

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

RESERVED ON : 25th MAY, 2015

DECIDED ON : 29th MAY, 2015

+ CRL.A.1134/2010 & CRL.M.A.No.4073/2015

UPENDER MUKHIYA

..... Appellant

Through : None.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal is directed against a judgment dated 09.04.2010 in Sessions Case No. 112/2008 arising out of FIR No.263/2007 PS Okhla Industrial Area by which the appellant – Upender Mukhiya was held guilty for committing offence under Section 376(2)(f) IPC. By an order dated 13.04.2010, he was sentenced to undergo RI for ten years with fine ₹ 1,000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 30.03.2007 in between 03.00 to 04.00 p.m. at house No. RZ 113B/3, T.K.D. Extension, New Delhi, the appellant committed rape

upon 'X' (assumed name) aged five years. The police machinery came in motion when Daily Diary (DD) No.23 (Ex.PW-10/B) was recorded on 31.03.2007 at 09.30 p.m. at PS Okhla Industrial Area on getting information from duty constable AIIMS about admission of 'X' in injured condition there who was sexually assaulted near her house. The investigation was assigned to SI Vijay who with Const.Davender went to the hospital. After recording statement of Mithlesh Devi – victim's mother (Ex.PW-2/A), the Investigating Officer recorded First Information Report. 'X' was medically examined and she recorded statement under Section 164 Cr.P.C. The accused was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. After completion of investigation, a charge-sheet was filed against the appellant in the Court. The prosecution examined twelve witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant pleaded false implication and denied his involvement in the crime. He examined DW-1 (Surender Mukhiya) and DW-2 (Harender Mukhiya) in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Appellant's conviction is primarily based upon X's testimony. She, in her Court statement, identified the appellant to be the perpetrator of the crime. She deposed that the accused had inserted his private part into her private part. She was taken inside the house by the accused on the pretext to give toffee when she was playing outside. Material facts deposed by 'X' remained unchallenged and uncontroverted in the cross-examination. A mere suggestion denying the incident was put to the witness. No ulterior motive was assigned to her for making a false statement against him. The accused did not deny his presence inside his house at the relevant time. 'X' aged about five years is not expected to level serious allegation of rape against an innocent one who lived in her neighbourhood. There was no previous animosity to falsely rope him in this case.

4. PW-2 (Mithlesh Devi) proved the initial version given to the police vide complaint (Ex.PW-2/A) without any major variations. She disclosed that when she did not find 'X' in the house at 04.00 p.m., she went outside and saw her weeping. On enquiry, she told to have some pain in her vagina. She took it lightly and thought that it could be due to hot weather. On the next day, she found blood stains on her underwear and on enquiry came to know that the accused had sexually assaulted her.

She narrated the incident to her husband who arrived at 08.00 a.m. after purchasing vegetables from Okhla Industrial Mandi. Since he was concerned with the vegetables to be sold, he told to return at 04.00 p.m. Thereafter, they went to the police station. From there, they were taken to AIIMS for medical examination where her statement (Ex.PW-2/A) recorded. She identified underwear (Ex.PW-2/1) seized by the police. In the cross-examination, she denied any business rivalry between the appellant and her husband. She volunteered that her husband used to sell vegetables while roaming whereas the accused sold vegetables in Chitranjan Park. She denied if any quarrel had taken place among Manoj, her husband and the accused about a month back and because of that the accused was falsely involved in the incident. She disclosed that the accused had come from his native place about 2 or 3 days prior to the incident. Apparently, no material infirmities could be extracted in her cross-examination. PW-6 (Virender Singh), X's father has testified on similar lines. Despite lengthy cross-examination, his version could not be shattered.

5. The incident of sexual assault is not in dispute. Only plea of the appellant is that he was not the perpetrator of the crime and it was the handi-work of someone else. 'X' and her parents were not expected to

spare the real offender and to falsely implicate the accused who belonged to their native place and with whom they did not have any strained relation prior to the incident. It is unbelievable that 'X' would not be interested to bring the real culprit to book. She and her parents were not going to be benefitted by falsely implicating the appellant. His involvement emerged on the very day of the incident. Soon after the occurrence, he fled the spot and could be arrested on 07.04.2007. The accused did not explain as to why he absconded and during this period where he remained. Abscondence is another incriminating circumstance to point an accusing finger against the accused. No strong reasons exist to disbelieve the testimony of child witness who had no ulterior motive to falsely implicate the appellant for such a heinous offence. Unless such an occurrence has really been taken place 'X' and her family members would be highly reluctant to make such serious allegation against an acquaintance.

6. The appellant has not given plausible explanation for his false implication. He has taken divergent and conflicting defences. Nothing has come on record if any serious quarrel had taken place among him, Manoj and X's father. It was not elaborated as to when and on what account the said quarrel took place. No complaint / FIR was lodged about

that incident. For any petty altercation X's parents are not imagined to concoct false allegations which have reflection upon the chastity of their little child. The accused also failed to establish the plea of 'alibi'. He claimed that in the rented room for the last about one month, his cousin along with wife used to stay. No cogent evidence has come on record to show that the rented room of the appellant was in their occupation and the appellant used to live at Sangam Vihar with his cousin. No such suggestion was put to 'X' in the cross-examination.

7. Ocular testimony of the prosecutrix is in consonance with medical evidence. 'X' was taken to AIIMS on 31.03.2007 by her mother. Instead of lodging the report soon after the occurrence, she took the child to AIIMS for her treatment as she felt pain in her vagina. The alleged history records the name of the appellant to be the perpetrator of crime on 30.03.2007 around 03.00 to 04.00 p.m. It further records that the child was having difficulty in urinating. PW-4 (K.Aparna Sharma) deposed that her hymen was freshly torn. FSL reports (Ex.PX and Ex.PX1) show that blood was detected on Ex.2 (One dirty underwear) and Ex.4 (Gauze cloth piece); humen semen was detected on Ex.2 (Underwear); Blood stains were of 'human' origin. It lends credence to X's version of sexual assault.

X's version is consistent throughout, her statement is clean and

unequivocal; in her 164 Cr.P.C. statement (Ex.PW-11/3) recorded on 16.04.2007, she gave detailed account of the incident and named the appellant to be the author of the crime. Before recording her statement, various questions were put to her to ascertain if she was competent to give statement and understood the questions properly to give rationale answers. Certain discrepancies regarding exact place of commission of crime, etc. are not fatal as they do not go to the root of the case. Delay of short period in lodging the FIR has been duly explained by X's parents. Apparently, being belonging to poor strata of society, X's father was worried about the sale of vegetables purchased by him to avoid its destruction. He preferred to go to sell vegetables first and then to lodge report with the police in the evening.

8. The impugned judgment based upon fair and proper appreciation of the evidence supported by relevant judgments needs no intervention. Conviction under Section 376(2)(f) is affirmed.

9. Since the perpetrator of the crime was known to the victim and belonged to their native place, he deserves no leniency particularly when the victim was aged about five years like his daughter. Sentence of ten years cannot be termed excessive. Default sentence for non-payment

of fine ₹ 1,000/- needs modification to the extent that default period would be fifteen days instead of six months.

10. The appeal stands disposed of in the above terms. Pending application also stands disposed of. 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

MAY 29, 2015 / tr