

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

+ *Judgment Reserved on: May 30, 2016*
% *Judgment Delivered on: June 01, 2016*

+ **CRL.A.850/2015**

SHAHID ALI

..... Appellant

Represented by: Mr.Anwesh Madhukar,
Advocate. (DHCLSC)

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP for the
State with W/SI Cisilia, PS
Vasant Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The instant appeal has been filed by the appellant Shahid Ali challenging the impugned judgment dated 30th May, 2015 whereby he has been convicted for the offences punishable under Section 366 IPC and Section 10 Prevention of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') in FIR No.482/2013 registered at PS Vasant Vihar and the order on sentence dated 2nd June, 2015 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹5,000/- for the offence punishable under Section 366 IPC and rigorous imprisonment for a period of five years and to pay a fine of ₹5,000/- for the offence punishable under Section 10 of POCSO Act.

2. The prosecution case is that on 27th October, 2013 around 1:25 PM, DD No.16A was received informing that a boy who was doing 'galat kaam' with a girl, has been caught at House No.46, Poorvi Marg. On receipt of DD

No.16A, W/SI Asha Singh, PW-7 reached the spot where SI Nand Kishore and Constable Murari Lal were already present. She made inquiry from the mother of the prosecutrix. As the prosecutrix was unable to speak and listen, she recorded the statement of the mother of the prosecutrix.

3. Smt.Vinod, PW-6 mother of the prosecutrix stated that she resides in the DDA Park, Vasant Kunj along with her husband and two children and used to do gardening in the park. She further stated that her husband is physically challenged and the prosecutrix, aged 8 years, is her younger child who is deaf and dumb. On the day of the incident, the prosecutrix was playing in the park. At around 1.00 PM when she returned to the park after buying the medicine, she saw a crowd in the park. When she went towards the crowd, she saw the prosecutrix and a man aged 22-23 years, whose name was revealed as Shahid Ali. Rajesh, PW-1 informed her that Shahid Ali was taking away the prosecutrix by gagging her mouth, to the bushes with the intent of doing a wrongful act. On seeing Rajesh, PW-1, Shahid Ali started running. Thereafter Rajesh called the security officers posted near the Embassy of Israel and with the help of Hawaldar Satyadev Tiwari, PW-2, Constable Surender Kumar, PW-3 and Constable Sonu Kumar Tomar, Shahid Ali was apprehended. She verified the facts with the prosecutrix in sign language who confirmed that Shahid Ali had taken her to the bushes by gagging her mouth with the intention of doing sexual assault/harassment.

4. On the basis of the statement of Smt.Vinod, W/SI Asha Singh prepared the rukka and sent the same for registration of FIR under Sections 363 IPC and 12 POCSO Act. W/SI Asha Singh, PW-7 handed over further investigation to W/SI Cecilia, PW-9. Charge sheet was filed for offences punishable under Sections 363/354 IPC and Section 12 POCSO Act.

Charges for offences punishable under Sections 363/366 IPC and Section 10 POCSO Act were framed against Shahid Ali. Statements of the prosecutrix and other witnesses were recorded during trial whereafter Shahid Ali was convicted and sentenced as noted above.

5. Learned counsel for the appellant contends that the police intentionally did not join any public witness despite the fact that the incident took place in a public park where many public persons were present. There are contradictions in the testimony of PW-1 Rajesh, as during his cross-examination he stated that he did not raise any alarm when Shahid Ali was taking the prosecutrix. However in his examination-in-chief, he stated that he gave signal to one Hawaldar of CRPF by waiving his hand. The learned Trial Court failed to appreciate that there were deviations in the testimony of PW-2 HC Satyadev Tiwari also. In his examination-in-chief, he stated that while he was on duty around the Embassy area, he was called by security guard, however, in his cross-examination, he stated that he had not personally seen Shahid Ali carrying away the prosecutrix. Statement of PW-1 that Shahid Ali was apprehended at the spot by him was contrary to the statement of PW-6 who stated during cross-examination that Shahid Ali was not present in the park when she reached there.

6. Learned APP for the State on the other hand contends that the age of the prosecutrix has not been disputed. Rajesh Singh, PW-1 the security guard has witnessed the incident and due to his timely intervention, the prosecutrix was saved. Testimony of Rajesh Singh is corroborated by the contemporaneous document DD No.16A informing that a boy was doing wrong act with a girl and has been apprehended. The site plan Ex.PW-6/D also corroborates the version of the security guard and the other two

witnesses, that is, Satyadev Tiwari and Constable Surender and thus the ingredients of the offences, Shahid Ali has been convicted for, are established beyond reasonable doubt.

7. PW-6 Smt.Vinod, the mother of the prosecutrix on whose statement the FIR was registered deposed in sync with her statement made before the police. However, during her cross-examination she stated that Shahid Ali was not present in the park when she reached there as he had already been taken to the police station and she saw him when she reached the police station.

8. After satisfying that the prosecutrix PW-5, who was aged 8 years at the time of incident, is capable and competent to depose correctly about the incident, the learned Magistrate recorded the statement of the prosecutrix. She was accompanied by her mother Smt. Vinod, PW-6 and Ms. Meenakshi Mignani, Teacher in Govt. Lady Noise Sr.Secondary School, for Deaf, Firozshah Kotla, Delhi. The deposition of PW-5 in question answer form is as under:

“On S.A.

Qn. Did you go in the park?

Ans. (the mother and Ms.Meenakshi have explained the question to the witness who has nodded her head in Yes).

Qn. Were you taken towards the bushes by the accused after gagging your mouth with his hand?

Ans. (the mother and Ms.Meenakshi have explained the question to the witness who has nodded her head in Yes and has also identified the accused who had been asked to step out of the one view mirror and has now been asked to go

behind the mirror).

Qn. Is it correct that the accused was apprehended by Security Guard Rajesh?

Ans. (the mother and Ms.Meenakshi have explained the question to the witness who has nodded her head in Yes).

XXX by Sh.Asim Ali, Ld.Counsel for accused.

Nil. Opportunity given.”

9. PW-1, Rajesh Singh, Security Guard in Embassy of Israel, the eye witness, deposed that on 27th October, 2013 at about 1/1:15 PM he was on duty at Poorvi Marg (Eastern side) where one of the diplomats was residing. While taking round towards the backside of the residence of the diplomat, he noticed many vehicles parked. On peeping further inside the park, he noticed one person was taking a small girl by gagging her mouth. He gave signal to one hawaldar of CRPF by waiving the hand. The Hawaldar sent two constables. Thus three of them apprehended the person. The accused was taking the girl to the bushes in the park by gagging her mouth. He correctly identified the appellant in Court as accused taking the girl. Thereafter he made a call to 100 number from his mobile phone and in the meantime, people gathered there. During his cross-examination he stated that he did not raise any alarm when he saw the appellant taking away the prosecutrix, however, he gave signal to the Hawaldar of CRPF by waiving his hand who was standing at a distance of hardly 15 steps away from him.

10. PW-2 HC Satyadev Tiwari and PW-3 Constable Surender also corroborated the testimony of PW-6 and PW-1. PW-3 Surender stated that

when he reached the spot along with Constable Sonu Kumar, he saw the appellant lying over the prosecutrix near a pit and had gagged her mouth and was holding her by other hand.

11. PW-8 Dr.Jhanvi, Senior resident, Safdarjung Hospital examined the prosecutrix on 27th October, 2013. She prepared the MLC which is Ex.PW-6/B. She stated that the mother of the prosecutrix refused for the internal medical examination of the prosecutrix.

12. Though learned counsel or the appellant had contended that there are material improvements in the testimony of PW-2 and PW-3 however, these witnesses have not been confronted with the improvements made. There was no need for the prosecution to examine the interpreter for the reason while examining the prosecutrix in Court she was explained by her mother as well with sign language. Moreover the prosecutrix was a deaf and dumb girl who had not learnt sign language as taught in the school but was more attuned to the sign language taught to her by her mother. Even if the statement of the prosecutrix could not be recorded under Section 164 Cr.P.C. the same is not a ground to discard her deposition before the Court which is duly corroborated by the witnesses. Moreover the appellant was apprehended at the spot.

13. From the aforesaid discussion and the fact that the prosecutrix was below 12 years of age, the charge for offences punishable under Section 366 IPC and Section 10 POCSO Act has been proved beyond reasonable doubt against Shahid Ali. The impugned judgment of conviction and order on sentence are upheld. The appeal is dismissed. The appellant will undergo the remaining sentence.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
15. TCR be returned.

(MUKTA GUPTA)
JUDGE

JUNE 01, 2016
‘vn’