

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

RESERVED ON : April 01, 2014

DECIDED ON : May 16, 2014

+ CRL.A. 975/2011

JAGMOHAN @ JAGGA Appellant
Through : Ms.Rakhi Dubey with Mr.Anuj Pal,
Advocates.

STATE Respondent
Through : Mr.M.N.Dudeja, APP for the State.

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

S.P.GARG, J.

1. The appellant-Jagmohan @ Jagga questions the legality and correctness of a judgment dated 11.08.2010 in Sessions Case No.83/09 arising out of FIR No.112/09 registered at Police Station Khyala by which he was convicted under Section 367/377/307 IPC. By an order dated 27.08.2010, he was sentenced to undergo RI for six years with fine ₹20,000/- each under Sections 367/377 IPC; and RI for ten years with fine ₹50,000/- under Section 307 IPC. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case, as reflected in the charge-sheet, was that on 19.05.2009 at about 10:00 pm at Gali No.1, Vishnu Garden, Delhi, the appellant kidnapped Chaman, aged 12 years, and committed carnal intercourse behind the bushes situated on the road leading towards Paschim Vihar. He also inflicted injuries to the victim in an attempt to murder him. Daily Dairy (DD) No.4A (Ex.PW-8/A) was recorded at Police Station Khayala at 12:15 (night) on getting information about a quarrel at RZ-T-156, Vishnu Garden. The investigation was assigned to SI Narayan Singh. At 12:40 (night) DD No.5A was recorded to the effect that Chaman has been admitted in DDU hospital in an injured condition. SI Narayan Singh went to the spot and came to know that the injured had already been shifted to Safdarjung hospital from DDU hospital. On 22.05.2009 after recording victim-Chaman's statement (Ex.PW-5/A), FIR was lodged by sending rukka (Ex.PW-8/D). Statements of witnesses conversant with the facts were recorded. The appellant was arrested on 23.05.2009 and pursuant to his disclosure statement (Ex.PW-4/B), clothes which he was wearing on the day of incident were recovered. After completion of investigation, a charge-sheet was filed against the appellant; he was duly charged and brought to trial. The prosecution produced nine witnesses to substantiate the charges.

In 313 statement, the appellant pleaded false implication and denied his complicity in the crime without examining any witness in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the appellant has preferred the appeal.

3. The appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of a child witness tutored by his brother and relatives. The prosecution did not explain the undue delay in lodging the FIR. Initially, the victim did not disclose commission of offence under Section 367/377 IPC. Subsequently, he improved the version at the instance of his family members and one Bijender with whom the complainant had a quarrel few days before. No statement of the child was recorded under Section 164 Cr.P.C. The appellant was unknown to the victim and the Investigating Officer did not move any application for holding Test Identification Proceedings. No injuries were found on the body of the victim or of the appellant to infer commission of offence under Section 377 IPC. Learned Additional Public Prosecutor urged that the child witness has fully supported the prosecution and there are no sound reasons to disbelieve him.

4. The occurrence in which the victim-Chaman sustained injuries on head took place at about 10:00 pm. Chaman became unconscious after sustaining injuries and from the spot went to his house at about 12:00 (night). Soon thereafter, he was taken to Deen Dayal Upadhyaya hospital and was medically examined by MLC (Ex.PW-6/A). It records the arrival time of the patient at around 12:30 am with the alleged history of 'physical assault'; the patient was conscious and oriented. PW-6 (Dr. Dinesh Kumar) proved the MLC (Ex.PW-6/A). On the basis of CT scan of head, he opined the nature of injuries as 'grievous'. Injury given by ENT doctor was 'simple' in nature. In the cross-examination, he revealed that the patient was brought by HC Pratap Singh. PW-7 (Mr.Navratan), victim's brother, deposed that when Chaman reached home at 11.00 pm, he was in injured condition. He informed the police at 100 and took him to DDU hospital where he remained under treatment till discharge on 21.05.2009. PW-5 (Chaman) in his statement (ExPW-5/A) given to the Investigating Officer on 22.05.2009 gave detailed account as to how and under what circumstances, he was beaten by the appellant with fist and blows and how he hit him by a stone on his head. While appearing as PW-5, in Court statement, Chaman implicated Jagmohan @ Jagga for causing

injuries on his head by a stone. The appellant did not dispute the injuries sustained by the victim in the cross-examination. The child victim was not expected to fake the incident in which he suffered grievous injuries on vital organ and let the real assailant to go scot free; to falsely name an innocent one with whom he had no prior animosity. The appellant did not give plausible explanation to the incriminating circumstances in 313 statement. He did not offer any reason as to how the quarrel had originated prompting him to hit Chaman by a stone. He also did not give reasonable explanation about his presence with the victims at the spot at odd hours.

5. It is true that initially the child did not reveal commission of unnatural offence by the appellant. PW-7 (Navratan) testified that after discharge from the hospital on 21.05.2009, when they were on way back to their house, Chaman told him that Jagmohan @ Jagga has committed 'wrong' act with him. He again contacted the police and disclosed about the development. Chaman was again taken to hospital where he was medically examined. PW-6 (Dr.Dinesh Kumar) has corroborated the version and deposed that on 21.05.2009, the patient was brought by SI Narain Singh and he was medically examined by him at 09.15 pm vide MLC (Ex.PW-6/B). The patient had told him that sexual or anal sex was

done with him about two days back. In the statement (Ex.PW-5/A) recorded on 22.05.2009, Chaman gave vivid description of the circumstances in which he was allured to be taken from the spot by the appellant to take food in a hotel. He described the occurrence in detail and disclosed how and in what manner the appellant committed anal sex with him. In his testimony as PW-5, he deposed that when he was playing outside in the gali at about 10.00 pm, the accused who was a resident of the same area i.e. next gali, offered him food at a hotel; took him to Nala Paar, Paschim Vihar inside the bushes and he committed sodomy. When he threatened to inform his parents, the accused picked up a stone and caused injuries on his head. He admitted that when he returned to the house, he did not tell about the incident of sodomy and informed his brother about it after two days of the occurrence. In the cross-examination, the witness stated that the place of incident was at a distance of half an hour walk from his house. It was a secluded place and there was no hotel nearby it. He denied the suggestion that sodomy was committed by one Bijender and the appellant was falsely implicated due to enmity with him. Scrutinizing the testimony of the child witness, it reveals that despite lengthy and searching cross-examination, nothing material could be extracted or elicited to disbelieve the version given by

the child. Nothing has come on record to show if the appellant had any quarrel with Bijender any time; the particulars of the said quarrel have not been disclosed in 313 statement. No such incident of quarrel was reported to the police. The victim is not imagined to exonerate the real culprit and to shift the blame upon the appellant with whom allegedly Bijender had a quarrel few days prior to the incident. The child had not implicated the appellant at the first instance for sodomy. It is true that there is delay of two days in recording the statement of the victim. However, initially the victim's statement could not be recorded as he was not able to speak due to injuries caused on head. The victim being a child aged 12 years, was reluctant to inform his family members about the sexual abuse at the hands of the appellant. Only when he became normal (after two days of the incident), he divulged the information to his brother. Delay has thus been properly explained. It is settled in law that mere delay in lodging the First Information Report cannot be regarded by itself as fatal to the case of the prosecution. The explanation offered by the victim deserves acceptance as in sexual assault cases, often the victim shows reluctance in telling the wrong act to his close friends and relatives due to fear or shame. The court has no valid reasons to disbelieve the child witness who was asked number of questions to ascertain if he was able to give

rational answers and understood the sanctity of oath. After the court was satisfied about the competence of the witness to make statement, it was recorded without administering oath. The witness admitted in the cross-examination that the statement recorded was on the asking of his brother Navratan and his father and nothing was asked from him by the police at that time. From this, it cannot be inferred that the statement before the court was the result of any tutoring. Family members of the victim had no ulterior consideration to tutor the statement for no apparent motive/benefit. The evidence of the witness is to be evaluated as a whole. Chaman had absolutely no reason to falsely implicate the appellant. Injuries sustained by him confirm his presence at the spot. Ocular testimony of the witness finds corroboration in FSL report (Ex.PW-9/A) where human semen was found on victim's underwear (Ex.2c)

6. It is not necessary that there should always be mark of injuries on the penis in the case of a child victim being ravished by a grown up person. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case. The absence of any injury on the anal of the victim may not discredit the statement of the child. No adverse

inference can be drawn for failure on the part of Investigating Officer to hold Test Identification Proceedings. The appellant was arrested at the pointing out of the victim from his house as he lived nearby. In the statement (Ex.PW-5/A), there is a specific mention that the appellant was known to the victim and he was known by the name of Jagmohan @ Jagga. This acquaintance had led the victim to accompany the appellant to get food in a hotel. Besides, the complainant identified the appellant in the Court without any hesitation and it is the substantive evidence. Minor contradictions, discrepancies and improvements highlighted by the appellant's counsel do not shake the basic structure of the prosecution case.

7. Regarding Section 307 IPC, in my view, the evidence adduced by the prosecution did not attract its ingredients. There was no past history of hostile relations between the parties. On the day of incident, the victim had voluntarily accompanied the appellant to get food. The appellant was not armed with any weapon. His only intention to take the child at a secluded place was to sexually abuse him. Only when the child threatened to disclose the appellant's wrong act to his parents, it appears that in a rage he picked up a stone and hit it at the victim which caused injuries on his head. The appellant did not cause multiple injuries

to the victim on vital organs in a repeat assault. The child was able to travel a distance of about half an hour walk from the spot to his residence alone at around 12.00 (night). When taken to DDU hospital, he was conscious and oriented and was discharged on 21.05.2009. The injuries sustained by him were 'grievous' in nature. Apparently, the injuries were not caused with the avowed intention or knowledge to cause death of the child. The offence committed by the appellant for causing injuries was punishable under Section 325 IPC where he voluntarily caused 'grievous' hurt by a blunt object. The conviction of the appellant under Section 307 IPC is accordingly altered to Section 325 IPC.

8. Since the conviction has been altered to Section 325 IPC, the sentence order requires modification. Appellant's nominal roll dated 10.10.2013 reveals that he had suffered incarceration for about four years, four months and fifteen days besides earning remission for eleven months as on 07.10.2013. He is not a previous convict and is not involved in any criminal case. He is a first time offender. Sentence order dated 27.08.2010 reveals that he was aged about 20-21 years on the day of occurrence and was the sole bread winner of his family comprising of his widow mother, handicapped sister and a brother suffering from tuberculosis. Considering these mitigating circumstances, the sentence

order needs modification. The appellant shall undergo RI for six years with fine ₹5,000/- each and failing to pay the fine to further undergo SI for two months each under Sections 367/377 IPC; RI for five years with fine ₹2,000/- and in default of non-payment, SI for one month under Section 325 IPC. The substantive sentence shall run concurrently. The appellant shall have benefit under Section 428 Cr.P.C. The petitioner shall, however, pay compensation of ₹20,000/- to the complainant; deposit it within fifteen days before the Trial Court; and it will be released to the complainant/victim after due notice.

9. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith along with the copy of this order.

(S.P.GARG)
JUDGE

May 16, 2014
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