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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 31, 2015

DECIDED ON : AUGUST 12, 2015

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CRL.A. 753/2012

VICKY

..... Appellant

Through : Mr.Pramod Kumar Dubey with
Ms.Pinky Dubey, Ms.Megha,
Mohd.Imran and Mr.Shiv Chopra,
Advocates.

VERSUS

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal is directed against the judgment dated 27.01.2011 of learned Additional Sessions Judge in Sessions Case No.363/07 emanating from FIR No.217/07 registered at Police Station Narela by which the appellant-Vicky was held guilty for committing offence under Section 376(2)(f)/363/506 IPC. By an order dated 28.01.2011 he was awarded various prison terms with fine.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 21.04.2007 at about 10.00 p.m. after kidnapping the prosecutrix 'X' (assumed name), aged around 8 years from the lawful guardianship of her parents, the appellant committed rape upon her and criminally intimidated her. On the fateful night 'X' had gone to see a marriage party procession in the neighbourhood where she was enticed by the appellant on the pretext that her mother was calling her. He took 'X' to an isolated place near cremation ground and sexually assaulted her. When PW-3 (Sanjeeta), 'X's mother did not find her in the house at night, she went to search her. 'X' met her on the way and she narrated the entire incident to her. Information conveyed by her to the police was recorded as Daily Diary (DD) No.6 at 7.00 a.m. at Police Post M.Vihar. The investigation was assigned to ASI Satbir singh who with Ct.B.K.Parthy went to the spot. After recording statement of victim's mother (Ex.PW-3/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused was arrested and statements of witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed for commission of the aforesaid

offences against the appellant in the court. The prosecution examined fifteen witnesses to substantiate its case. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication. He did not produce any evidence in defence. The trial resulted in his conviction as mentioned previously. Hence the appeal.

3. I have heard the learned counsel for the parties and have examined the file. 'X' was aged around eight years on the day of incident; the accused has not challenged it. Nothing was suggested to her in the cross-examination if she was more than eight years on the day of incident. Being below 16 years of age even her consent for physical relations (if any) was inconsequential.

4. The occurrence took place at 10.00 p.m. on the night intervening 21/22.04.2007. It being late hours, PW-3 (Sanjeeta) did not report the incident immediately to the police as her husband was far away at Kolkatta that time. However, in the morning at around 7.00 a.m., she put the police machinery into motion and DD No.6 (Ex.PW-4/A) came into existence. In her statement (Ex.PW-3/A) 'X's mother Sanjeeta gave detailed account as to how and under what circumstances 'X' was sexually assaulted by the accused who lived in her neighbourhood. Since the FIR was lodged without inordinate delay, there was least possibility of

the prosecutrix and her mother to concoct a false story to implicate the appellant by name in such a short interval.

5. Material testimony to infer the appellant's guilt is that of prosecutrix 'X'. She recorded her statement under Section 164 Cr.P.C (Ex.PW-12/B) on 24.04.2007. She gave vivid description of the entire episode and implicated the appellant to be the author of the crime. When she appeared as PW-2 in the Court, the learned Presiding Officer conducted preliminary enquiry to ascertain if she was a competent witness and was able to give rational answers to the questions put to her. It also ensured that she was making her statement voluntarily without any fear or pressure. After recording his satisfaction, the learned Presiding Officer recorded her statement without oath. In her Court statement, 'X' fully supported the prosecution and proved the version given to the police and before the Metropolitan Magistrate without any variation. She disclosed that at around 9.30 p.m. she had gone to watch a marriage procession in the neighbourhood. From there she was taken by Vicky to a vacant place behind the cremation ground and there she was sexually assaulted. She further disclosed that on the way to her home after the occurrence, her mother met and she narrated the entire incident to her. In the cross-examination, she disclosed that the cremation ground was far away from

marriage venue and she was tired after travelling to that place. She denied that the accused was falsely implicated at the behest of their landlord. Apparently, no material discrepancy or infirmity could be elicited in her cross-examination. Nothing was suggested to her as to how the landlord was interested in the false implication of the accused. It is unbelievable that a girl of tender age would level such serious allegations just on the asking of their landlord. The accused has not given any particulars of the said landlord including name or that he nurtured any ill-will or enmity against him for any specific reason. PW-11 (Dr.Neeraj) medically examined 'X' who made endorsement on the MLC (Ex.PW-11/A). There were abrasions on mons pubis; hymen was ruptured. It lends credence to the ocular testimony of the prosecutrix and her mother. 'X' was medically examined at around 11.00 a.m. on 22.04.2007. The alleged history records 'rape' by a neighbouring boy. Exhibits were sent to Forensic Science Laboratory for examination. As per FSL report (Ex.PW-15/C) human 'semen' was detected on exhibits 1a (T shirt) and Ex.7 (nikar). It further confirms appellant's involvement in the crime.

6. PW-3 (Sanjeeta), 'X's mother has corroborated her version in its entirety. No ulterior motive was assigned to her to falsely implicate the accused. She denied if the accused was arrested at the instance of her

previous landlord. Again, name of the previous landlord was not disclosed and it was not suggested as to how and why he was interested to implicate the accused. Unless such an incident had really been taken place, parents of a little child would be highly reluctant to level such serious allegations of rape against their own unmarried minor daughter to have reflection on her chastity. Nothing has appeared to infer if 'X' was a tutored witness. There were no compelling reasons for PW-3 (Sanjeeta) to tutor 'X' without any extraneous consideration. Settled law is that the testimony of a child witness cannot be rejected out-rightly. The evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him 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 is no indication if the prosecutrix was tutored; her statement is consistent throughout. The Trial Court has given well reasoned judgment which requires no intervention.

Learned counsel for the appellant in the alternative prayed for modification of the sentence order and to release the appellant for the period already undergone which has exceeded more than nine years. I

find no adequate and sufficient reasons to award sentence less than the prescribed one under Section 376 (2) (f) IPC as the victim was a child, aged around eight years. The appellant who lived in her neighbourhood had a duty to protect her in case of need. Instead of performing his duty as a good neighbour, he ravished her after kidnapping from the lawful guardianship of her parents. The sentence order needs modification to the extent that default sentence for non-payment of fine imposed by the court shall be one month in all. Other terms and conditions of the sentence order are left undisturbed.

7. The appeal stands disposed of in the above terms. Trial Court record (if any) along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

AUGUST 12, 2015

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