

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

RESERVED ON : 20th FEBRUARY, 2015

DECIDED ON : 24th APRIL, 2015

+ CRL.A.No.577/2003

ASLAM @ AKRAM

..... Appellant

Through : Mr.Shailender Dahiya, Advocate
with Mr.Pradeep Ahlawat,
Advocate along with appellant in
person.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 21.07.2003 of learned Addl. Sessions Judge in Sessions Case No. 63/2001 arising out of FIR No.40/01 PS Khajoori Khas by which the appellant – Aslam @ Akram was convicted under Sections 366/376 IPC, he has filed the instant appeal. By an order dated 22.07.2003, he was awarded RI for ten years with fine ₹ 10,000/- each under Sections 366/376 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 25.02.2001 at about 07.00 P.M. from 20 Foota Road, A-Block, Shree Ram Colony, the appellant kidnapped prosecutrix 'X' (assumed name) a minor from the lawful guardianship of her parents without their consent and thereafter sexually assaulted her. The police machinery was set in motion when victim's father – Mustaq Ahmed lodged Missing Person Report (Ex.PW-3/A) at 07.45 P.M. at Police Station Khajoori Khas. SI Ajay Kumar along with HC Surender, Const. Ram Gopal and Const. Devender, on receipt of the information, immediately went to a deserted plot at Gokalpuri. The appellant was found in the company of 'X' who was lying naked there. The appellant was arrested at the spot. The Investigating Officer after recording statement of the victim's father – Mustaq Ahmed (Ex.PW-3/B) lodged First Information Report by sending rukka (Ex.PW-15/A) at 12.45 A.M. 'X' was taken for medical examination. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the accused for the commission of the aforesaid offences. The prosecution examined sixteen witnesses to establish its case. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The

trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the appellant has preferred the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Indisputably, 'X' aged around 6 / 7 years was kidnapped and sexually assaulted. The crucial aspect for determination is whether the appellant was the author of the crime. The prosecution witnesses have given divergent and inconsistent versions. It has come on record that the appellant was also involved in FIR No. 31/01 of PS Khajoori Khas under Sections 363/376 IPC and Investigating Officer in the said FIR was also SI Ajay Kumar, the Investigating Officer in this case. In that case, SI Ajay Kumar had visited with the prosecutrix in the said FIR to the spot where allegedly, he had sexually assaulted her. This had led the Investigating Officer to suspect the perpetrator of the crime of this FIR to be present at the said plot along with the prosecutrix 'X'. Accordingly, PW-15 (SI Ajay Kumar) along with other police officials immediately, on receipt of DD No.13A (Ex.PW-3/A), went there. Strange enough, the appellant and the prosecutrix 'X' were found at the said very place which was earlier used by the appellant for committing similar offence in case FIR No. 31/01 of PS Khajoori Khas. It is significant to note that the appellant has been acquitted in the said FIR by a judgment

dated 04.10.2002. Learned counsel for the appellant in the written submissions on record has stated that in para No.5 of the said judgment, it was observed *“It appears that the accused was arrested without any rhyme or reason. It is well known that when one robber is arrested, the police tries to involve him in untraced cases of robberies.”* In the said judgment it was further observed that the Investigating Officer had made a clumsy attempt to frame the accused in this case. It is further relevant to note that the appellant was also implicated in another FIR No. 343/2000 P.S. Khajoori Khas under Sections 363/376/506 IPC. As per written submissions on record, the appellant was acquitted in the said case vide judgment dated 04.09.2001 and it was observed by the Court *“Despite sustained cross-examination on behalf of the State the said witnesses have remained firm on the stand of neither naming nor identifying the accused to be the person involved in the incident and parents of the prosecutrix have gone to the extent of blaming the police authorities by saying that they had handed over the real culprit to the police but police had let him go off and fixed the accused (facing trial) in the present case.”* Still in another FIR No. 280/2000 PS M.S.Park under Sections 363/376 IPC, the appellant was acquitted. In para No.9 of the judgment dated 14.07.2003, it

was observed “*The fact that how the accused was apprehended is still shrouded in mystery.*”

4. In the instant case also apprehension of the appellant at the very spot where he had sexually assaulted the victim in case FIR No.31/01 of the same police station is highly suspect. The witnesses have given inconsistent and contradictory statements in this regard. The prosecutrix ‘X’, in her cross-examination, disclosed that the boy who had committed the offence had gone away and he was subsequently apprehended by the police and then showed to her. It belies the statement of the Investigating Officer that both appellant and ‘X’ were found red handed at the spot. As per prosecution case, SI Ajay Kumar along with other members of the police team including PW-4 (Saima) and PW-3 (Mustaq Ahmed) had arrived at the spot soon after lodging of DD No.13A (Ex.PW-3/A). However, PW-3 (Mustaq Ahmed), victim’s father merely deposed that when he had accompanied the police in search of ‘X’, in Gokalpuri, the girl was recovered with the appellant. He revealed that SI Ajay Kumar told him that he had caught the accused when the prosecutrix was being sexually assaulted. Apparently, PW-3 (Mustaq Ahmed) did not see the commission of rape. He was informed of the apprehension of the accused and the nefarious act committed by him by PW-15 (SI Ajay Kumar). As

per PW-15 (SI Ajay Kumar)'s testimony when he allegedly reached the spot, he found the accused present in the corner of a room on the said plot where 'X' was lying naked. He was not categorical to say that he had witnessed the appellant committing rape upon the prosecutrix. In the cross-examination, he admitted that at the time of his apprehension, the appellant was not naked. PW-2 (Const. Ram Gopal) who had accompanied the Investigating Officer gave a different version disclosing that on their arrival at the spot, they found the appellant committing rape upon 'X'. PW-1 (Const.Devender), another member of the raiding team, did not state if the appellant was found doing any objectionable activity at the spot. He merely stated that at the pointing of Saima - victim's sister, the accused was apprehended. PW-11 (HC Surender) deposed that when they went a vacant plot in Gokalpuri Extension, the appellant met them with 'X' there and was identified by Saima – victim's sister to be abductor of her sister. PW-4 (Saima) merely deposed that when she accompanied the police and her father in search of the accused, the accused was seen going out of the door with her sister and was apprehended by the police. The prosecution witnesses have given conflicting statements about the apprehension of the accused and also whether he was indulging in any sexual activity with 'X' that time.

5. The occurrence took place at around 07.00 P.M. when 'X' was allured by the assailant and was sexually assaulted thereafter. In DD No.13A (Ex.PW-3/A) recorded at 07.45 P.M., victim's father – Mustaq Ahmed disclosed that he came to know about the kidnapping of his daughter from his other daughter – Saima aged about 10 years. There is no mention in the DD No. 13A (Ex.PW-3/A) and statement (Ex.PW-3/B) if PW-4 (Saima) was in the company of the prosecutrix 'X' at the time of her kidnapping. PW-4 (Saima) claimed that she and her sister 'X' were going to her father when on the way, the accused took her with him to Gokalpuri. She thereafter went to her father and informed about the kidnapping. The prosecutrix 'X', on the contrary, in examination-in-chief, itself disclosed that none was with her at the time when the accused had taken her to Gokalpuri on the pretext to get her toys. For the first time PW-4 (Saima) in Court statement deposed that the kidnapper who had met them on the way had told that he knew their father and would bring toys for her sister - 'X'. He also wanted to give her ₹ 50 note which she refused. In the cross-examination, she was confronted that her statement (Ex.PW-4/DA) recorded under Section 161 Cr.P.C. where these facts did not find mention. The prosecution witnesses have given contradictory statements about the distance between the place of apprehension of the

accused and the police station. Admittedly, the appellant was beaten and was medically examined. It is stated by the Investigating Officer that the beatings were given by the public persons to the appellant after the occurrence. Apparently, public witnesses who had allegedly beaten the accused were available at the spot. However, for the reasons known to the Investigating Officer, no such independent witness was associated in the investigation. The factum of giving of beatings to the accused finds mention in Ex.PW-3/B also. Delay in lodging the complaint has remained unexplained. 'X' was taken for medical examination at around 12.10 A.M. despite her recovery at about 08.30 or 08.45 P.M. MLC (Ex.PW-8/A) of the appellant records the arrival time for his medical examination at the same very hospital (GTB Hospital, Delhi) at 11.45 P.M. FSL reports (Ex.PW-14/A & Ex.PW-14/B) reveal that human blood of 'A' Group was detected on Ex.1a (Salwar), Ex.1b (Lady's shirt), Ex.3 (Pants). It is, however, not clear if the blood group of the assailant was also of 'A' Group. The semen stains were detected on Ex.1a (Salwar), Ex.1b (Lady's shirt) and Ex.3 (Pants). However, its group could not be established to connect the appellant with the crime. In the disclosure statement (Ex.PW-1/C), it was recorded that earlier also the appellant had committed rape at the same spot with other girls. It was further recorded therein that the

appellant had raped two more victims – A & B (assumed name) in the other FIRs.

6. The investigation is defective and deficient. Statement of the prosecutrix was not recorded under Section 164 Cr.P.C. No Test Identification Proceedings were conducted to ascertain the identity of the assailant when 'X' categorically informed the Court that the boy who had sexually assaulted her had gone away and the accused was brought subsequent to that and was shown to her by the police. PW-3 (Mustaq Ahmed) has gone to the extent to depose that Saima – her daughter had informed that one 'Murseleen' had taken away the prosecutrix. PW-5 (X) further disclosed that the police had made a telephone call to her father and he came later on at the spot. No incriminating material like blood / semen was found at the spot to infer commission of rape there. No injury was found on the private part of the appellant.

7. Appellant's conviction is primarily based upon the statement of the prosecutrix 'X'. The Court is conscious that the sole testimony of a rape victim is enough to base conviction. At the same time, it is settled position of law that the statement of the prosecutrix must be of sterling quality and is found to be credible and convincing. The evidence of a child witness is to be evaluated carefully and with great circumspection

because a child is susceptible to be swayed by what others tell him / her and thus he or she is an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the Court is the voluntary expression of the victim and that she was not under the influence of others. Where there are two possible views one in favour of the accused and other against him, the Court would invariably lean in favour of the view favouring accused.

8. In the light of above discussion, the appellant deserves to be given benefit of doubt. The appeal is allowed. The conviction and sentence are set aside. Bail bond and surety bond stand discharged.

9. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

APRIL 24, 2015 / *tr*