

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

**RESERVED ON : 24th January, 2013
DECIDED ON : 28th January, 2013.**

+ CRL.A.No.427/2010

**DINESH Appellant
Through : Mr.A.J.Bhambhani, Advocate.**

Versus

**STATE (NCT) OF DELHI Respondent
Through : Mr.M.N.Dudeja, APP for the State.**

**CORAM:
MR. JUSTICE SANJIV KHANNA
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellant-Dinesh impugns the judgment dated 09.10.2009 and order on sentence dated 13.10.2009 of learned Additional Sessions Judge by which he was convicted for committing offence punishable under Section 376 (2)(f) IPC and sentenced to undergo rigorous imprisonment for ten years with fine of ₹5,000/-

2. Allegations against the appellant were that he committed rape upon the prosecutrix 'X' (assumed name) aged three years in his house on 22.03.2008 at about 04:00 P.M. The prosecution examined ten witnesses. In his statement recorded under Section 313 Cr.P.C. the appellant pleaded false implication. He examined himself in defence and stated that he had taken 'X' to his house on 22.03.2008 at about 11:00 A.M. Since his parents and nephew were present in the house, he took her to an abandon house situated near his residence and there inserted finger in the vagina of the girl. She cried and the blood oozed out from her vagina. He left her to her house. After seeing the blood coming out from the vagina, her mother thought that he committed rape/sexual assault upon her.

3. Counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper prospective and fell in grave error in relying upon the testimony of PW-3 who was an interested witness. The Trial Court ignored the vital discrepancies emerging in the testimonies of the prosecution witnesses. The prosecution witnesses have given inconsistent version whether the prosecutrix was conscious or unconscious at the time of occurrence or if there was blood/stool at the spot. No injuries were found the body of the prosecutrix and the accused's genetalia. Had the accused, a grown up adult to raped the

prosecutrix, she must have sustained vital internal injuries. It was a case of outraging the modesty of the child. Learned Additional Public Prosecutor urged not to interfere in the impugned judgment as it is based upon cogent appraisal and appreciation of the evidence brought on record. Testimony of the prosecutrix's mother is in consonance with medical evidence.

4. I have considered the submissions of the parties and have examined the Trial Court record. The victim is admittedly a child aged three years. The accused resided in the neighbourhood of the victim's parents and was known to them. On 22.03.2008 he took the child to his room on the pretext to play. When PW-3 heard the shrieks of the child she went to the room and found the accused naked. The accused had not disputed these facts and has admitted in his statement under Section 313 Cr.P.C. that he had inserted only finger in the vagina of the child and it led to bleeding. The accused did not deny his presence with the victim inside the room where he was caught red handed.

5. PW-3 (Smt. Birwati) is a crucial witness. DD No.38 (b) Ex.PZ-1 was recorded at police station Nangloi on 22.03.2008 at 04:40 P.M. on getting information that a child aged about 4-5 years was raped. PW-3 in her statement (Ex.PW3/A) gave vivid account of the incident as

to how and under what circumstances her daughter was ravished by the accused. The accused was apprehended at the spot and was given beatings by public. The occurrence took place at about 04:00 P.M. First Information Report was lodged at 07:00 P.M. There was no delay in lodging the First Information Report and it rules out possibility of any fabrication. While appearing before the court, PW-3 proved the version given by her to the police at the first instance. She categorically deposed that on the day of incident at about 04:00 P.M., the accused who resided in her neighbourhood took 'X' on the pretext to give her food. On hearing the shriek of her daughter, she went to the accused's house. When she opened the door, she saw that the accused was lying on her daughter and had removed her garments from the lower portion. The accused had also pulled down his underwear. He was moving to and fro on her daughter and committing rape. Her daughter was not conscious at the time. She pushed the accused away and picked up her daughter who was bleeding from her private parts. When she raised alarm, the accused was apprehended and beaten. In the cross-examination, she explained that parents and nephew of the accused lived with him. However, at the time of occurrence, no other person was present in the house. She denied that the accused had only inserted finger in her vagina.

6. Testimony of PW-3 inspires confidence as she had no ulterior motive to make false statement against the accused who was her neighbour. There is no history of hostility with the accused. Had it been so, PW-3 must have not permitted the child to accompany with the accused. She was not aware of the evil design of the accused. The accused did not attribute any motive to the witness to falsely implicate him. It is not believable that she being the mother would falsely levied allegations of rape to bring her own daughter in disrepute.

7. PW-8 (Dr.Jyoti Bansal) proved MLC (Ex.PW8/A) by which X was medically examined on 22.03.2008. On local examination, a tear was seen in the posterior vaginal wall. Blood was also present. She advised the patient to be admitted in labour room for observation and repair under general anthesia. In the cross-examination, she was categorical that injuries reflected in the MLC could be sufficient for sexual intercourse in this case. She explained that in case of a forceful and vigorous sexual intercourse with a three year old child by a fully grown male, the damage may extend to perineum, anus or even the muscle. However, she volunteered to add that in case of lesser penetration or lesser use of force, there may not be any damage or much less extensive damage. She further clarified that there is difference

between penetration caused by finger or by penis. She was certain that the tear in the posterior vaginal wall usually could not be caused by insertion of finger. She was of the opinion that in case of insertion by finger such tear in the posterior vaginal wall or bleeding could not occur and it is possible only in case of insertion of penis. There are no reasons to discard the expert opinion.

8. Ocular testimony of PW-3 is in consonance with medical evidence and there is no conflict between the two. Minor discrepancies highlighted by the counsel are not material to discredit the testimony of PW-3. The prosecution had produced 'X' to examine in the court but due to her tender age she was not able to understand and give rational answers to the questions put to her.

9. The order on sentence also does not require any intervention as minimum sentence prescribed under Section 376 (2) (f) IPC has been awarded to the accused. There are no adequate and special reasons to award less than the minimum sentence prescribed under the Act. The victim was a child aged about three years. The accused was a grown up person who resided in the neighbourhood of the family. He betrayed the trust of his neighbours and ravished a minor innocent kid who was unaware of the consequences of the heinous act.

10. In the light of the above discussion, the appeal lacks merits and is dismissed. The conviction and sentence of the appellant are maintained.

11. Trial Court record be sent back forthwith.

12. Crl.M.B.No.536/2010 stands disposed of as being infructuous.

(S.P.GARG)
JUDGE

JANUARY 28, 2013

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