

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

RESERVED ON : 5th MARCH, 2015

DECIDED ON : 17th APRIL, 2015

+ CRL.A.No.1402/2011

MAINUDDIN

..... Appellant

Through : Mr.Krishan Kumar, Advocate.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 09.08.2011 of learned Addl. Sessions Judge in Sessions Case No. 02/2009 arising out of FIR No.240/2008 PS Sadar Bazar by which the appellant – Mainuddin was convicted under Sections 363/376 (2)(f) IPC, he has filed the instant appeal. By an order dated 18.08.2011, he was awarded RI for ten years with fine ₹ 50,000/- under Section 376 (2)(f) IPC and RI for seven years

with fine ₹ 50,000/- under Section 363 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 06.09.2008 at around 08.15 P.M. within the jurisdiction of Police Station Sadar Bazar, the appellant and co-convict – Mohd.Mukeem @ Buchi kidnapped prosecutrix ‘X’ (assumed name) aged 4 years from the lawful guardianship of her parents without their consent and committed rape upon her. ‘X’ had gone outside her house to take some eatables from a shop on 06.09.2008 at about 08.15 P.M. When she did not return as usual, Usman (her brother) went to search her. He brought the child at around 10.45 P.M. She was bleeding from her private parts. The incident was reported to the police. ‘X’ was taken to Lady Harding Medical College for examination. The Investigating Officer lodged First Information Report after recording statement of the victim’s mother (Ex.PW-3/A). Statements of the witnesses conversant with the facts were recorded. ‘X’ recorded her statement under Section 164 Cr.P.C. She also participated in the Test Identification Proceedings and identified co-convict – Mohd.Mukeem @ Buchi in Tihar Jail. After completion of investigation, a charge-sheet was filed against the appellant and co-convict in the Court. The prosecution examined twenty-five witnesses to

establish their complicity in the crime. In 313 Cr.P.C. statement, they denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as aforesaid. It is relevant to mention that co-convict – Mohd.Mukeem @ Buchi was acquitted of the offence under Section 363 IPC and the said acquittal was not challenged by the State. It is unclear if co-convict – Mohd.Mukeem @ Buchi has challenged the impugned judgment.

3. I have heard the learned counsel for the parties and have examined the file. Indisputably, 'X' aged around 4 years was brutally ravished on 06.09.2008 in between 08.15 P.M. to 10.30 P.M. Soon thereafter, she was taken to hospital for medical examination; she suffered 'grievous' injuries and hymen was found torn. She was bleeding from her private parts. The incident was reported to the police promptly soon after the incident. The FIR was lodged on the night intervening 06/07.09.2008 at 03.20 A.M. after recording statement of victim's mother – Farzana (Ex.PW-3/A). In her statement, the complainant gave detailed account as to how and under what circumstances, 'X' was sexually assaulted by two individuals who took her on a scooter. The complainant had no ulterior motive to fake the incident of sexual assault.

4. Appellant's contention primarily is that he was not the perpetrator of the crime and has been falsely implicated. He, however, did not give any reasons for his false implication in the incident. He and co-convict lived in the neighbourhood of the complainant and were acquainted with them. Nothing has surfaced to show if there was any previous animosity or ill-will between the complainant and her family members with the convicts to falsely rope them in this incident. The complainant and her family members had suffered immensely due to horrible incident of rape upon child aged 4 years and were really interested to bring the real culprit to book. They were not expected to falsely implicate the appellant and his associate and to let the real offenders go scot free. The complainant had even not named them initially in the FIR.

5. During investigation, photographs of criminals / suspects were shown to the child to ascertain / establish the identity of the culprit. PW-23 (Insp.Arti Sharma) showed fifteen photographs of the BC / ruffians and suspects to 'X'. Out of the said photographs, 'X' was able to identify the appellant as one of the culprits. PW-3 (Farzana) categorically deposed that the police had shown photographs of criminals to her daughter 'X' and she had identified / recognized the culprits. After the

appellant was identified / recognised by 'X' in the photo shown to her, the police arrested him on 09.09.2008. In her 164 Cr.P.C. statement (Ex.PW-15/B), 'X' named co-convict as the other culprit. The police arrested the co-convict – Mohd.Mukeem @ Buchi who was already in judicial custody in some other case on 06.03.2009. 'X' identified him in TIP proceedings conducted at Tihar Jail.

6. Photo identification is only an aid to investigation where an accused is not known to the witnesses. The Investigating Officers resort to this practice out of prudence to ensure that they have got the right person as an accused. Of course, substantive evidence is the evidence of identification in Court. In the instant case, 'X' without hesitation identified the appellant as one of the assailants in her Court statement recorded on 31.08.2009. She attributed specific and definite role to both the assailants and revealed that the appellant had taken her on foot. Learned Presiding Officer put number of questions to the child witness before recording her statement to ascertain if she was able to understand the questions put to her and give rationale answers. With great difficulty the learned Presiding Officer was able to record her statement. She identified both the appellant and his associate for the crime committed by them. She disclosed that they had taken her behind Idgah and had put off

her clothes. They had also put off their clothes. They had inserted their male organs in her female organ as a result of which she suffered a lot of pain. In the cross-examination, her statement on material aspects remained unchallenged and uncontroverted. Nothing was suggested to her if the appellant was not present at the spot at the time of occurrence or that he had not taken 'X' behind Idgah on the pretext to take her to her father there. The appellant did not claim himself to be present at the relevant time at some other specific place. Nothing was suggested to 'X' if she was a tutored witness or had given the statement at the behest of her parents. In her 164 Cr.P.C. statement (Ex.PW-15/B) recorded on 01.12.2008, 'X' had given vivid description of the incident and has implicated the appellant and his associate. There are no major variations in version recorded under Section 164 Cr.P.C. (Ex.PW-15/B) and the one before the Court. Certain discrepancies are expected to emerge when a reluctant witness aged around 4 years is examined. At the time of her statement before the Court, she was sweating and was nervous. Nothing more could be expected from a child of this age in her examination. She was intelligent to identify appellant's associate in TIP proceedings (Ex.PW-24/B) conducted in Tihar Jail correctly. Appellant's associate had joined nine other under-trials of similar age and physique in the Test

Identification proceedings. The child 'X' identified him to be the person standing at Sl. No. 6 from her left hand side and at 5th position from right hand to be the culprit. It shows how mature and intelligent 'X' was. Law is well settled that the evidence of a child cannot be rejected out-rightly and the same must be evaluated with great circumspection. 'X' has categorically and affirmatively implicated the appellant and his associate to be the authors of the crime.

7. Another crucial witness is PW-4 (Mohd.Sayeed) who had seen the appellant to be in the company of a girl child aged about 4 or 5 years on 06.09.2008 at about 09.00 P.M. He deposed that he had seen the appellant taking a girl aged about 4 or 5 years in his lap near Kabir mandir towards Idgah. The child was covered with a piece of red cloth. On the next morning, when he went to a tea shop near bari masjid, Kasab Pura, Sadar Bazar, Delhi, he came to know that the appellant (who was known to him) had raped a girl child of 4 or 5 years. This witness had no axe to grind to give false evidence against the appellant in the absence of any prior ill-will or enmity. Nothing was suggested to him if he nurtured any grudge against the appellant to make a false statement. The witness was fair to deny the appellant's arrest at his instance or recovery of any undergarment pursuant to his disclosure statement. He was fair enough to

claim that though the documents were signed by him, the police had obtained his signatures on blank papers. The appellant did not divulge the identity of the girl child who was in his lap and also why he had taken the girl child towards Idgah at odd hours. PW-4's testimony lends credence to the prosecution case and corroborates 'X' version.

8. Certain omissions, inconsistencies and contradictions pointed out by the appellant's counsel do not affect the core of the prosecution case and to discredit the statement of the prosecutrix in the presence of overwhelming evidence against him. There is no variance between ocular and medical evidence. The Trial Court has dealt with all the relevant contentions. The impugned judgment based upon fair appraisal of the evidence needs no intervention.

9. Minimum sentence prescribed under Section 376(2)(f) is ten years which cannot be modified / reduced. The Trial Court has imposed fine of ₹ 1 lac in all and the default sentence for its non-payment is one year. Sentence order needs modification to the extent that default sentence for non-payment of fine shall be one month in all.

10. The appeal stands disposed of in the above terms. While maintaining the appellant's conviction under Sections 363/376 (2)(f) IPC, Sentence order is modified to the extent that the default sentence for

non-payment of total fine would be one month only. Other terms and conditions of the sentence order are left undisturbed.

11. 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

APRIL 17, 2015 / *tr*