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

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CRIMINAL APPEAL NO.566/2008

Date of decision: 9th September, 2010

MAHENDER KUMAR S/O PREM KUMAR Appellant
Through Ms. Rakhi Dubey, Advocate.
versus

STATE Respondent
Through Mr. Arvind Kumar Gupta, APP for
the State along with ASI Jagu Ram, P.S. South
Rohini.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

1. The appellant by the impugned judgment dated 22nd January, 2008 was convicted under Section 376/511 of the Indian Penal Code, 1860 (IPC for short) and by the order of sentence dated 24th January, 2008 was sentenced to undergo rigorous imprisonment for a period of five years and fine of Rs.5,000/-. In default of payment of fine, the appellant was to undergo a simple imprisonment for a period of three months. The appellant was given benefit of Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short).

2. Learned counsel appearing for the appellant submitted that there are contradictions between the statement of the prosecutrix recorded under Section 164 of the Code dated 7th March, 2006 Exhibit PW-1/A and the statement of the prosecutrix before the trial court. She submits that the appellant had called the police and, therefore, the prosecution story deserves to be rejected. She states that the FIR was registered after a delay of few hours and submits that the mother of the prosecutrix in her statement under Section 161 of the Code, Exhibit PW-2/A, had only alleged that the appellant had given beating to her daughter and no

allegation of sexual assault, etc. was made.

3. The prosecutrix was examined as PW-1. She was aged about 7/8 years at the time of the offence. Learned Additional Sessions Judge took due precautions and care to make her at ease before recording her testimony and in ensuring that she was not under any influence or tutored. The prosecutrix was asked simple and relevant questions by the court but was cross examined. She recognized the appellant, who was present in the court and stated that the appellant on the concerned date had given money to other children, who were playing there and had sent them to market to buy toffees, etc. He caught hold of the hand of the prosecutrix and told her that when he signals, the prosecutrix should come to him and he would give her money to buy toffees, chocolates etc. The appellant dragged her inside his room and switched off the lights and closed the door. She was made to lie on the cot. The appellant took off his clothes including his underwear and then he took off her frock and her underwear. The appellant warned the prosecutrix not to tell this to anyone, or else her mother would beat him up and in turn he would beat up the prosecutrix. She has stated that the appellant put his finger inside her from where she urinates. She felt pain and cried out loudly. The appellant put his hand on her mouth, but in the meanwhile, on hearing noise, the children who were outside came and started knocking at the door. The appellant opened the door after wearing his clothes and also made the prosecutrix to wear her clothes. This took time. By this time two-three women had also gathered. Before opening the door the appellant gave a Rupee note to the prosecutrix. The prosecutrix went to her room and started crying. When her elder brother Suraj came to know about the said incident, he gave a beating to the accused. At that time, the mother of the prosecutrix was not in the house and as she had gone to work. The mother of the prosecutrix was informed by Suraj and she came back. The mother also gave beating to the accused. The prosecutrix

become unconscious was taken to the hospital and was medically examined.

4. The prosecutrix was cross-examined and has maintained her stand. Despite her tender age, her statement is trustworthy, lucid, and categorical. In the cross-examination she has clearly stated that she had stated the correct facts and she was not asked to make a particular statement before the court. She has further stated that the appellant had pressed her mouth but did not give her a beating and had inserted his finger inside her and had not done anything else. PW-3, Dr. Neerja had examined the prosecutrix and had stated that on local examination she had found a small laceration on the inner side of left labiamajora. Medical evidence supports and corroborates the statement of the prosecutrix. There is no contradiction as such on material aspects between in the statements made by the prosecutrix made before the magistrate under section 164 of the Code and before the court during the trial.

5. PW-2, Chanderkala, mother of the prosecutrix, has stated that she has four children including the prosecutrix and on the concerned date, i.e., 3rd March, 2006 she had left home for work at 4 p.m. At 7 p.m. her son Suraj came and stated that something had happened to Radhika. After reaching home, she asked the prosecutrix what had happened. The prosecutrix was perturbed. Several persons had collected from the neighbourhood. The appellant, who was residing in the upper portion of the house, had been beaten up. The prosecutrix narrated the entire incident including the fact that the appellant had taken off his clothes, lifted her clothes and had tried to insert his finger inside her. When she cried, children and women gathered and knocked at the door. The appellant after putting clothes opened the door and gave a Rupee to the prosecutrix and told her not to tell anything to her mother. She has stated that she had taken the prosecutrix to the hospital. In the cross-

examination, she had stated that her statement was recorded at night on 3rd March, 2006. PW-2 was confronted with her statement under Section 161 Exhibit PW-2/A wherein she had stated that initially the prosecutrix had told her that the accused had given her a beating but later on at about 9-9.30 p.m. the prosecutrix complained of pain below her stomach and thereafter told her about the actual acts which were committed by the appellant. In my opinion, this minor discrepancy, does not destroy the prosecution case or casts any doubt to disregard her statement and the statement of the prosecutrix, PW-1. MLC Exhibit PW-3/A was recorded at about 11.10 p.m. at night. In this MLC it is mentioned that the prosecutrix and her mother had stated about sexual assault at about 5 p.m. It is also mentioned that the sexual assault was by a known person. The injury suffered by the prosecutrix is also mentioned. There may have been initial hesitation on the part of the mother, PW-2 to take action as she was working as a house maid and she may have been reluctant to report the matter and approach the police. This also explains the minor delay of a few hours in approaching the police. It is apparent that when the prosecutrix required medical attention and went to the hospital, the incident got reported and police action was taken. The statement made by the prosecutrix, PW-1 in the court merits acceptance and is reliable and there is no reason and cause why she would have falsely implicated the appellant. The injury suffered by the prosecutrix supports and corroborates her statement.

6. In view of the aforesaid, I do not find any merit in the present appeal and the same is dismissed.

7. Ms. Rakhi Dubey, Advocate has appeared as Amicus Curiae for the appellant. She will be paid Rs.5,000/- for the present case.

SANJIV KHANNA, J.

**SEPTEMBER 09, 2010
VKR**