

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 7th August, 2018

Date of decision : 12.09.2018

CRL.A 1189/2016

MANOJ

..... Appellant

Through Mr.Kanhaiya Singhal, Adv.

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Dharmendra
Pratap Singh, PS Samaipur
Badli

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The present Criminal Appeal No. 1189/2016 filed by the appellant/convict assails the impugned judgment dated 27.8.2016 and order of sentence dated 31.8.2016 of the learned Additional Sessions Judge-01, North (Rohini) whereby the appellant was convicted for an offence punishable under Section 6 of the Prevention of Children from the Sexual Offences Act, 2012 (POCSO) and Section 377 of the Indian Penal Code, 1860 whereby the convict was sentenced to

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undergo rigorous imprisonment for a period of 10 years along with fine of Rs.5000/- and in default of payment of fine to simple imprisonment for a period of one month for the offence punishable under Section 6 of the POCSO Act, 2012 but no separate sentence was awarded to the convict for the offence punishable under Section 377 of the Indian Penal Code with the benefit of Section 428 of the Cr.P.C., 1973 having been granted to the convict. The Delhi State Legal Services Authority (North District), New Delhi was further directed to ensure that the amount of Rs.2,00,000/- was granted to the victim as compensation to provide rehabilitation and compensatory justice.

2. The appellant is in custody and production warrants were issued to procure his presence and he was thus produced on 7.8.2018.

3. The Trial Court Record has been requisitioned and perused.

4. On behalf of the appellant, learned Legal Aid counsel Mr. Kanhaiya Singhal, Advocate, addressed his submissions in support of the contentions made in the appeal to contend that the testimonies of the prosecution witnesses were wholly infirm and inconsistent and did not bring forth the guilt of the appellant even remotely.

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5. On behalf of the State, Ms.Kusum Dhalla, learned APP for the State, contended that the testimonies of the prosecution witnesses established the guilt of the appellant/convict to the hilt of his commission of aggravated penetrative sexual assault on the child victim aged 10 years at the time of sexual assault and that there exists no ground for any leniency whatsoever.

6. Along with the appeal Crl.M.A. No. 19631/16 an application under Section 5 of the Limitation Act, 1963 seeking condonation of 30 days' delay was filed which was condoned vide order dated 15.12.2016. Vide Order dated 8.3.2018 Criminal M.C. 399/18 under Section 389 of the Cr.P.C. seeking suspension of sentence of the appellant till pendency of the appeal was declined. Vide order dated 7.7.2018, the nominal roll of the appellant was called for which indicates that it has been received vide letter dated 30.7.2018 from the Superintendent, Central Jail No.2, Tihar which indicates that the appellant as on 30.7.2018 had undergone a period of four months and 24 days of incarceration with remission of five months 10 days with the unexpired portion of the sentence being five years one month and 26 days if the fine of Rs.5000/- imposed was paid. Apparently, the

said fine imposed vide the impugned order on sentence dated 31.8.2016 has not been paid by the appellant.

7. A perusal of the Trial Court Record and the testimonies of the 13 prosecution witnesses examined indicate that the date of the incident was the night intervening 5/6.3.2014 though apparently it has been mentioned as 5.3.2014 in the FIR EX. PW-12/A-1 and thus is so mentioned in the Charge of allegations framed on 19.8.2014.

8. PW-1 'R', the minor child whose identity is withheld and who was not administered oath but whose competence to testify was ascertained by the learned Trial Court before examination on 30.1.2015 indicates that on the date of his examination the minor child was studying in Standard VI in a school opposite Alipur Police Station and stated that he was born in the year 2003 and he had two brothers inclusive of himself and two sisters. On examination of the minor child who on being asked by the learned Trial Court as to whether one should speak the truth or lie, replied that one should speak the truth, and the learned Trial Court concluded that he was a competent witness but did not administer him oath observing to the effect that the child would not understand the sanctity of the same in view of his tender

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age. The testimony of this child witness is to the effect that his father had gone to the native village and thus he was residing with his uncle Vishwadev (PW-2) in a farm where his uncle was also working as a farmer and on 6.3.2014 he had just finished his dinner and was about to sleep and at that time the convict Manoj, the appellant herein, came there and took him to the roof and took off the clothes of the minor child/PW-1) and took off his own clothes and then inserted his penis into the child's anus and at that time he shouted for help and nobody listened to him and then the child slept on the roof and felt pain and was unable to walk properly and the next morning he got up and went to the school since he was not feeling well and one of his uncles Gyan had taken him to the doctor and then he had taken a cup of tea and also had two-three biscuits and that the child had then informed Gyan about the entire incident and according to the child witness, his uncle Gyan informed the police. The minor child stated that he was well acquainted with the accused and thus identified the accused as being the culprit as he was working as a security guard after his father went to the native village,. He further stated that he himself was produced before the Court of the learned Metropolitan Magistrate where his

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statement was recorded and he (PW-1) identified his signatures on the statement Ex.PW-1/A and stated that he could identify the accused if shown to him and he correctly identified the accused in the Court during his testimony on 30.1.2015.

9. On being cross-examined by the learned counsel for the accused, this witness stated that his statement was recorded in the police station on 6.3.2014 and that Gyan met him at Khera Kalan and that he, the child did not know what he does and he stated that he did not know the name of the gunman employed at the farm house. He further stated that he was going to school the next morning after the incident after taking a bath and had not told about the incident to anyone and had left the school at 1 p.m. and was going to seek medical aid with another acquaintance Haripal on a cycle and on the way he met Gyan uncle and that he however had not informed about the incident to Haripal and did not inform the incident to the doctor who attended him and for the first time he had narrated the incident to Gyan uncle and that he was taken for a medical check up to the hospital by police officials.

10. PW-2 put forth is Vishwadev who was the uncle of the victim

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with whom the minor child was living and he stated that he had given medical aid to the child and thus he (PW-2) had gone back to his house at Samaipur Badli, Delhi and on being cross-examined on behalf of the accused, i.e., the appellant herein, the witness stated that the victim was not residing with him but was residing at the farm of the accused, i.e., the appellant herein and that the father of the victim had told him to take care of him

11. PW-3 examined by the prosecution was HC Ramdhan No. 3172/OD who registered the FIR on receipt of the rukka.

12. PW-4 examined was Dr. Meet Kumar, CMO, Dr.BSA hospital, Rohini, who identified the signatures at Point 'A' being that of signatures of Dr. Kaustuv Kiran on the MLC dated 21.3.2014 bearing No. 3589/14 of the child (EX-PW-4/A). The MLC EX-PW-4/A indicates that the child patient was brought for examination with the alleged history of sexual assault on 5.3.2014 as informed by the Investigating Officer and the MLC was prepared on 6.3.2014 at 10:40p.m. vide MLC No. 3210/14 and samples had been collected then. The MLC No.3210/14 Ex.PW-6/B indicates that the male child PW-1 aged 10 years had been brought to the hospital with the alleged

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history of unnatural sexual assault at about 10:44 p.m.. It was observed further that proper history was not available, that there was no obvious external injury seen and that the samples, i.e. perianal swab, anal swab and a brown colour underwear of the child had been taken from the victim and handed over to the Investigating Officer.

13. PW-5 examined was Head Constable Rajinder Singh who stated that on that day i.e., 6.3.2014, he was on patrolling having been posted at PS S.P. Badli as Beat Officer at PP Khara Kalan and one of the public person told him that at Goyal Farm House, a child was sexually assaulted and when he reached there he found public persons present and one of them told him that the person standing near the wall was the same person who had sexually assaulted the child. The said person was apprehended with the help of the public and the beat constable and thereafter he was taken to the police station and thereafter was handed over to the Investigating Officer SI Kaptan. He further testified to the effect that SI Kaptan asked him to take the victim to the BSA Hospital for his medical examination and thereafter the Investigating Officer arrested the accused vide memo EX.PW-5/A and thereafter he accompanied the victim to the police station and

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handed over the pulandas to the Investigating Officer which were seized vide memo Ex. PW-5/B and Ex. PW-5/C. This witness on cross examination by the counsel for the accused stated that all the seizure memos were prepared at the Police Station and not at the spot.

14. PW-6 examined by the prosecution is Dr. Brijesh Patel, CMO, Dr. BSA hospital who testified to having examined a male aged 40 years vide MLC No. 3209/14 and stated that he examined the patient/victim aged 10 year old boy vide MLC No. 3210/14 and observed that the victim had two small cut injuries of size approximately 0.5MM X 1MM X 1MM present on interior part of anal area.

15. PW-9 Dr. Mukesh Kumar, SR Forensic Medicine, Dr. BSA hospital has testified to the effect that on 7.3.2014 a male, namely, Manoj aged 40 years had been brought to the hospital for the potency test and he had conducted the same and testified to Ex. PW-9/A being the report prepared by him.

16. Ex. PW-9/A indicates that it was opined by Dr. Mukesh Kumar that there was nothing to say that the person examined was unable to perform sexual intercourse.

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17. 'A', PW-7 the father of the minor child 'R' was examined on 13.5.2015 who testified to the effect that his son was aged about 12 years and that he PW-7 was working as a Guard in the Goyal Farm situated at Budhpur, Alipur and his son used to reside with him and used to study at a school (identity having been withheld), stated that he had gone to his native village for the marriage of his daughter, by leaving his son at his room at Goyal Farm as he was having his examinations and had asked his cousin Vishwadev who used to reside in Budhpur to look after his son. He further stated that he had also asked the accused Manoj, i.e., the appellant herein to take care of his son in his absence as he was working as a guard in his absence, i.e., absence of PW-7. He further stated that the accused, i.e., the appellant herein, used to sleep at the terrace of PW-7's room and on 6.3.2014 his son called him i.e. PW-7 and told him that the accused Manoj had committed wrong act with him and thus PW-7 called his cousin telephonically and asked him to visit his son and to know his well being and PW-2 thus met his son who narrated the whole incident to him and PW-7 stated that he could not return due to his daughter's marriage and later on called his cousin Vishwadev who asked him to

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reach Delhi as soon as possible. This witness stated that on 7.4.2014 he reached at the Goyal Farmhouse and came to know that his son was staying at the Bal Sudhar Grah and he brought back his son who told him that the accused Manoj who was in jail had committed wrong with him. No cross-examination of this witness was conducted on behalf of the accused.

18. PW-8 examined was Ct.Dinesh No.3437/OD, PS S.P.Badli who testified to the effect that on 6.3.2014 he was posted at PS S.P.Badli and was on emergency duty from 8 p.m. to 8 a.m. He further stated that he brought the victim to the police station and thereafter the matter was handed over to SI Kaptan and SI Kaptan arrested the accused vide memo Ex.PW-5/A bearing his signatures at point 'B' and the personal search of the accused was taken vide memo Ex.PW-8/A, bearing his signatures at point 'A'. He further stated that the accused also made his disclosure statement vide Ex.PW-8/B which bears his signatures at point A and was taken to the place of occurrence where the Investigating Officer prepared the pointing out memo vide Ex.PW-8/C which bears his signatures at point A.

19. PW-10 Dr.Priyanka Singh, SR Psychiatry, Dr. BSA Hospital,

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Rohini, Delhi, who on 7.3.2014 examined the patient Manoj, 40 years vide OPD Card bearing No. 3209/14 Ex.PW-10/A that the patient, i.e., a reference to the accused, i.e., the appellant herein being a regular user of alcohols, with alcohol intake present.

20. PW-11 Madan Mohan, the Chowkidar who used to work at Goyal Farm House, Badshahi Road, Khara-Kalan, stated that on the date of the incident the victim was residing with him PW-11 as the child's father had gone to his native village and after 1 to 2 months of the incident the Investigating Officer had come to investigate the case and he (PW-11) had shown the room where the victim 'R' was residing and where the wrong act was committed with him, but stated that he PW-11 did not know anything about the case.

21. PW-12 examined by the State was SI Kaptan, the Investigating Officer of the Case who supported the prosecution version in *toto* as set forth in the charge sheet and testified to Ex.PW-2/A being the statement of uncle of the victim recorded by him, Ex.PW-12/A being the rukka attested by PW-12 on the statement of the uncle of the victim Ex.PW-2/A and testified to EX.PW-5/A being the arrest warrant of the accused, Ex.PW-8/A being the personal search memo,

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and Ex.PW-8/B being the disclosure statement of the accused. *Inter alia* PW-12 testified to Ex.PW-12/B being the site plan of the spot prepared at the instance of the victim whereafter he came back to the police station and he along with HC Rajinder and Ct. Dinesh took the accused at the spot, i.e., Goyal Farm House where he pointed out the place of incident vide pointing out memo Ex.PW-8/C. He further stated that on the same day the statement of the minor child under Section 164 Cr.P.C. was recorded vide Ex.PW-12/C and a copy thereof was obtained by the Investigating Officer on applying for the same vide application Ex.PW-12/D and thereafter the custody of the victim was handed over to his uncle. This witness also testified to the effect that the accused was produced before the concerned Court and sent to Judicial custody on 21.3.2014. The accused was taken to BSA hospital for his potency test and after examination the report was obtained from the concerned doctor Ex.PW-9/A. PW-12 further stated that on 31.3.2014 on his instructions the exhibits of the case were deposited with the FSL by Constable Gulshed Ahmad and the FSL result had been filed on record as Ex.F-1. The investigating officer stated that after recording the statements of the witnesses and

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completion of investigation, he filed the chargesheet in the Court.

22. On being cross-examined, PW-12 denied that he had not taken the signatures of the victim on Ex.PW-12/B.

23. PW-13 examined was Parveen Kumar Singh, the teacher of the Government Boys Senior Secondary School, Alipur and testified to the effect that as per admission Register the child, i.e, 'R' was admitted in class VI on 1.4.2014 vide admission No. 10449 and that his date of birth was mentioned as 26-8-2003 and placed a copy of the certificate in respect of the minor child bearing the signatures of the Principal Sh.Asha Ram of the school on the certificate Ex.PW-13/C.

24. Through his statement under Section 313 Cr.P.C. the accused, i.e., the appellant herein denied the evidence led against him and stated that the father of the victim had left the victim in custody of his cousin and has admitted his medical examination vide MLC No.3209/2014 Ex.PW-6/A and the OPD Card EX.PW-10/A but has denied that he committed any offence against the minor child stating that he had been falsely implicated. He further stated that he was wrongly arrested and that he had made no statement, (i.e., the disclosure statement Ex.PW-8/B). He further stated that no incident

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as alleged had happened and that the witnesses were interested witnesses. Though vide statement dated 19.4.2016 he sought to lead evidence in defence, but no such evidence was led by the accused. i.e., the appellant herein. *Inter alia* the accused had stated that he was innocent and reiterated that the witnesses who testified against him were interested witnesses and that he had been falsely implicated

ANALYSIS

Age of the victim

25. The age of the victim is not disputed. There is no ostensible dispute that the school record of the minor child indicated that his date of birth was 26.8.2003 and that he was a "child" within the meaning given under the POCSO Act, 2012 on the date of the incident, i.e., 5.3.2014/6.3.2014

Delay in registration of the FIR

26. The incident has taken place on 5/6-3-14 and the FIR was lodged on 7.3.2014. The father of the minor child was not in Delhi and had gone for his daughter's marriage and the child 'R' could not go for the marriage as he had his examinations and that he had to apprise his uncle about the same is a factor which has to be considered and

cannot be overlooked. The registration of the FIR at 1:15 a.m. on 7.3.2014 thus cannot be termed to be delayed in any manner especially as information to the Beat Officer at PP Khera Kalan was given on 6.3.2014 itself.

**TESTIMONIES CONSISTENT IN RELATION
TO MATERIAL PARTICULARS**

27. The testimonies of the minor child 'R' examined as PW-1 and the uncle of the minor child examined as PW2 are categorical and cogent and consistently clear. The statement of the child witness Ex.PW1/A i.e., the translated version of the Section 164 Cr.P.C., 1973 statement of the child is to the effect to the effect:

"on 05.03.2012 I was sleeping in my room and suddenly a person namely Manoj Kumar took me forcibly at the terrace. He forcibly removed my clothes and sodomized me. He committed wrong act with me for 2-2 ½ hours. I screamed but no one was there. I went from his room and in the morning went to the School. There I felt pain in my stomach. Manoj Kumar has committed wrong act with me. I do not want to say anything else."

28. As rightly observed by the learned Trial Court vide para 31 of the impugned judgment:

"Testimony of the victim, with relation to the incident is reassuring as he has been consistent throughout in describing what the accused did to

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him. Merely the fact that the victim did not testify as to whether he called his father to inform about the incident does not go to the root of the matter. While appreciating testimony of victim, it has to be kept in mind that victim is merely 10 year old boy and description of the act as given by the victim is accurate and is narrated with the understanding of a 10 year old child. Despite the cross-examination of victim no material contradiction came out. No reason has been attributed to him as to why he would falsely allege that accused has committed sexual assault on him."

29. The testimony of PW-1 the minor child, PW-2 Vishwadev the uncle with whom the child lived when his father was away from work, PW-9 Dr. Mukesh Kumar who testified to his report Ex.PW-9/A which indicated that there was nothing to indicate that the petitioner was not potent are all in synchrony, the testimony of PW-2 Vishwadev who was informed of the incident by the father of the minor child as the father had himself telephonically informed the PW-2 of the incident also thus corroborates the prosecution version as also set forth by the PW-7, the father of the minor child examined as PW-7.

30. The testimony of this witness was categorical to the effect that on 6.3.2014 his son called him and told him that the accused/i.e., the appellant herein had committed a wrong act with him whereof he had called his cousin to visit his son who had narrated the entire incident

to him, the testimony of PW-7, the father of the minor child corroborates that he had asked Manoj to take care of the minor child when he was away due to his daughter's marriage and that when he was going to the Goyal Farm House, he learnt that his son was staying in Bal Sudhar Grah and he got his son back and his son told him that Manoj the accused, i.e., the appellant herein had committed wrong act to him.

31. The child 'R' through his statement under Section 164, 1973 recorded on 7.3.2014 was administered oath as the learned Link Magistrate observed to the effect that the child understands the importance and sanctity of the oath during the proceedings under Section 164 Cr.P.C. and deposed on oath also.

32. Through the available record, the testimony of the child 'R' as PW1, his statement under Section 164 Cr.P.C. and the testimonies of the prosecution witnesses thus establish beyond a reasonable doubt, that the accused Manoj, i.e., the appellant herein, that on the night intervening 5-3-2014/6-3-2014 had taken the minor child out of the custody of PW-2 and committed an illegal act of aggravated penetrative sexual assault on him by commission of carnal intercourse.

There is no inconsistency in the testimonies of the prosecution witnesses examined in relation to material particulars. There is no explanation whatsoever that the accused/appellant herein, has put forth in support of his plea of innocence as to why the minor child would falsely implicate him for the commission of a sexual assault. There is no explanation also put forth by the accused as to why Vishwadev the uncle of the victim would falsely implicate the accused nor there is any explanation even sought to be put forth by the accused that he was on any inimical terms with the father of the minor child.

33. The injuries on the interior part of the anal area of the victim as depicted in EX.PW-6/B, the MLC of the child also corroborate the version of the victim that he was sexually assaulted carnally.

CONCLUSION

34. In the circumstances of the case, as rightly held by the learned Trial Court, the guilt of the accused, i.e., the appellant herein qua the commission of the offence punishable under Section 6 of the POCSO Act, 2012 read with Section 377 IPC, 1860 qua the commission of the aggravated penetrative sexual assault in terms of Section 9 (p) of the POCSO Act, 2012 in as much as the child was under the care of the

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accused, i.e., the appellant herein who had committed aggravated penetrative sexual intercourse by having violently committed carnal intercourse against the order of nature with a minor child of the same sex as the appellant herein is established beyond a reasonable doubt. The testimony of the minor child through his testimony on oath as PW-1 and his statement under Section 164 Cr.P.C. are categorical to the effect that the appellant inserted his penis into the anus of the minor child. In these circumstances, the conviction of the appellant herein for the commission of the aggravated penetrative sexual assault by way of carnal intercourse is upheld under Section 6 of the POCSO Act, 2012 and the appeal being devoid of any merit is hereby rejected.

SENTENCE UPHELD

35. During the course of the arguments, the appellant sought mercy. However as rightly held by the learned Trial Court vide the impugned order on sentence for a deterrent sentence in terms of Section 6 of the POCSO Act, 2012 was required in the circumstances of the case, more so, as the appellant herein was in capacity of trust and authority over the child in as much as the father of the minor had left him, i.e., the minor 'R' to his care also apart from leaving the minor child to the

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care of PW-2 and it, is established that the appellant herein had taken the child on the terrace and committed aggravated penetrative sexual assault by way of carnal intercourse with him and that too with a minor aged 10 years.

36. In the circumstances there is no ground for leniency and apart from the same, it is essentially observed that Section 6 of the POCSO prescribes a minimum term of rigorous imprisonment for a term which is not to be less than 10 years and which may extend to imprisonment for life and that the accused, i.e., the appellant herein is also liable to pay a fine and thus the sentence imposed vide the impugned judgment of the rigorous imprisonment for a period of 10 years with a fine of Rs.5,000/- and in default of fine to simple imprisonment for a period of one month for offence under POCSO Act, 2012 is upheld, and the appeal is dismissed.

REFORMATIVE PROGRAMME

37. In terms of the verdict of Supreme Court in *Phul Singh Vs. State of Haryana* in Criminal Appeal No. 506/1979 decided on 10.09.1979 and directions laid down by us in *Sanjay vs. State* 2017 III AD (Delhi) 241, dated 20.02.2017 so that the “*carceral period*

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reforms the convict" it is essential that the following directives detailed hereunder are given to the sentence of imprisonment.

38. The concerned Superintendent at the Tihar Jail, New Delhi where the appellant shall be incarcerated for the remainder of the term of imprisonment as hereinabove directed shall consider an appropriate programme for the appellant ensuring, if feasible :

- appropriate correctional courses through meditational therapy;
- educational opportunity, vocational training and skill development programme to enable a livelihood option and an occupational status;
- shaping of post release rehabilitation programme for the appellant well in advance before the date of his release to make him self-dependent,
- ensuring in terms of Chapter 22 clause 22.22 (II) Model Prison Manual 2016, protection of the appellant from getting associated with anti – social groups, agencies of moral hazards (like gambling dens, drinking places and brothels) and with demoralised and deprived persons;
- adequate counselling being provided to the appellant to be sensitized to understand why he is in prison;
- conducting of Psychometric tests to measure the reformation taking place; and
- that the appellant may be allowed to keep

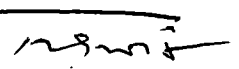
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contact with his family members as per the Jail rules and in accordance with the Model Prison Manual.

39. Furthermore, it is directed that a Bi-annual report is submitted by the Superintendent, Tihar Jail, New Delhi to this Court till the date of release, of the measures being adopted for reformation and rehabilitation of the appellant.

40. Copy of this judgment be also sent to the Director General, Prisons, Delhi and to the Secretary, Law, Justice and Legislative Affairs, GNCTD, Delhi to ensure compliance of the above directions. The copy of this judgment be supplied to the appellant and be sent to the Superintendent Jail, Tihar.

41. The record of the trial Court be returned forthwith.


ANU MALHOTRA, J

SEPTEMBER 12th, 2018/sv