

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Reserved on: 21st January, 2022**
Pronounced on: 04th March, 2022

+ CRL.A. 321/2016 & CRL.M (BAIL) No. 385/2020

LAXMAN @ LUCKY

..... Appellant

Through: Mr. Vijay Kumar Shukla, Ms.
Nupur Shukla, Mr. Anirudh
Gulati and Mr. Digant Mishra,
Advocates

versus

STATE

.... Respondent

Through: Mr. Panna Lal Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

(J U D G E M E N T)

CHANDRA DHARI SINGH, J.

1. The instant appeal has been filed under section 374 of the Code of Criminal Procedure Code, 1973 (hereinafter "Cr.P.C.") by the Appellant/Accused against the judgment of conviction dated 15th January, 2016 passed by learned Additional Sessions Judge-01, North District, Rohini, Delhi (hereinafter "learned ASJ") in Session Case (SC) No. 39/2015, wherein Appellant/Accused was convicted for the offences punishable under sections 323/506(II)/377 of the Indian Penal Code, 1860 (hereinafter "IPC") and under Section 6 of the

Protection of Children from Sexual Offences Act, 2012 (hereinafter “POCSO Act”), and vide order on sentence dated 28th January, 2016, Appellant/Accused had been awarded with the following sentences:

- Rigorous Imprisonment for a period of 10 years along with fine of Rs. 5,000/-, in default Simple Imprisonment for a period of 1 month for the offence punishable under Section 6 of the POCSO Act;
- Rigorous Imprisonment for a period of 3 months along with fine of Rs. 1,000/-, in default further Simple Imprisonment for a period of 10 days for the offence punishable each for offences under Section 323 of the IPC;
- Rigorous Imprisonment for a period of 1 year along with fine of Rs. 1,000/-, in default further Simple Imprisonment for a period of 1 month for the offence punishable each for offences under Section 506 (II) of the IPC;
- Since, sentence is awarded to the convict for the offence punishable under Section 6 of the POCSO Act, no separate sentence is awarded to convict for the offence punishable under Section 377 of the IPC;
- Sentences shall run concurrently and the benefit of Section 428 of the Cr.P.C is accorded to the convict.

2. Factual matrix of the matter in nutshell is that the instant FIR bearing No. 18/2015 was registered on the written complaint lodged by the complainant/father of the victim. As per the FIR, on 5th January, 2015 at about 8:00 P.M., Complainant’s son aged about 10 years disclosed him that on the very same day at about 4:00 P.M.

Appellant/Accused herein took him to Nala (Drainage area), Near DESU Colony, Rana Pratap Bagh, Delhi and committed sodomy (unnatural sexual act) and threatened him not to tell the incident to anybody otherwise he would kill him. On the said complaint instant FIR was lodged and the Appellant/Accused was arrested on the same day, i.e., on 5th January, 2015.

3. The offences levelled against the accused were triable by the Sessions Court, therefore, the learned Magistrate wisely transmitted the proceedings to the concerned Sessions Court for trial of the accused within the purview of law. The learned ASJ framed the charges against the accused, to which the Appellant/Accused pleaded not guilty and claimed trial. In order to bring home guilt of the accused, prosecution examined total 7 witnesses in this case namely, PW-1: Victim; PW-2: Principal of the School in which the victim was studying, who had proved the date of birth of the victim as 28th December, 2005 as per his School Record which is Ex PW2/A-D; PW-3: HC Jai Bhagwan; PW-4: Ct. Ram Swaroop; PW-5: Complainant/father of the victim, who had deposed on the lines of his complaint and proved it on record as Ex PW5/A; PW-6: Virender Singh, learned Metropolitan Magistrate (hereinafter “learned MM”), who recorded the statement of victim under Section 164 of the Cr.P.C, which is exhibited as Ex PW 1/A; and PW-7: SI Kuldeep Singh, IO of the case, who had prepared the *tehrir*, exhibited as Ex PW7/A on the basis of complaint and prepared site plan of the place of occurrence as Ex PW7/B.

4. Learned ASJ recorded statement of the Appellant/Accused prescribed under Section 313 (1) (b) of the Cr.P.C. Upon conclusion of the Trial in Sessions Case No. 39/2015, the learned ASJ vide impugned judgment dated 15th January 2016, has convicted the Appellant/Accused for the offences punishable under Sections 323/506(II)/377 of the IPC and Section 6 of POCSO Act, and vide order dated 28th January 2016, he was sentenced as prescribed under Para No. 1 hereinabove.

5. Hence, the instant criminal appeal assailing the impugned judgment and order on sentence on the ground of validity, propriety and legality.

6. The learned counsel for the Appellant/Accused vehemently submitted that the learned Trial Court failed to appreciate the oral and circumstantial evidence(s) on record in its proper perspective and committed error by taking adverse inference against the accused, in regard to charges framed against him. Learned counsel further submitted that there is delay in lodging the FIR as the incident of sodomy happened on 15th August, 2014, however, the present complaint was lodged on 5th January 2015. The delay in lodging the FIR has not been explained by the complainant. It is also submitted that there is no medical report of the victim on record showing any sodomy. It is further submitted that the father of victim had himself denied medical examination of his son. Therefore, these facts are sufficient to create doubt over the allegations.

7. Learned counsel for the Appellant/Accused further submitted that the incident related to slapping the victim was not even mentioned

in the FIR, however, the same was added during the statements recorded under Sections 161 and 164 of the Cr.P.C of the victim as well as his father/complainant. The FIR merely mentions that the victim told his father/complainant that on 5th January 2015, the Appellant/Accused had committed sodomy on him and further mentioned that the same used to happen frequently, but had never told about it earlier because of the fear, Appellant/Accused had imposed on him, which clearly shows that the story was merely made up by the father of the victim just to take revenge against the Appellant/Accused, in relation to the property, due to which the families of the complainant as well the Appellant/Accused were inimical to each other.

8. The counsel on behalf of the Appellant/Accused submitted that the victim mentioned in his statements that the Appellant/Accused committed sodomy on him multiple times near the drainage area, however, there is not a single witness to prove that whether such incident had ever happened. It is further submitted that as per the statements of the victim, the Appellant/Accused had slapped him when he came to the shop to buy matchsticks, however, neither this statement has been mentioned in the FIR, nor a single eye witness has been examined to concur that incident, especially the shopkeeper who must have been present on the shop during the time of the alleged offence.

9. Learned counsel on behalf of the Appellant/Accused submitted that the father/complainant had refused to let his son/victim go for any medical test, which clearly raises suspicion over the fact that whether

any kind of offensive act had been committed on the victim or not. Alternatively, learned counsel for the Appellant/Accused submitted that the Appellant/Accused was arrested on 5th January 2015, and since then he is languishing in jail and has already completed about 7 years; the Appellant/Accused was about 21 years young boy on the date of the incident; his conduct in jail is found to be satisfactory in the nominal roll. Therefore, keeping in view his young age as well as the financial condition, it is prayed that his sentence may be reduced for the period already undergone.

10. *Per contra*, Mr. Panna Lal Sharma, learned APP for the State has vehemently raised objection to the contentions propounded on behalf of the Appellant/Accused and submitted that the evidence on record squarely proved that victim was minor at the time of commission of crime; the appellant has committed sodomy on the victim; and all prosecution witnesses, exhibited documents and other circumstantial evidence(s) have proved the case of the prosecution beyond reasonable doubt. Therefore, the findings of the Trial Court do not warrant any interference.

11. Heard learned counsels for parties at length and perused the record. This Court has given thoughtful consideration to the arguments advanced on behalf of the parties.

12. Before advertng to facts of the case, it is necessary to set-out the relevant provisions:

a. Section 377 of the IPC

“377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any

man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

b. Section 6 of the POCSO Act.

6. Punishment for aggravated penetrative sexual assault.—

“(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

13. As referred above, in order to bring home the guilt of accused within the ambit of Section 6 of the POCSO Act, it was incumbent for the prosecution to prove that the victim was a minor, i.e. below the age of 18 years at the time of commission of crime. For convicting the Appellant/Accused for an offence punishable under Section 377 of the IPC, the prosecution has to prove that the Appellant/Accused had committed sodomy upon the victim as alleged in the FIR. The prosecution primarily relied upon the oral version of victim (PW-1) as well as his father/complainant (PW- 5). PW-2, Principal of the School (in whose school the victim was studying) was examined for the purpose of determination of the age of the victim at the time of the incident. As per the statement of PW-2 and PW-5, it stated that at

time of the commission of offence, the victim was minor aged 9 years old boy. In order to test the veracity of the depositions of the victim (PW-1), it may be relevant to make reference to his examination-in-chief, in which he stated as under:

“On the day of incident in the evening time, my father told me to purchase 5 matchboxes. I know accused Lucky who resides in our neighborhood (accused present in the Court today, correctly identified). When I was buying matches from the shop, the accused came in drunken state and slapped me. I caught hold of wooden board in order to avoid injury. When I came back to home, I narrated the incident to my father and my father dialed at 100 number. Then police came at the spot and took us and the accused to Police station. Nothing else happened. Lucky did not committed any other act with me.

It is correct that on 15.08.2014, while I was flying kite with my bhaiya Pankaj who resides in our neighborhood, the kite of Pankaj was struck off in a tree and Pankaj went away to bring that kite, in the meantime the accused came and took me to a drain. There he did 'gandi baat' with me. He put his urinary part in my mouth and threatened me not to disclose this incident to anybody otherwise he would cut me from neck and throw me in the drain. After some day, I narrated the incident to my mother. Since I was scared, I did not inform the incident to my mother on that day.”

14. The relevant reference of the cross-examination of the victim is stated as under:

“We do not have any enmity with the family of accused. Even prior to 15th August, the accused committed wrong with me. The accused used to daily indulge in such activity with me. I do not know how many brother sisters, accused Lucky have. There are two houses (which are not

pakka makan) in between my house and the house of accused. In those two jhuggis two different family are residing. We are not on talking terms with those two families. I do not know the names of the persons residing in those two jhuggis.

My father is a rickshaw puller. He plies rickshaw in Old Delhi area such as Sadar Bazar, Barfkhana, Sabzi Mandi & Paharganj. Lucky also goes to a job but I do not know nature of his job. I go to school in evening session and came back to my home at about 5 pm. My mother takes me to School and also used to bring me back from School. My father comes back from his work at 12 noon and then by 6 in the evening. I did not tell about the activities of accused to my father. The accused comes back at about 1 AM in the night and goes to his work at about 5 am.

The accused used to do the activities at 10 pm and he used to take me in the drain by foot. That place is at some distance from my house. He used to leave me at that place only and I used to come back to my home alone. On the way I had to cross a road which is main road on which trucks and buses ply. It used to take long time to come back to my house. Again he used to take me in evening hours. When my mother used to ask me as to I was where, I kept mum. Vol. Accused had threatened me to face dire consequences. Nobody in our vicinity sleep outside their houses. It is correct that on the way I used to find many passersby, rickshaw pullers, hawker etc., and I never used to talk to anybody. It is correct that I never raised alarm when accused used to do wrong act and I never denied to accompany him.

The parents of accused are residing with him but I am not acquainted with them. The accused never threatened me by showing any weapon to me. Some persons used to be present at the spot where the accused used to take me. It is incorrect to suggest that except for the small quarrel

with the accused no incident of any sexual assault of any kind was committed by the accused on me.”

15. The relevant reference of PW-2 – Sh. Narendra Kumar Mishra, Principal Incharge, MCD Primary School, Rajpura Gudmandi-II, Delhi-07, is stated as under:

“Today, I have brought the summoned record pertaining to the date of birth of victim N. As per the admission register, the said pupil was got admitted in our school on 05.09.2011 and as per our record his date of birth is 28.12.2005. Certified copy of the said register is Ex. PW2/A. A certificate has also been issued in this regard by me which is Ex. PW2/B bearing my signature at point A. Certified copy of admission form is Ex. PW2/C and certified copy of affidavit which was given at the time of admission of the said pupil is Ex. PW2/D.”

16. The relevant reference of the Examination-in-chief of PW-5: father of victim/complainant is stated as under:

“My son N aged about 10 years disclosed me that when he went to buy a match box, a boy namely Laxman met him and slapped him without any reason and gave life threat. He further informed me that when he was flying kites alongwith his friend Pankaj and when the kite got cut off, he went to fetch the same at DESU Colony, Rana Pratap Bagh, Delhi there also the accused Laxman met him. The accused took my son towards the Nala and put his penis in the mouth of victim forcibly and threatened him by giving life threat not to disclosed this fact to someone. My son disclosed me that the accused has done such wrong act with him 4-5 times but my son could not tell me. Thereafter, I made a call at 100 number....”

17. The relevant reference of the cross-examination of PW-5: father of victim/complainant is stated as under:

“I have never attended any school. We are four brothers and one sister out of which two brothers have already been expired. My sister is having her matrimonial house in Lucknow. My elder brother is residing in the same locality on the first floor. My elder brother have three daughter and one son. My other deceased brothers have no family. It is correct that there is a court case pending between my elder brother and me with respect to the jhuggi situated in property no. T-207 and I am the petitioner/plaintiff in that case. Earlier also I have filed a case for the partition of a plot in Village Mukandpur against my brothers, which has been settled and the plot was partitioned in equal share. Afterwards, I have filed the another case for the share/space of the Jhuggi of Rajpura Gudmandi. It is correct that I do not have cordial relations with my elder brother and his family and there is no talking terms between us. It is correct that my wife has lodged so many complaints against my elder brother and his son in the PS. I have many pending litigations in the court.

I have two children. My elder son is aged about 10 years and my younger daughter is aged about 5 years. I do not know whether my wife knows how to sign. She is little bit literate but I do not know exactly about her educational qualification.

In plot no. T-207 there are 10-12 Jhuggis approximately having same address and in all the jhuggis separate families are residing. There are two Jhuggis between my jhuggi and the jhuggi of accused. We have talking terms with the families of those two jhuggis. I never had any dispute with the father of the accused.

My son studies in class V in a nearby government school. But I do not know the name of school. My wife takes my son to school and also bring him back.

It is wrong to suggest that my son never disclosed me about any sexual assault on him or that in order to extort money from the accused and his family we have lodged the false complaint against the accused through our son. It is wrong to suggest that the father of accused wanted to sell his jhuggi and I wanted to purchase the same but due to some dispute in respect to sale amount the deal could not materialize and due to same reason, the accused has been falsely implicated in the present case.”

18. The overall circumstances discussed above, if cumulatively considered, lead to the only conclusion that Appellant/Accused has committed sodomy on the minor victim aged about 10 years at the time of commission of the offence. Eventually, the prosecution succeeded to prove that accused committed sodomy on victim. Therefore, he is guilty for the offence punishable under Section 377 of the IPC and Section 6 of the POCSO Act. The learned Trial Court has correctly dealt with the oral and circumstantial evidence on record in its proper perspective and held the Appellant/Accused guilty for the charges pitted against him. Therefore, circumstances do not permit to cause any interference in the findings of conviction expressed by the learned Trial Court in this case.

19. At this juncture, learned counsel for Appellant/Accused submitted that the Appellant/Accused was youngster aged about 21-22 years old at the time of commission of offence and had committed crime in a heat of passion. It is further submitted that there is no criminal history of the Appellant/Accused and more so, his conduct is also found to be satisfactory as per nominal roll during the period of incarceration. In view of these circumstances, he urged to reduce the

substantive sentence imposed on the Appellant/Accused for the charges pitted against him.

20. This Court has perused the latest nominal roll dated 2nd December 2021, which is on record. As per the nominal roll, the conduct of the Appellant/Accused is found to be satisfactory in the custody. Moreover, there is also no other criminal case pending against him.

21. After giving due consideration to the submissions of learned counsel for the Appellant/Accused, in the light of circumstances discussed above, this court find substance in his contention to reduce the substantive sentence inflicted on the Appellant/Accused. The accused was about 21 years old at the time of the commission of crime. He has already undergone substantial period of sentence i.e. about 7 years. Learned Trial Court had imposed the sentence of Rigorous Imprisonment of 10 years and a fine for offences punishable under Section 377 of the IPC and Section 6 of the POCSO Act. In view of his age, mitigating factors referred above and considering the age of the appellant/accused at the time of offence, non-involvement in any other criminal case, and his conduct in jail during incarceration, this court is of the opinion that the interest of justice would met if the substantive sentence imposed upon the appellant/accused is reduced to the period already undergone by him.

22. Accordingly, the criminal appeal filed by the appellant/accused is allowed in part. Consequently, the judgment dated 15th January, 2016 passed by the learned ASJ, holding the appellant/accused guilty is upheld; however, the order on sentence dated 28th January, 2016 is

modified to the sentence for the period already undergone by the appellant. The Appellant/Accused shall be set at liberty forthwith, if his detention is not required in connection with any other case, subject to depositing the fine as ordered by the learned Trial Court, if already not paid.

23. The appeal and pending application, if any, stands disposed of.

24. Copy of this order be sent to the Jail Superintendent for compliance.

25. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MARCH 04, 2022

Aj/ct