

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

RESERVED ON : 3rd FEBRUARY, 2015

DECIDED ON : 4th MARCH, 2015

+ CRL.A. 96/2012

NANDU SAHANI

..... Appellant

Through : Mr.Chetan Lokur, Advocate.

VERSUS

THE STATE (GOVT. OF NCT) DELHI Respondent

Through : Mr.Navin K. Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant – Nandu Sahani impugns the legality, correctness and propriety of a judgment dated 26.09.2011 of learned Addl. Sessions Judge in Sessions Case No. 49/2010 emanating from FIR No.77/2010 PS Nabi Karim by which he was held guilty for committing offences under Sections 363/354/376 IPC. By a sentence order dated 26.09.2011, he was awarded various prison terms with fine.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 06.07.2010, the appellant after kidnapping ‘X’

(assumed name) aged about 10 years outraged her modesty and sexually assaulted her. On 06.07.2010, Const.Darvesh Singh produced 'X' and the accused – Nandu Sahani before ASI Ashwani Kumar of PS Nabi Karim, who was on patrolling duty in the area. On enquiry, 'X' disclosed that she had accompanied with her father from her village to attend marriage in Delhi. On the way, her father got down at a station to bring water. The train started leaving him behind.

3. 'X' in her statement (Ex.PW-1/B) before Child Welfare Committee implicated the accused for committing rape upon her. FIR was subsequently lodged against the appellant and he was arrested. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Exhibits were sent to Forensic Science Laboratory for examination. Statements of the relevant witnesses were recorded. After completion of investigation, a charge-sheet was filed against the appellant in the Court. To bring home appellant's guilt, the prosecution examined fourteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication. The trial resulted in his conviction. Being aggrieved and dissatisfied, he has preferred the appeal.

4. I have heard the learned counsel for the parties and have examined the record. Appellant's conviction is primarily based upon the

sole testimony of 'X'. Undoubtedly, conviction can be based upon the sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the Court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In the instant case, inherent defects emerge in the evidence adduced by the prosecution to establish the appellant's guilt. Police machinery came into motion when Daily Diary (DD) No.12A at PS Nabi Karim was recorded at 07.30 A.M. by ASI Ashwani Kumar. It records that an individual who had produced 'X' informed that she had separated from her family while travelling in a train. ASI Ashwani Kumar and Const.Sonu took 'X' to Lady Harding Medical College, where she was medically examined. Efforts were made to locate the house where 'X' intended to go at Sunder Nagri. However, she could not locate it. Since the police was unaware of the family members and their place of residence, 'X' was produced before Child Welfare Committee. Daily Diary (DD) No.12A does not record that 'X' was in the appellant's company at the time of her recovery. 'X' did not disclose any foul play to the police that time. Record further reveals that the appellant and 'X' were brought at the police station and after necessary enquiries when PW-9 (ASI Ashwani Kumar) did not find anything wrong, freed the appellant.

5. Before CWC, Mayur Vihar, 'X' was examined by PW-2 (Ms.Mamta Sahai). She directed to conduct her medical examination vide order dated 07.07.2010 (Ex.PW-2/A). Her statement (Ex.PW-1/B), disclosed that she was resident of F-Block, Sunder Nagri and had come to Delhi along with her father to attend the marriage of her Mausi's daughter. On the way, when her father got down at Motihari Railway Station to bring water, the train started and left him behind. In the train, she met an individual who promised to take her to her house after five days. However, the said person took her to his residence and did "Gandi Harkat"; he urinated in her mouth and gagged it. Thereafter, he did something after putting off her pant and she felt pain. It is significant to note that in her statement (Ex.PW-PW-1/B), 'X' did not specifically name the appellant for outraging her modesty or committing rape upon her.

6. In her statement under Section 164 Cr.P.C., 'X' improved her initial version and disclosed that that day, she was to come in a train with her father from Lucknow. When her father went to take water, she remained in the train and her father was left behind at the railway station. An individual who met her at Lucknow told him to accompany him as she had lost her father; she went with him. When they got down at New Delhi, the said man took her to a nearby house where none else was present at

around 10.00 A.M. She further disclosed that the said person urinated in her mouth. She shouted but nobody came for her help. Two ladies were going from the said house that time. She was sexually assaulted by the said man twice and was not provided with any food. Thereafter, the said person took her outside to drop her at her house. On the road, a person selling water asked the accused as to whose girl she was and where he was taking her. The accused ran away. Someone informed the police. Police took her to the police station. She took the police at the house of the accused from where he was arrested.

7. The version narrated by 'X' in her 164 Cr.P.C. statement (Ex.PW-1/A) is in conflict with the prosecution case as well as her statement given before CWC (Ex.PW-1/B). In 164 Cr.P.C. statement, she disclosed that her father had gone to bring water at Lucknow itself and the individual who had brought her to Delhi met her at that railway station. She did not adhere to her earlier version that her father had got down at Motihari Railway Station and they were to come to Delhi to attend the marriage of her Mausi's daughter from Bihar. It further belies the prosecution case that both the appellant and the prosecutrix were found together at the time of recovery of the child. She made vital improvements

regarding sexual assault committed on her person which did not find mention in the statement given to CWC. She did not name the accused.

8. In her Court statement (PW-1), she informed that her mother was residing with her 'Nakli Papa' (step-father) at Durga Puri chowk. Her natural father was in Tihar jail. She introduced a new story and disclosed that she used to live with her 'Nani' in Bihar. On that day, she was scolded by her and was not given food for two days. She ran away from the house and came to Mehersi Railway Station in Bihar. She travelled to Delhi alone by train. When she got down at Delhi Railway Station, the accused met her; offered to leave her at her house after five days and took her to his house. 'X' did not adhere to her earlier version that she had accompanied with her father from Lucknow or Bihar to attend the marriage of her Mausi's daughter or that at Lucknow or Motihari Railway Station, her father had gone to bring water. She did not state that the accused had met her in the train and had brought her to Delhi. These infirmities have remained unexplained.

9. She further stated after sexual assault, next morning the accused had taken unsuccessfully to Durga Puri Chowk to locate her house. When she was brought back to the house, a paniwale uncle (waterman) on her disclosure that she was not related to the appellant,

made a telephone call to the police and they took them to the police station. It is significant to note that identity of 'paniwale uncle' (waterman) has not been established. He was not cited a witness and was not examined. Nothing has come in the statements of the police witnesses if any information about the child with the appellant was given by the said 'waterman' on phone. Again, 'X's assertion to have been taken to police station with the appellant is at variance with her 164 Cr.P.C. statement.

10. In the cross-examination, she reiterated that she performed the journey from her village Mehersi to Delhi alone after leaving the house without informing her 'Nani'. She admitted that her father was not with her that time. She did not offer any compelling reason to allege earlier that her father had missed the train at Motihari Station. She further admitted that there were many residents at the place where the appellant lived. She further disclosed that her mother did not keep her though she had come to meet her.

11. On appraisal of the statement of the child witness, it transpires that she has narrated conflicting and inconsistent version as to how and under what circumstances she arrived at Delhi; whether she was alone or was accompanied by her father from the destination point; whether the appellant met her on the way in the train or at the railway

station; whether she was apprehended along with the appellant or was alone that time. Initially, when 'X' was recovered on 06.07.2010, she did not lodge any complaint with the police for committing rape on her person by the appellant. At the time of her medical examination at Lady Harding Medical College nothing was revealed to the doctor regarding sexual assault. The accused was even taken to police station and after necessary enquiries when no wrong was noticed, he was permitted to go. The appellant did not abscond and was apprehended from his house the next day after 'X' recorded her statement before the Child Welfare Committee. The prosecutrix has made vital improvements in her statement under Section 164 Cr.P.C. as well as Court statement.

12. X's statement has remained uncorroborated. Nothing incriminating was recovered at the residence of the accused. No witness from the neighbourhood was examined to find out if 'X' had stayed at the appellant's house during that night or any unusual activity was noticed there. 'X' did not raise alarm or hue and cry at any stage. On the next day on 07.07.2010, the prosecutrix was with the appellant without any fear. The waterman, a crucial witness, was not examined. It has come on record that attempts were made by the appellant to take 'X' at her residence at

Sunder Nagri but the house could not be located. Had there been guilty conscious of the appellant, he would not have taken her there.

13. 'X' was medically examined after lodging of the FIR at Lady Harding Medical College vide MLC Ex.PW.10/B on 07.07.2010 at 06.00 P.M. PW-10 (Rajesh Meena), Record Clerk proved the MLC prepared by Dr.Priya. As per MLC (Ex.PW-10/B), no external injuries were found on her body. The hymen was intact (one-little finger). Apparently, there is complete variance between the ocular and medical evidence which does not support 'X's version that she was sexually assaulted twice.

14. X's frock and underwear recovered during investigation were not shown to her for identification. FSL reports (Ex.PW-9/C & Ex.PW-9/D) do not incriminate the appellant. No blood was detected on any exhibits including Ex.1a (One dirty frock), Ex.1b (One dirty underwear), sent for forensic examination. Similarly, no semen could be detected on any such exhibit. The accused was also medically examined and no injuries were found on his body.

15. No independent public witness was joined from the appellant's neighbourhood. Police investigation does not record at which place 'X' met the appellant and under what circumstances, he allegedly brought her to his residence.

16. In the light of above discussion, it would not be safe to rely upon the statement of 'X', a child witness, who has deviated from her version at different stages of the proceedings. Her conflicting statement has not been corroborated by any other ocular, medical or scientific evidence. In '*State of Rajasthan vs. Om Prakash*', 2002 (5) SCC 745, Supreme Court held : "The evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied on.....". The appellant deserves benefit of doubt.

17. The appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside giving benefit of doubt. The appellant shall be released forthwith if not required to be detained in any other case. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent Jail for compliance.

(S.P.GARG)
JUDGE

MARCH 04, 2015 / tr