

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

% Reserved on: 3rd May, 2017
Decided on: 31st May, 2017

+ CRL.A. 401/2016

JITENDER

..... Appellant

Represented by: Mr.Aditya Vikram, Advocate,
(DHCLSC)

versus

STATE (N.C.T) OF DELHI

..... Respondent

Represented by: Mr. Ravi Nayak, APP for the
State with SI Ravinder Kumar,
PS Prashant Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Jitender challenges the impugned judgment dated 1st April, 2016 convicting him for offences punishable under Sections 354 IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and the order on sentence dated 4th April, 2016 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- each for offences punishable under Section 8 of POCSO Act and Section 354 IPC.

2. Assailing the conviction, learned counsel for the appellant contends that victim could not identify the appellant in the Court. Later when the APP pointed out towards the appellant, victim stated "perhaps" he was the person who misbehaved with her. Statement of the victim was not recorded under Section 164 Cr.P.C. The owner of the Atta chakki was not examined by the prosecution. There being no legal evidence against the appellant, he be

acquitted.

3. Learned APP for the State on the other hand submits that there is no illegality in the impugned judgment of conviction and the order on sentence. The reason why the victim could not identify Jitender in Court was due to the fact that the victim was only six years old at the time of incident and her statement in Court was recorded nearly after 2½ years from the date of incident.

4. Process of law was set into motion on 3rd April, 2013 around 7:10 P.M., when information was received stating that "*Shakti Apartment ke backside servant ne bachi ke saath galat kaam kiya*" The aforesaid information was recorded as DD No. 28A and assigned to PW-6 SI Karan Singh, who along with PW-5 Ct. Mahesh reached the spot and met the complainant/mother of the Victim, who produced Jitender @ Jatin and gave a written complaint as under:

"I am resident of Rohini. On 3-4-13 my daughter was going downstairs then Jiten s/o Durga (servant of Aggarwal Atta Chakki) touch sex of my child with hand as well as by mouth in the stairs. My daughter cried due to this. When we asked her then she explained the incident. When we enquire from nearby flats then we came to know that person came from Aggarwal Atta Chakki. When we go to shop my daughter recognised him in front of police and explained the incident.

I request you to punish him so that he not even think to repeat this act in future."

5. On the basis of the aforesaid complaint (Ex. PW-1/A), FIR No. 177/2013 was registered under Section 354A at PS Prashant Vihar. Jitender

was arrested vide arrest memo Ex. PW-1/B. Charge for offences punishable under Section 8 of POCSO Act and Section 354A IPC was framed against Jitender.

6. During the course of trial, PW-2 Virender Kumar from the school where the victim studied deposed that as per the copy of relevant entry of admission and withdrawal register (Ex. PW-2/A), copy of admission form (Ex. PW-2/B) and the copy of birth certificate (Ex. PW-2/C), the date of birth of the victim is 23rd March, 2007.

7. PW-1, mother of the victim, deposed that on 3rd April, 2013, they all had to go to the doctor as her son was ill. Her husband had gone downstairs with their son. When she was locking the door, she heard the victim crying loudly. She immediately rushed towards her, who was on the stairs. She pacified her, brought her inside the house and asked her as to why she was crying. Her daughter told that the uncle who had then just left was very bad and he touched her underwear, touched his mouth on her face and all over the body. He had also strongly embraced her. When she made enquiries from the neighbours about the person, she came to know that a boy had come from Aggarwal Atta Chakki from the nearby market. She along with her husband and the victim went to the aforesaid shop and victim identified the appellant at the shop as the boy who assaulted her. She stated that the owner of the said shop also confirmed that the said boy had gone to deliver flour at flat which was opposite to their flat.

8. PW-8 the Victim deposed in Court that on the date of incident, she was studying in class III and they were going to the doctor as her brother was unwell. When they were alighting the stairs, her mother remembered something to bring from the house and she went back to get it. In the

meantime, when she started going downstairs, a boy came there, whom she could identify. She further stated that she did not remember rest of the things. When Jitender was shown to her in Court through wooden partition, she stated that she was unable to identify Jitender and submitted that she was unable to recollect the face of the accused. On being asked by the learned APP she further stated that Jitender had caught hold of her and he touched her hands and legs. He did not kiss her. She managed to run downstairs and in the meantime, her mother came there. Her mother had seen Jitender while he was leaving the premises on his bicycle. Then they went to the market where they saw Jitender at the flour mill. When learned Addl. PP pointed out towards Jitender, she stated perhaps he was the person who misbehaved with her. During her cross-examination, she denied the suggestion that her mother had tutored her before the deposition.

9. No doubt, the victim did not identify the appellant Jitender in the Court and even on cross-examination by the learned APP, her identification was not specific. The victim however supported the sequence of events and what transpired to her at the time of incident. In respect of identity of Jitender for having committed the offence alleged, it may be noted that though the portion of testimony of mother of the victim stating that the owner of the shop also confirmed that Jitender had gone to deliver flour at a flat opposite to their flat cannot be read in evidence being hearsay however the rest of her evidence is admissible as res-gestae evidence under Section 6 of the Indian Evidence Act. Immediately after the incident, the victim cried and her mother reached her at the stairs, took her in the house where she narrated the entire incident and it was found out that the person who had come downstairs was a boy from Aggarwal Atta Chakki. Mother of the

victim along with the victim went to the said place, where the victim identified Jitender as the person who had sexually assaulted the minor victim.

10. Dealing with the evidence of res-gestae, Supreme Court in the decision reported as (2011) 7 SCC 130 Krishan Kumar Malik Vs. State of Haryana held-

“34. We shall now deal with Section 6 of the Act, which reads as under:

“6.Relevancy of facts forming part of same transaction.— Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.”

35.Black's Law Dictionary defines res gestae as follows:

“(Latin: ‘things done’) The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present sense impression or excited utterance).”

36. The said evidence thus becomes relevant and admissible as res gestae under Section 6 of the Act.

37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the

investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences.”

11. A Division Bench of this Court in the decision reported as ILR (2009) Supp. 3 Delhi 380 Tejinder Viridi @ Dolly Vs. State dealing with the law of res gestae held-

“128. Section 6 of Evidence Act embodies the principle of law usually known as the rule of res gestae recognized in English law. The essence of the doctrine is that facts, though not in issue, but so connected with the fact in issue as to form part of the same transaction, become relevant and hence admissible. The reason is that the circumstances, facts and declarations which grow out of the main facts are contemporaneous with it and serve to illustrate the fact in issue. In that sense, they can safely be said to be an incident of the event under circumstances, and being made or done under the immediate influence of the principal transaction, characterize or explain the principal transaction.

129. Thus, spontaneity and immediacy of the statements or facts in relation to the fact in issue which are made without premeditation or artifice and without a view to the consequences are admissible, because they are the natural result of the act they characterize or elucidate. To form a particular statement as a part of the same transaction, utterances must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. To put it simply: Everything that may be fairly considered an incident of the event under consideration would be admissible. However, it has to be guarded that there should be no time interval to allow fabrication or to reduce the statements to the mere narrative of a past event. If there is an interval, however slight it may be, which was sufficient for fabrication then the statement is not part of res gestae.

130. The principles relatable to the rule of res gestae are four in number:

I The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto.

II The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

III The declaration and the act may be by the same person, or they may be by different persons, eg, the declarations of the victim, assailant and by-standers.

IV Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.”

12. The incident took place on 3rd April, 2013 and the victim was examined before Court on 19th September, 2015 i.e. nearly more than 2 years and five months after the incident. The reason for delayed examination of the victim is noted in the order sheet dated 30th October, 2014 passed by learned Additional Sessions Judge wherein the mother of the victim who got her testimony recorded and was cross-examined and discharged stated that she does not want to produce the victim in Court for her deposition as the victim is still under fear psychosis and gets afraid in such circumstances. The victim was of tender age of six years. Though she was not able to identify with certainty Jitender in Court, however the same does not nullify the evidence of the mother of the victim who though not an eye witness but was associated with the victim soon after the incident and the events that unfolded thereafter.

13. The explanation of Jitender in his statement under Section 313 Cr.P.C. is that he was innocent and falsely implicated by the parents of the victim in connivance with the police officials and that he had been wrongly identified by the mother of the victim. No such suggestion has been given to the mother of the victim stating that false implication was in connivance with the police official though the suggestion of false implication has been given.

14. In view of the evidence of the mother of the victim, the victim and Virender Kumar, who deposed about the date of birth of the victim, this Court finds no illegality in the impugned judgment of conviction and the order on sentence. The appeal is accordingly dismissed. The sentence of the appellant was suspended by the learned Trial Court for filing the present appeal which interim order continued pending hearing of the appeal. The bail bond and surety bond of Jitender are discharged. Jitender will surrender to custody to undergo the remaining sentence.

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

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 31, 2017
‘v mittal’