

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

**RESERVED ON: 6th JULY, 2015
DECIDED ON : 28th SEPTEMBER, 2015**

+ CRL.A. 3/2013

RANJAN KUMAR Appellant

Through : Mr.Abhinav Agnihotri, Advocate
with Mr.Deepak Vohra, Advocate.

versus

STATE (GNCT 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 09.10.2012 in Sessions Case No.120/11 emanating from FIR No.144/11 PS Ghazi Pur by which the appellant – Ranjan Kumar was convicted under Section 376 IPC, he has preferred the instant appeal to challenge its legality and correctness. By an order dated 17.10.2012, the appellant was sentenced to undergo RI for seven years with fine ₹1,000/-. Vide order dated 04.01.2013, this Court issued show cause notice to the appellant as to why the sentence awarded by the Trial Court be not enhanced. Response to it has been filed by the appellant.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 19.05.2011 at about 07.10 p.m. in the toilet of a house belonging to Rakesh Mehto, Sapera Basti Chowk Village Ghadoli, Delhi, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around two years. Intimation of the occurrence was conveyed to the police and Daily Diary (DD) No.31A came into existence. SI Kuldeep Singh along with Const.Ravinder Pal and Lady Const.Preeti Yadav went to the spot and came to know that the victim 'X' had already been taken to Lal Bahadur Shastri Hospital (In short 'LBS Hospital') by PCR officials. After collecting victim's MLC and recording her father's statement (Ex.PW-9/A), he lodged First Information Report. During investigation, the prosecutrix recorded her statement under Section 164 Cr.P.C. The accused was arrested and taken for medical examination. Statements of the 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 laid before the Trial Court against the appellant for commission of offence under Section 376 IPC. The prosecution examined fourteen witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant abjured guilt and pleaded false implication. He did not examine any witness in defence.

After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court, held the appellant guilty for commission of rape. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. It committed grave error in relying upon the uncorroborated testimonies of the child witnesses. Significant contradictions and discrepancies emerging in the statements of the prosecution witnesses were ignored without cogent reasons. Conflicting versions have been given by the prosecution witnesses about the presence of the accused at the spot soon before the occurrence. Relevant and material witnesses were not examined to establish appellant's presence at the spot. 'X' did not suffer any external injuries on her body and it ruled out commission of rape. No witness from the neighbourhood was examined. It is not believable that the appellant would spare the elder sisters of the prosecutrix and ravish a little child aged around two years inside the toilet. 'X' aged about two years was unable to comprehend and her statement is a tutored one. Per contra, learned Addl. Public Prosecutor urged that no sound reasons exist to

disbelieve the statements of the prosecution witnesses including the victim who had no ulterior motive to falsely implicate the accused.

4. Admitted position is that the premises in question were owned by the appellant's cousin Rakesh Mehto who lived on the ground floor. Manoj Thakur, victim's father lived in the rented accommodation in the said premises on the first floor. The appellant who lived at a nearby house was frequent visitor to his cousin.

5. 'X', in the instant case, aged about two years was victim of sexual assault and animal lust of the perpetrator of the crime. She was ravished in the toilet of the house on the ground floor. Soon after the horrendous crime, PCR officials arrived at the spot and took 'X' to LBS Hospital where she was medically examined vide MLC (Ex.PW-8/A) at about 11.00 p.m. In the alleged history, it is specifically mentioned that it was a case of 'sexual assault' at around 08.00 p.m. by a known person (landlord's cousin). PW-8 (Tapsi Chatterjee) who was conversant with the handwriting and signatures of Dr.Nidhi Aggarwal in official capacity has proved the MLC (Ex.PW-8/A) prepared by her. As per local examination, there was redness and swelling over labia majora and hymen was ruptured. Apparently, it was a case of sexual assault upon the prosecutrix. The incident of rape suffered by the victim has not been controverted.

Appellant's only plea is that he was not the author of the crime and it was the handiwork of 'someone' else.

6. The incident took place at around 07.30 p.m. FIR was lodged promptly after recording statement (Ex.PW-9/A) of the victim's father Manoj Thakur and rukka (Ex.PW-12/A) was sent during the night intervening 19/20.05.2011 at around 00.10 hours. In his statement (Ex.PW-9/A), Manoj Thakur gave detailed account as to how and under what circumstances, the appellant who was in X's company soon before the incident sexually assaulted her. The accused was specifically named to be the perpetrator of the crime at the earliest and specific role was assigned to him. Since the FIR was lodged without any delay, there was least possibility of the victim and her family members to concoct a false story in such a short period.

7. On the day of incident, 'X' along with her siblings had gone to play with the landlord's children on the ground floor. PW-3 (Anjali) aged around seven years in her Court statement informed that on that day, she along with her sisters 'X' and Stuti had gone to play with Suraj and Shubham, landlord's sons. The appellant was present in the room that time. The accused asked Suraj and Shubham to go out of the room. She and Stuti also came out of the room while 'X' remained there. When she

tried to call 'X', the accused did not permit her to go out. In the cross-examination, she elaborated that Suraj and Shubham were studying in class 5th and 2nd, respectively. Their mother was sitting outside and was talking to another aunt. She denied the suggestion that the appellant was not present at the spot that time. No reasons exist to disbelieve the testimony of the child witness about the presence of the accused at the spot soon before the incident. 'X' in her 164 Cr.P.C. statement (Ex.PW-14/A) recorded at 20.05.2011 affirmatively revealed about the presence of the accused at the spot. When asked by the learned Presiding Officer whether she was able to identify the assailant, she nodded her head in affirmative by moving it up and down. Before recording her Court statement as PW-7, a preliminary enquiry was conducted by the learned Presiding Officer to ascertain if 'X' was a competent witness, able to understand and give rational answers to the questions put to her. After recording satisfaction that 'X' was able to give statement, her statement in question-answer form was recorded. She not only implicated the appellant for the horrible crime but also identified him without any hesitation. She described him as 'Daruwala'. In the cross-examination, she continued to emphasise that the appellant 'Daruwala' uncle had taken her in the latrine.

When feeble attempt was made to confuse her by putting a question,

‘Aunty had told you to identify the accused in the Court?’, response of the child was that he had taken her in latrine and ‘Mujhe Sata Liya Tha’. Her natural version establishes appellant’s presence along with the victim in the latrine at the relevant time. PW-9 (Manoj Thakur) has also corroborated her on the circumstance of last seen when he informed that on his arrival at the spot, the accused ran away. When chased by him and some public persons, the appellant managed to flee. Soon thereafter, a call at 100 was made and PCR officials arrived after 5 or 7 minutes and took ‘X’ to LBS Hospital. PW-2 (Rani), victim’s mother was apprised of the incident and about the involvement of the appellant soon after the occurrence. It stands established that soon before the incident, the appellant was present at the spot and the victim was in his company. When victim’s sisters were playing with landlord’s children, ‘X’ was hale and hearty. After the appellant managed to send all other children out of the room, he took ‘X’ to the latrine and committed the act. There was no other male member in the room that time. Landlord and his wife were not present in the house at the time of occurrence. The appellant did not produce any evidence in defence to prove his plea of ‘alibi’. In 313 Cr.P.C. statement, he did not disclose as to where else he was present that time. He even did not examine his cousin – Rakesh Mehto to falsify the

prosecution case that on the day of occurrence, he had not visited the house. Landlord's children – Suraj and Shubham were also not examined to deny his presence in the house. The circumstances which have been highlighted by the prosecution witnesses prove that the accused was last seen in the company of the victim. The plea of alibi set up has not been established. In '*State of U.P. vs. Satish*', 2005 Cri.L.J. 1428, Supreme Court noted as follows :

“22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2”

8. Besides it, 'X' consistently implicated the appellant to be the author of the crime. In her 164 Cr.P.C. statement (Ex.PW-14/A), she disclosed that the landlord's brother had taken her to the latrine. She

pointed her hand at her vagina and stated that it was the place where the said person had fondled her. In her Court statement as PW-7, she proved the version recorded under Section 164 Cr.P.C. without variation. She reiterated that the accused to whom she described as 'Daruwala' had taken her in the latrine and had pressed her towards him (Sata liya). The accused thereafter fled the spot and she was taken to the hospital where her undergarments were taken by the doctor. In the cross-examination, she denied herself to be a tutored witness. In response to various questions put by the learned counsel for the accused, she repeatedly claimed that the accused had taken her in the latrine and 'Mujhe Sata Liya Tha'. The accused did not put any suggestion to the victim if he was not present at the spot and had not taken her to the latrine. He did not give any plausible explanation as to what had prompted her to take the tiny girl to the latrine.

9. 'Toilet' in the house is the place where 'X' was found crying and weeping by PW-9 (Manoj Thakur). When her two daughters Anjali and Stuti came upstairs, his anxiety was as to why 'X' who was playing with them did not accompany them. Finding something amiss, he came downstairs to find 'X' and finally located her in the latrine. He was aghast to find that the little girl was weeping inside the toilet. He noticed that her underwear was lying removed. 'X' informed him that she was suffering

from pain in her stomach. Medical evidence is in consonance with the facts proved by 'X' and other prosecution witnesses. Her hymen was found ruptured and there was swelling over labia majora. Since the appellant was in the company of the child at the crucial time, the facts were in his special knowledge as to how and under what circumstances 'X' had sustained injuries on her body and how the hymen happened to be ruptured. Adverse inference is to be drawn against the appellant for not divulging the necessary information under Section 106 Evidence Act.

10. FSL report is another vital incriminating circumstance to connect the appellant with the crime. As per FSL report (Ex.PW-13/A), human semen was detected on Ex.1a (baby's banian); Ex.1b (baby's underwear); Ex.3 (underwear) and Ex.6 (gauze cloth piece). It is true that the prosecution was unable to gather evidence to prove that the human semen detected on these articles was that of the appellant. Nevertheless it corroborates X's version that she was sexually assaulted. The appellant did not furnish any explanation as to how the underwear worn by him got semen stains.

11. Certain insignificant discrepancies or infirmities highlighted by the appellant's counsel are inconsequential as these do not go to the root of the case to affect the core of the prosecution case. No ulterior

motive was assigned to 'X' and her family members to falsely implicate the accused. There was no previous history of hostility between the parties. 'X' and her family members had no extraneous consideration to fake the incident of sexual assault and to name the appellant to be the perpetrator of the crime. They must be interested to bring the real culprit to book. In the absence of prior animosity or ill-will 'X' and her family members were not expected to let the real offender go scot free. Nothing has come on record to show that 'X' and PW-3 (Anjali) were tutored witnesses. Since 'X' was an immature infant girl aged around two years, she was unable to give complete and exhaustive details of the incident. It shows that she was not tutored by her parents. Nothing more can be expected from a child of this age. It is well settled that if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required.

12. The prosecution case is based upon direct, circumstantial and medical evidence and these are in consonance with each other to establish the appellant's involvement in the crime beyond reasonable doubt. The impugned judgment based upon fair appraisal of evidence needs no intervention.

13. The appellant was sentenced to undergo RI for seven years with fine ₹1,000/- by a Sentence Order dated 17.10.2012. No adequate and special reasons have been given by the Trial Court as to why the minimum sentence prescribed under Section 376(2)(f) IPC i.e. ten years was not awarded to the appellant. The victim in the instant case was aged around two years. At this tender age, she was subjected to sexual abuse by the grown up able bodied convict. Sentence order records that the abusers in such type of incident are often sex deprived and mentally pervert. Thus there were no valid reasons to take lenient view. The punishment awarded by the Trial Court is not commensurate with the crime committed by him to award lesser punishment. Showing leniency in such matters would be really a case of misplaced sympathy. Act of the accused was both despicable and reprehensible, reflecting a perverted mind, deserving the befitting sentence.

14. In the instant case, considering the nature and gravity of the crime where the victim of sexual assault is an innocent child of two years there were no mitigating circumstance to award lesser sentence than the one prescribed under the Act. Accordingly, sentence order is modified and the appellant is sentenced to undergo RI for ten years with fine ₹5,000/- and default sentence would be SI for two months.

15. The appeal stands disposed of in the above terms. Trial Court record be sent back with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

SEPTEMBER 28, 2015 / *tr*