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

DECIDED ON : 13th FEBRUARY, 2015

+ **CRL.A. 632/2012**

SANTOSH Appellant

Through : Mr.M.L.Yadav, Advocate.

VERSUS

STATE Respondent

Through : Ms.Kusum Dhalla, APP with
SHO Dabri Mahender Kr.Mishra
and SI Benkatesh, P.S.Dabri

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.Garg, J. (Open Court)

1. Present appeal has been preferred by the appellant – Santosh to challenge the legality and propriety of a judgment dated 06.08.2011 of learned Additional Sessions Judge in Sessions Case No.16/10 arising out of FIR No.223/09 PS Dabri by which he was held guilty for committing offences punishable under Sections 342/366/376 IPC. By an order dated 19.08.2011, he was sentenced to undergo RI for ten years with fine ₹ 10,000/- under Section 376 IPC; RI for seven years with fine ₹ 5,000/-

under Section 366 IPC and RI for one year under Section 342 IPC. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 11.07.2009 at about 04.00 P.M., the appellant kidnapped prosecutrix 'X' (assumed name) aged about 11 ½ years and sexually assaulted her after confining in his house. The incident was reported to the police on 17.07.2009. First Information Report was lodged after recording victim's statement; she was medically examined. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits were sent to Forensic Science Laboratory for examination. After necessary investigation, a charge-sheet was submitted in the Court. The prosecution examined fifteen witnesses to bring home the appellant's guilt. In 313 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 filed the instant appeal.

3. Learned counsel for the appellant urged that the appellant was falsely implicated due to a previous enmity with the prosecutrix' father. Inordinate delay in lodging the First Information Report has remained unexplained. Various discrepancies and contradictions in the

statements of the prosecution witnesses make it unsafe to base conviction. Learned Addl. Public Prosecutor urged that the prosecutrix has attributed specific role to implicate the appellant and her statement without major infirmities cannot be disbelieved.

4. Admitted position is that the accused is the prosecutrix' 'Mausa' and lives in the vicinity. It is also not denied that he and prosecutrix' father were engaged in the same business. 'X' was sexually assaulted on 11.07.2009 at around 04.00 P.M. by the appellant in his house after he enticed her there on the pretext to count sticks used in the business. PW-4 (Manju), prosecutrix' mother on return from her job in the evening at around 06.00 P.M., noticed blood on X' salwar. When she enquired from 'X' about that, she divulged the incident to her. She took her to Gandhi Nursing Home where she was medically examined and treated. PW-11 (Dr.Juhi Sharma) deposed that on the night intervening 11/12.07.2009 at around 01.00 A.M., 'X' aged about 11 ½ years was brought by her mother with the alleged history of bleeding from vagina following a 'fall from stairs on a sharp object'. The patient could not be examined on the bed due to pain and bleeding. Her examination was done under anesthesia. On examination, she found a clear tear on the right side of vaginal wall about 1 inch to 1 ½ inch long with an active bleeder.

The bleeder was ligated and the tear stitched. She proved her report (Ex.PW-11/A). On 21.07.2009, 'X' again visited the Nursing Home to get her stitches examined. Ex.PW-11/B is the medical record of the patient which was seized by the Investigating Officer vide seizure memo Ex.PW-11/C. Statement of the witness remained unchallenged. Apparently, 'X' had sustained injury on her private part. As per MLC (Ex.PW-14/A) prepared at DDU Hospital on 17.07.2009, her hymen was found torn, small 0.5 x 0.5 cm laceration was seen towards left side of vaginal introitus. It is true that the prosecutrix' mother did not reveal to the doctor at Gandhi Nursing Home about sexual assault. Contrary to that, she informed the doctor that 'X' had sustained injuries due to fall from stairs. Obviously, at that time PW-Manju did not want any police action due to absence of her husband. No question was put to the examining doctor if such an injury in the private part was possible due to fall on a sharp object. There was no occasion for the little child to fall from stairs at 01.00 A.M. Prosecutrix' mother was anxious to wait for the return of her husband before initiation of police proceedings.

5. Prosecutrix 'X's statement as PW-1 is crucial and relevant to infer the appellant's guilt. She gave a detailed account as to how and under what circumstances on 11.07.2009 when she was playing with

children in the street, the appellant allured her to his house on the pretext to count 'teela' (sticks of broom) as she used to do that work. When she went there, the appellant bolted it from inside and sexually assaulted her. It led to bleeding from her private part. The appellant directed her not to disclose the incident to anyone. Since, she was scared, she did not disclose it to anyone and her father was out of Delhi that time. On 16.07.2009, when her father returned, she informed about the occurrence to her mother and on 17.07.2009, First Information Report was lodged on her statement (Ex.PW-1/A). In the cross-examination, irrelevant questions unconnected with the incident were put to the prosecutrix. She was able to respond that previously her 'bua' was married to the appellant. After she went with one Raju subsequently her mausi was married to the appellant. 'X' had no concern with all these family disputes which had occurred much prior to the incident. The fact remains that the appellant was acquainted with the prosecutrix before the incident and they were related to each other. This relationship provided an opportunity to the accused to entice the unsuspecting child on the pretext of counting sticks (of brooms) and to sexually assault her thereafter. 'X' was taken by surprise and was not aware about the impending danger. Her testimony on material aspects remained unchallenged. In the cross-examination, no suggestion was put

to her if the appellant was not present at his house at the relevant time or that no such incident had taken place. No ulterior motive was assigned to the victim to rope him in the ghastly crime. PW-3 (Ram Kumar) and PW-4 (Manju), prosecutrix' parents have supported the prosecution and has corroborated X's statement on vital facts. They denied any animosity with the appellant on account of marriage of prosecutrix' bua or over any money transaction. The prosecutrix, a child, is not expected to fake the incident of rape to defame herself because of the alleged animosity. It was not expected that the prosecutrix's parents would concoct a false allegation of rape simply to implicate the appellant. Had it been so, on 11.07.2009 itself the prosecutrix' mother could have lodged report with the police against him. There are no valid reasons to disbelieve the statement of the prosecutrix. Her testimony in consonance with medical evidence inspires implicit confidence. Unless an offence has really been committed, an unmarried little girl would be extremely reluctant to make such allegations which are likely to reflect on her chastity.

6. Discrepancies in the statements of the witnesses highlighted by the appellant's counsel are not material to affect the core of the prosecution case. It is well settled that there are bound to be some discrepancies between the narrations of different witnesses when they

speak on details and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. The Trial Court has noted down all these discrepancies to ignore.

7. It is true that there is delay of about six days in lodging the report with the police. Again, it is settled position that delay in lodging the FIR cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. Delay per se is not a mitigating circumstance for the accused when accusation of rape is involved. In the instant case, the delay in lodging the report has been explained. The prosecutrix' father was away out of Delhi at the time of incident. The accused was related to the prosecutrix and her family members. It was not unusual for the prosecutrix' mother to wait for the arrival of her husband to decide as to what course of action should be adopted. After his return on 16.07.2009, X' father was apprised of the incident and soon thereafter the police machinery was put into motion. Delay in lodging the report thus is not fatal in the instant case. In '*State of Himachal Pradesh vs. Gian Chand*', AIR 2001 SC 2075, it was observed that it is common knowledge and also judicially noted fact that incidents like rape, more so when the perpetrator of the crime happens to be a member of the family or related

therewith, involve the honour of the family and therefore there is a reluctance on the part of the family of the victim to report the matter to the police and carry the same to the Court.

8. The appellant did not examine any witness in defence to prove any animosity with the X's parents forcing them to falsely implicate him in the instant case. He has taken divergent defence. At one stage, he pleads that the prosecutrix' father nurtured ill-will as X's bua married to him had eloped with Raju, his nephew. At other place, he alleges that X's father did not intend to return ₹ 15,000/- taken from him for getting him married to his sister-in-law. Nothing has come on record as to when any such payment was given to X's father. The defence deserves outright rejection.

9. The Trial Court's judgment is based upon fair appreciation of the evidence and all the relevant contentions of the appellant have been rejected with reasons. Conviction and sentence deserve no interference. Sentence awarded is adequate and needs no modification except that default sentence for non-payment of total fine of ₹ 15,000/- shall be Simple Imprisonment for one month. Other terms and conditions of the sentence are left undisturbed.

10. The appeal stands disposed of in the above terms. 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 information.

(S.P.GARG)
JUDGE

FEBRUARY 13, 2015