

7. It has come in evidence that victim, after death of her mother, had been residing at Andretta with her Aunt (Bua) Sushma Devi since last one year and was studying in 7th class. Whereas, her two brothers were living with father. On 12.12.2013, victim alongwith Shivani, Ayush and Piyush who are children of her Aunt, at about 5.00 p.m., was going to purchase Note Book. Ayush and Piyush were rolling scooter tyre, which accidentally rolled inside the house of appellant and both of them went inside the house of appellant, but thereafter, only Ayush came back, but Piyush did not. Victim went inside to bring Piyush. At that time, appellant was alone at his home and was lying on the bed. Piyush also came out and Shivani was already

standing outside the house. In the meantime, appellant-Rajesh stood up, came towards victim and after catching her hand pulled her towards him and started vulgar activities with her by opening his zip and showing his penis. Victim rescued her by giving bite and ran alongwith her sister Shivani towards home. It has further been stated by victim that appellant was showing her note of ₹100/- when he was lying on the bed and when they were running towards Aunt's home, appellant also followed them and came to house of Aunt of victim. Victim narrated the entire incident to her Aunt Sandhla Devi as her Aunt Sushma Devi was out of station to attend a marriage. Sandhla Devi reprimanded the accused. Whereupon, he ran from the spot and next day victim's Aunt Sushma Devi came back from marriage and entire episode was narrated to her, who approached the Pradhan, who attempted to resolve the issue by visiting house of appellant, but appellant was not home, however his wife and mother were there, who instead of resolving the issue started blaming the children. Resultantly, matter was reported to the police and statement of victim was recorded under Section 154 of the Code of Criminal Procedure (in short 'Cr.P.C.') at 10.00 p.m. and Rukka was sent to the Police Station, on the basis of which FIR was registered.

8. Arguments canvassed, on behalf of the appellant, that Ayush and Shivani have not been examined and Piyush has not supported version of the victim, are not tenable for the reason that it is not the quantity but quality of evidence which determines the fate of a trial. Otherwise also, Ayush and Shivani

did not see that accused was holding hand of the victim as Ayush had come out and Shivani was already outside the house. Therefore, they are not witness to the act of appellant. Whereas, Piyush who was inside the house, had seen that victim was caught by appellant and thereafter he came out and, therefore, he was witness only to the fact that victim was caught by appellant but he did not see anything thereafter, therefore, he was not supposed to depose the fact which he did not notice.

9. It is contended on behalf of the appellant that child witnesses were tutored, but I find that this argument is also not tenable. Had it been so, then Piyush would have also been tutored to corroborate entire episode, but he has deposed to the extent to which he had noticed the occurrence, not less than that not more than that. Therefore, he has deposed as a natural witness.

10. PW.1-victim and PW.3-Piyush have categorically denied the suggestion that they were deposing in the Court in a particular manner as asked by their Aunt/mother.

11. PW.1-victim and PW.2-Sandhla Devi have also denied the suggestion that children had gone to the house of accused with intention to commit theft and they were caught red-handed by wife of the accused and as a counterblast, a case has been registered. Not only PW.1-victim, but PW.2-Sandhla Devi and PW.3-Piyush, who are related to each other, have corroborated the occurrence in the same manner as was reported to the police and also deposed by PW.1-victim in her statement recorded under Section 164 Cr.P.C. before the Magistrate. PW.3-Piyush

has corroborated all the facts, which were reported to the police, without any major discrepancy or improvement or contradiction therein. Statements of PW.1-victim, PW.2-Sandhla Devi and PW-3-Piysh have also been corroborated in the statement of Panchayat Pradhan PW.4-Rajni Devi and reporting of incident to her has also been corroborated by PW.4 herself. At that time, no suggestion has been put to her as put to PW.1 to PW.4 that a false case has been made out by the residents of Village in order to oust the appellant from the Village to get the rented accommodation vacated. This plea has been taken for the first time in statement recorded under Section 313 Cr.P.C. There is no suggestion to these witnesses with regard to any enmity of these witnesses i.e. PW.1 to PW.4 with accused. False implication of the accused for catching children red-handed while they were making an attempt to commit theft has also not been put to PW.3 Piyush.

12. Learned counsel for the appellant has also referred statement of PW.12-Dr.Sandeep Kashyap, who had examined the accused, wherein he has stated that on examination there was no external injury, abrasion or teeth marks as alleged in the application submitted by the police at the time of issuance of MLC (Ex.PW.12/A).

13. Victim at the time of incident was about 12 years old it is not necessary that every bite, that too of a child of 12 years old who is trying to rescue herself from the clutches of 37 years old person, would cause injury, abrasion or teeth marks on the body of the accused. Therefore, I am of the considered opinion

that absence of external injury, abrasion of teeth marks on the body of the accused is of no consequence, particularly keeping in view the cogent, reliable and convincing evidence of the prosecution in statements of PW.1 to PW.4. Other witnesses are formal in nature, who have substantiated the prosecution case with respect to their role in the investigation.

14. In alternative, appellant has also submitted that keeping in view family life of the appellant and also that victim has not been violated or injured by the appellant and as claimed by the victim, after the incident appellant had come to the house of victim, is also indicating that appellant was having repentance about his conduct, a lenient view be taken and sentence imposed upon him be reduced.

15. Appellant has been convicted for offences under Sections 354A, 506, 509 IPC and Section 10 of POCSO Act. Quantum of five years sentence awarded under Section 10 of POCSO Act is highest amongst all. Appellant has already served the sentence awarded under Sections 354A, 506 and 509 IPC.

16. Section 10 of POCSO Act provides that sentence under this Section may of either description for a term which shall not be less than five years but which may extend to seven years with fine. There is no provision for awarding lesser sentence than the minimum prescribed sentence for offence under Section 10 of POCSO Act. Language of this Section indicates legislature's intent unambiguously that for offence punishable under Section 10 of POCSO Act minimum sentence shall not be less than five years in any case. There is no scope of

interference in the awarded sentence which is prescribed sentence. Therefore, I, for the provision of the Section, in the light of pronouncements of the Supreme Court in *Mohinder vs. State of Haryana, (2014) 15 SCC 641*; *Parveen vs. State of Haryana, (2016) 3 SCC 129*; and *State of Madhya Pradesh vs. Vikram Das, (2019) 4 SCC 125*, afraid to consider case of the appellant for reduction of sentence.

17. Taking into consideration entire facts and circumstances and evidence on record, prayer for reducing the sentence is rejected.

18. As discussed supra, after considering arguments of respective learned counsel for the parties and examining testimonies of witnesses minutely, I am of the considered view that no case for interference in the impugned judgment is made out. Hence, the appeal, being devoid of merit, is dismissed and disposed of accordingly. Pending application(s), if any, also stand disposed of. Record be sent back forthwith.

(Vivek Singh Thakur),
Judge.

March 29, 2022
(Purohit)