

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

RESERVED ON : 3rd AUGUST, 2015

DECIDED ON : 12th AUGUST, 2015

+ **CRL.A. 812/2013**

AFZAL Appellant

Through : Mr.Haneef Mohammad, Advocate
with Mr.Mohd.Mustafa, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI & ANR. Respondents

Through : Mr.Amit Ahlawat, APP.

+ **CRL.A. 754/2013**

AASHIK SAIFI Appellant

Through : Mr.Haneef Mohammad, Advocate
with Mr.Mohd.Mustafa, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI & ANR. Respondents

Through : Mr.Amit Ahlawat, APP.

AND

+

CRL.A. 796/2013

ASLAM

..... Appellant

Through : Mr.Haneef Mohammad, Advocate
with Mr.Mohd.Mustafa, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI & ANR. Respondents

Through : Mr.Amit Ahlawat, APP.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 02.03.2013 of learned Addl. Sessions Judge in Sessions Case No. 153/11 arising out of FIR No. 213/11 PS Kanjhawala by which the appellants – Afzal (A-1), Aashik Saifi @ Afsar (A-2) and Aslam (A-3) were convicted under Section 376 (2)(f) IPC, the instant appeals have been preferred by them. By an order dated 20.03.2013, they were awarded RI for ten years with fine ₹ 5,000/- each.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that A-1 to A-3 committed rape upon the prosecutrix 'X' (assumed name) aged ten years during her stay at C-1/38, Meer Vihar,

Gali No.11, Madanpur Dabas, Delhi. Police machinery came into motion on receipt of Daily Diary (DD) No. 26A (Ex.PW-4/D) and Daily Diary (DD) No.19A (Ex.PW-4/C) received on 09.09.2011; one from PS Nangloi-West and the other from PS Kanjhawala. Information was conveyed at PS Nangloi that 'X' aged around ten years was being sexually abused by her relatives. The investigation was assigned to SI Satish Kumar who with Const. Satyavrat went to the spot. Since the incident had taken place within the jurisdiction of PS Kanjhawala, SI Satish Kumar took 'X' and her maternal grand-parents and produced them there vide DD No.19A (Ex.PW-4/C). The investigation was taken over by SI Ravi Kumar who after recording victim's statement (Ex.PW-1/A) lodged First Information Report on 10.09.2011. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused persons were arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against all the appellants in the Court. The prosecution examined fourteen witnesses in all to establish their guilt. In 313 Cr.P.C. statement, they denied their involvement in the crime and pleaded false implication. DW-1 (Anita), DW-2 (Babloo), DW-3 (Rahisan) and DW-4 (Noor Jahan) were examined in defence. The trial

resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, they have preferred the above said appeals.

3. Learned counsel for the appellants would urge that the Trial Court did not appreciate the evidence in its true and proper perspective and committed grave error to base conviction on the sole testimony of the prosecutrix which was full of discrepancies and infirmities; she has given conflicting versions. At no stage, during stay with the appellants' parents, she lodged any complaint whatsoever to her close relatives. The appellants have been falsely implicated due to enmity. 'X' is a tutored witness. The Trial Court did not give due weightage to the defence evidence. Delay in lodging the FIR has remained unexplained. Learned Addl. Public Prosecutor urged that statement of the prosecutrix is convincing and reliable. She has implicated all the appellants and there are no sound reasons to discard her statement.

4. Admitted position is that victim 'X' was aged around ten years; her date of birth being 11.02.2002 as recorded in the School Leaving Certificate (Ex.PX). Learned counsel for the appellants recorded statement on 30.08.2012 admitting the date of birth recorded in Ex.PX. Apparently, 'X' was below twelve years on the date of incident and even her consent to have physical relations was of no relevance.

5. Indisputably, the victim had lost her father even before her birth. Even her mother had abandoned her soon when she opted to contract second marriage. 'X' and her two elder sisters were brought by their maternal grand-parents at village Barola, Jafarabad, Aligarh, U.P. 'X' stayed there for some period. Thereafter, she was brought by her Fufi Naseem at Delhi to stay with them. She lived with Naseem and her family members for about four years. She used to go to school and was in 4th standard. It is also admitted that the appellants are real brothers and they lived in the said house along with their mother. A few days prior to the incident 'X' was taken by her cousin Babloo (Tau's son) to Rohini where she stayed for some days. From there, she went to her maternal grand-parents at village Barola, Jafarabad, Aligarh, U.P. She narrated the incident to her sisters who in turn informed her maternal grand-parents. Without wasting any time, X's maternal grand-parents lodged the First Information Report in Delhi.

6. DD No.26A (Ex.PW-4/D) recorded at 03.30 p.m. on 09.09.2011 mentions that 'X' was sexually abused by her relatives at Meer Vihar, Aman Vihar. In her statement (Ex.PW-1/A) 'X' gave detailed account as to how she was sexually assaulted on various occasions by the appellants during her stay in the said house. In her 164 Cr.P.C. statement

(Ex.PW-1/B) recorded on 12.09.2011, she again implicated the appellants for committing rape upon her. Innocently, she elaborated that the appellants used to penetrate their male organs but she did not allow them to do so completely by offering resistance. In her Court statement as PW-1 she proved the version given to the police and before the learned Metropolitan Magistrate without major variation. She deposed that after her Fufi brought her to Delhi on the assurance that she would be adopted and married at appropriate stage, after 2 / 3 days, the appellants A-1 to A-3 started committing rape upon her on the roof. It continued regularly for almost four years. In the cross-examination, she denied herself to be a tutored witness. She denied that due to enmity, she has falsely implicated the appellants. Giving further details, she disclosed that earlier after taking her on the roof, the appellants used to offer her money. After realizing it to be a 'wrongful' act, she started putting resistance. She fairly admitted that due to fear of being beaten by the appellants, she did not inform her school friends about the act of rape.

7. On scrutinizing the evidence of the child witness, it reveals that her testimony is consistent throughout. Before recording her statement under Section 164 Cr.P.C. and the Court statement, the learned Magistrate / Presiding Officer had conducted preliminary enquiry to

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ascertain if 'X' was a competent witness and was able to give rationale answers put to her. It was also ensured that the statement being given by her was voluntarily and not under any fear or pressure. After recording their satisfaction, the statements were recorded. No ulterior motive was attributed to the prosecutrix for falsely implicating the appellant for the heinous offence. 'X' who had stayed for sufficient long duration at the appellants' residence had no valid reasons to suddenly rope their close relatives in this crime. It has come on record that the appellants had another brother Akram. 'X' fairly admitted that he did not commit rape upon her. There was no reason for her to implicate the appellants and to exonerate the other one.

8. PW-12 (Dr.Meenakshi Bansal) proved MLC (Ex.PW-12/A) prepared by Dr.Pooja who medically examined her on 09.09.2011. At the time of her examination 'X' was running temperature 101.0 degree F; her hymen was found torn (old tear). Apparently, 'X' was sexually abused during her stay at the appellants' residence. None of them has explained as to how and under what circumstances, 'X' lost her virginity at that tender age. Suggestion has been put in the cross-examination to PW-11 (SI Ravi Kumar) that whatever incident had happened with 'X', it was at her Tau's house. The appellants or her family members cannot shirk their

responsibility to take proper care of 'X' when they had brought her for her well-being. No action whatsoever was taken at any stage by the appellants and her family members against any other alleged rapist. Medical evidence is, thus, in consonance with X's ocular testimony.

9. PW-2 (Mumtaz) and PW-3 (Mohd.Nizamuddin) are the X's maternal grand-parents. After coming to know about the horrendous act and that too by their close relatives during victim's stay with them, they promptly rushed to Delhi to lodge First Information Report. PW-2 (Mumtaz) denied that since she was aware that X's father had immovable property, false case has been lodged to grab it. It was, however, not elaborated as to how the maternal grand-parents of the prosecutrix were to grab the immovable property left by X's father. In any case, the appellants or their family were not going to receive the said property. Details of the said immovable property have not been divulged. It is also unclear as to who is in possession of the said property, and if so, since when. PW-3 (Mohd.Nizamuddin) denied that X's father was having any property. He, however, disclosed that her grand-father had two bighas of land.

10. PW-11 (SI Ravi Kumar), the Investigating Officer, denied that 'X' was under the pressure of her maternal grand-parents. He denied that the incident had happened at the house of X's Tau. Entirely divergent

suggestion was put to PW-3 (Mohd.Nizamuddin) in the cross-examination that he wanted to call back 'X' and when her Fufa and Fufi declined to do so, he implicated the appellants. The defence deserves outright rejection; it inspires no confidence. X's maternal grand-parents had nothing to do with any property dispute and for that petty issue, they were not imagined to level serious allegations of rape to bring a child of tender age into disrepute. Unless such an incident has really been happened, parents or other family members of the victim would be highly reluctant to say so. During X's stay with the appellants for a considerable time, PW-2 (Mumtaz) and PW-3 (Mohd.Nizamuddin) never had any complaint against their conduct and behavior. Only when 'X' apprised them about her plight and declined to return to the residence of the appellants, the police machinery was put into motion. The accused and her family members have not offered any plausible explanation as to what had prompted or forced 'X' to desert them and to return to her maternal grand-parents after staying and studying for sufficient time with them. Had the conduct and attitude of the appellants and his family members being fair and cordial towards 'X', she had no reasons to make departure from Delhi. Had there been any ill-will or animosity, PW-2 (Mumtaz) or PW-3 (Mohd.Nizamuddin) would not have permitted 'X' to stay with them and

had not taken so long to lodge the report with the police. They would not have permitted 'X' to suffer the trauma of repeated sexual assault for so long. If the prosecution had an intention of really planting a false story of rape, it is highly improbable that they would have created a story having a huge time gap between the days of incident and the date of lodgment of the FIR. If it were a well thought concocted story so as to lodge a false case, obviously, the prosecution would not have taken the risk of giving a huge time gap.

11. 'X' has categorically and affirmatively implicated the appellants. No reason exists as to why a child of her age would get an innocent person named for an offence which was indisputably committed on her. It is settled position of law that the evidence of a child witness cannot be rejected out-rightly but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him / her and a child witness is an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the Court is voluntarily expression of the victim and that she was not under the influence of others. As observed above, there was no sound reasons for the maternal grand-parents to tutor her to implicate the appellants who were X's close relatives. When the evidence of PW-2

(Mumtaz) and PW-3 (Mohd.Nizamuddin) coupled with medical evidence is taken into consideration, it becomes crystal clear that the accusations made by 'X' are cogent, credible and have grain of truth and the same were not in any manner could be said to be influenced by any tutoring. A child staying with the appellants and dependant upon them for all her needs is not expected to resist the act of sexual assault. Moreover, she was allured with money for the wrong act. Merely because she did not raise alarm or report the incident to anyone, it does not discredit her version. Sole testimony of the prosecutrix if convincing and credible can be the basis of conviction without any corroboration.

12. The Trial Court has discussed all the relevant aspects minutely. The defence witnesses are all interested witnesses. 'X' was not sexually assaulted to their view. It is only the victim who is aware as to what had happened with her in secrecy. No interference is warranted in the conviction recorded by the Trial Court; it is affirmed. Since the prosecutrix was below twelve years of age, minimum sentence prescribed under Section 376(2)(f) IPC cannot be modified or reduced in the absence of adequate and sufficient reasons. Sentence order dated 20.03.2013 requires modification to the extent that default sentence for non-payment

of fine ₹ 5,000/- shall be one month in all. Other terms and conditions of sentence order are left undisturbed.

13. The appeals stand disposed of in the above terms. 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

AUGUST 12, 2015 / *tr*