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

Reserved on: 26th November, 2015

% **Date of Decision: 16th December, 2015**

+ CRL.L.P. 598/2015

THE STATE

..... Appellant

Through: Ms. Anita Abraham, APP along
with Inspector Rajender Singh,
PS Sahabad Dairy.

versus

GANGA RAM

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R. K. GAUBA, J:

1. Upon cognizance being taken on the report under Section 173 of the Code of the Criminal Procedure, 1973 (Cr.P.C), submitted on conclusion of investigation into FIR No. 272/2012 of Police Station Shahbad Dairy, the respondent herein stood trial in Sessions case No.91/2012 on the charge for offences punishable under Sections 363 & 376 (2)(f), 1860 of the Indian Penal Code, 1860 (IPC) on the allegations that on 11.08.2012 at about 8 am, he had kidnapped a girl child (PW-21) aged about 10 years, daughter of the first informant Dalip Kumar (PW-16) from near her house in Metro Vihar, Phase-I, Holambi Kalan, Delhi and thereafter committed rape upon her during the period from 11.08.2012 till 18.08.2012. By judgment dated

02.12.2014, the learned trial court held that the prosecution had failed to prove its case against the respondent beyond reasonable doubts and, thus, acquitted him.

2. The State has brought this petition under Section 378(3) Cr.P.C praying for leave to appeal seeking to assail the view taken in the impugned judgment about the evidence adduced at the trial.

3. The petition to leave to appeal was preferred with delay of about 150 days and, therefore, an application under Section 5 of the Limitation Act, 1963, CrI.M.A. 1333/2015, for condonation of delay has been filed. However, before issuing notice on the said application, we deemed it appropriate to examine the leave to appeal on merits.

4. The first informant Dalip Kumar (PW-16) and his wife Puja (PW-19) worked as labourers in a factory. Their testimonies show that prior to shifting their residence to Metro Vihar area of Police Station Shahbad Dairy, they were earlier living in village Sannoth, which falls within the territorial jurisdiction of nearby Police Station Narela. The couple (PW-16 and PW-19) had five children, the prosecutrix (PW-21) being the third one. At the relevant point of time, she was studying in Municipal Corporation Primary Girls School in fifth standard. The principal of the said school (PW-1) proved her date of birth as 15.07.2002, on the basis of school records. This evidence along with oral testimony of PW-16 and PW19 prove beyond doubt that the child in question (the prosecutrix) was 10 years old in August 2012 to which the case relates.

5. There is substantive evidence adduced to prove that the prosecutrix had gone out of her house to play sometime around 8 am on 11.08.2012. Since she did not return home, her father reported to the police at 0110 hours on 12.08.2012, vide his statement (Ex PW-16/A) recorded by HC Surgyan (PW-18). In the FIR (Ex PW-2/A), thus registered, Dalip Kumar (PW-16) had expressed suspicion that some unknown person may have kidnapped his daughter. The police took all necessary steps to trace out the missing girl but with no success. On 18.08.2012, at 0914 hours, police control room (PCR) informed police station Narela about information received by them regarding a girl aged about 8 years having been noticed sitting near public school on main road, C-Block, village Sannothe. This information was logged vide DD No.19A (Ex PW-11/A) in the said police station and the matter entrusted to ASI Inderjit Singh (PW-12). The police officer statedly went to the said place where he found the prosecutrix (PW-21) present in the company of public persons. The enquiries of the girl elicited response that she had forgotten the address of her house. As she mentioned the area to be Metro Vihar, further probe by PW-12 brought out that she was the girl in whose respect missing report (Ex PW-2/A) had been lodged in local police station (Shahbad Dairy) earlier by her parents. Her house was located by PW-12 but the parents were found to be unavailable at that point of time. The custody of the prosecutrix (thus recovered) was handed over by PW-12 to HC Surgyan (PW-18).

6. After the prosecutrix (PW-21) had been recovered, she was taken for medical examination to Maharishi Valmiki Hospital, Poothkhurdh, Delhi. Dr. Amit Shaukin (PW-5) examined her at 12:40

pm on 18.08.2012 and noted in the medico legal report (MLC) (Ex PW-5/B) that there were no fresh external injuries. She was then brought before Ms. Meenu Kaushik, Metropolitan Magistrate (PW-22) with the request (Ex PW-22/A) for her statement under Section 164 Cr.P.C to be recorded. After the Magistrate had satisfied herself as to her competence to make a statement, she was examined under Section 164 Cr.P.C. The said statement (Ex PX) shows that the prosecutrix told the Magistrate on 18.08.2012 that she had gone to the house of her friend Aanchal, located ahead of her school and thereafter had lost her way for two days and that the police was informed by father of Aanchal whereupon her father had come to take her back.

7. On 18.09.2012, one month after the recovery of the child, Dalip Kumar (PW-16) submitted a written complaint (PW-3/A) informing the SHO, police station Shahbad Dairy that questioning of the prosecutrix (PW-21) by him and his wife Puja Devi (PW-19) had revealed that she had been taken by Ganga Ram R/o village Sannoth (the respondent) to his house from the shop of Radhe *Baniya* and thereafter he had assaulted her ("*galat kaam*"). He also stated that the girl had earlier not shared this information with the family or the police on account of fear. He stated that since he had earlier lived in Sannoth, he was well acquainted with Ganga Ram (the respondent).

8. The complaint (Ex PW-3/A) was formally taken on record vide DD No.28A (Ex PW-3/B) logged at 06:25 pm on 18.09.2012 by police station Shahbad Dairy. The matter was thereafter further investigated. The prosecutrix (PW-21) was taken to Dr. Baba Saheb Ambedkar Hospital, Rohini where she was examined by Dr. Puja, Senior Resident

(Gynaecologist), with the consent and in the presence of the mother (PW-19). The MLC (Ex PW-6/A), proved at the trial by Dr. Nidhi, Medical Officer (PW-6), had *inter alia* noted that the *hymen* of the girl had been ruptured and there was an abrasion present on the right side of *labia majora*.

9. On 19.09.2012, the prosecutrix (PW-21) was taken for another statement under Section 164 Cr.P.C on the basis of formal request (Ex PW-23/A) made by SI Anju Dahia (PW-4) who had since taken over the investigation of the case. A fresh statement under Section 164 Cr.P.C. was recorded by Mr. Ajay Nagar, Metropolitan Magistrate (PW-23) in question and answer form (Ex PW-23/B). The sum and substance of the said statement under Section 164 Cr.P.C (Ex PW23/B) made by the prosecutrix (PW-21) on 19.09.2012 was that she had gone all alone for playing in a park whereupon she had been taken along by a person from a shop. She would describe the person as an old man (*buddha*), bald (*takla*) with no moustaches or beard, wearing a white vest (*ganji*). She had neither seen the said person earlier nor knew him by name from before. She stated that the said person had taken her to his house where he had removed her lower underwear and made her lie down on his stomach. She stated that he had indulged in an indecent act (*ganda kaam*) with her and had also taken her to be sold. She further stated that he had made her run away from her house at 10 o'clock. She answered in the affirmative to the question as to whether she would be able to identify him, if brought face to face.

10. Besides the prosecutrix (PW-21) and her parents (PW-16 and PW-19), the evidence of some other public witnesses was also

gathered, they including Vinod (PW-10), his wife Puja (PW-9), their landlord Dal Chand (PW-8) and their neighbour Abdul Jabbar (PW-20), all residents of village Sannoth. PW-9 and PW-10, are parents of the girl named Aanchal who is described as a classmate and friend of the prosecutrix (PW-21). The information available to PW-8 and PW-20 is essentially based on what had been discussed by PW-9 and PW-10 with them. The sum and substance of this part of the evidence of the prosecution is that, on 17.08.2012, Aanchal had gone to the market where she had come across the prosecutrix (PW-21) and brought her home. PW-9 and PW-10 were already aware that she (PW-21) had been missing from her house since her mother (PW-19) had paid a visit to their house one week earlier with her photograph, apparently in an effort to search her out. On 18.08.2012, upon this fact being brought to the notice of PW-8 by PW-10 and PW-20, the former is stated to have informed police station Narela which resulted in the girl being restored to the family.

11. During the trial, Dalip Kumar (PW-16) disowned the complaint (Ex PW-3/A) lodged on 18.09.2012 making allegations (against the respondent) of kidnapping and implying sexual assault committed against the prosecutrix (PW-21). His wife Puja (PW-19) who had joined him in the said complaint however stuck to the version. She, *inter alia*, stated that upon the girl being restored (on 18.08.2012) she had found that she was wearing an underwear which was different from the one in which she had gone missing. She stated that she had noted some blood stains on the underwear and when she had tried to take off the clothes of the child, she would not allow her to do so and seemed scared and had cried. She stated that it was 10-15 days after the

recovery that the girl (PW-21) had told her that Ganga Ram (the respondent) had taken her with him from the shop of Radhe Baniya and had committed rape upon her in his house. The prosecutrix (PW-21) in her court testimony identified the respondent as the person described by her as *Buddha* (old man) who had taken her away. She stated that after taking her home he had made her unconscious (*behosh kar dia*) and removed her lower garment (*pant utari*) and then she had suffered pain in her private parts. She stated that she had been confined in the house (*ghar mein band kar dia*) and later he had made her run away. She also added that the respondent had burnt her clothes (which would include her black colored trousers and green frock). She stated that she had gone to the house of Aanchal after the respondent had set her free.

12. The learned trial court did not find the evidence of the prosecution, in general, and that of PW-19 and PW-21, in particular, convincing. In the given facts and circumstances, it is necessary to take note of the prime reasons set out by the trial court for doubting the prosecution case. The following observations (*in para 57 to 58*) need to be quoted in extenso:-

“In order to explain the delay in reporting of rape to the police, it has been contended by learned Addl. PP that the victim was unable to disclose about the matter to any one out of fear. However, the conduct of the mother of the victim does not justify the delay in reporting the matter to the police. From the statement of PW19, mother of the victim, it is brought out that when she had taken the victim home on 18.08.2014 (sic), she had observed that victim was not wearing the same underwear, which she was wearing, when she had gone missing. She (PW-

19) has also deposed that she had found some blood stains on the underwear of the victim and that when she tried to take off the clothes of the victim to give her bath, her daughter i.e. the victim did not allow her to do so and started crying and appeared to be scared. It is not clear from the testimony of PW19 as to when, she observed blood stains on the underwear of the victim for the first time and when she gave bath to the victim, for the first time, after taking the victim back to home, with her on 18.08.2012. If the observations of injuries made by the concerned doctor on the MLC Ex. PW6/A of victim prepared on 18.09.2012, is correct, then it would mean that the victim continued to have injuries on her person/private parts even one month after the incident and a natural logical conclusion arising therefrom would be that she must have had noticeable injuries on her private parts, when she was taken for her initial medical examination on 18.08.2012. However, neither the doctor who prepared her MLC Ex. PW5/B (on 18.08.2012), nor the police officials and the parents of the victim observed any unusual behaviour discomfort or injury on the person of the victim on 18.08.2012. If the victim continued to have bleeding during period intervening 18.08.2012 (day she was recovered) and 18.09.2012 (the day rape was reported), then other persons would have also noted traces of said bleeding and this includes PW9 Smt. Manju and PW10 Vinod (parents of child A) with whom, the victim had stayed over night, before being reported abandoned on 18.08.2012, and PW20 Abdul Jabar, who had given information about victim to PS Narela. It was for the prosecution to prove that the victim had sustained injuries to her private parts on account of sexual assault committed on her between 11.08.2012 and 18.08.2012 and that she continued to bear traces of said injuries till 18.09.2012 by adducing relevant medical and ocular evidence, but the prosecution has failed to do so. Considering that there was a gap of about one month between the first MLC Ex. PW5/B dated 18.08.2012 and second MLC Ex. PW6/A dated 18.09.2012, the possibility of victim having been sexually assaulted by some one,

during period intervening 18.08.2012 and 18.09.2012, cannot be ruled out. In these circumstances, the fact that there is no witness, who had seen the accused kidnapping the victim child and/or having the victim child in his custody/possession between 11.08.2012 to 18.08.2012 becomes very relevant. None of the neighbours of the accused have been examined to establish that the victim was seen near about the house of the accused, let alone in the house of the accused during the relevant period. Even, Radhey Baniya, to whose shop, victim is stated to have gone on 11.08.2012 has not been put forth as a witness to establish the link between the accused and the victim.

XXX....In the present case, the delay of one month in reporting the rape does not stand explained satisfactorily by the prosecution. In fact, PW19 Smt. Pooja, mother of the victim has stated in her deposition that she had been told by the victim after about 10/15 days that accused Ganga Ram had committed rape upon her. The fact that the PW19 Smt. Pooja had been disclosed about the factum of rape by the victim child and she herself claims to have noticed unusual behaviour of victim, while she (PW19) tried to give her bath as also blood stains on her underwear, makes the conduct of PW19 in reporting the matter to the police, after lapse of further period of 15/20 days, does not stand explained. In these circumstances, the possibility of victim child, who was aged only about 10 years being tutored can also not be ruled out.”

13. Having heard the learned counsel for the State and having gone through the record in entirety, we find that the learned trial court has appreciated the evidence properly and has expressed reservations about the proof for justifiable reasons.

14. It is clear from the version of PW-21 in the court, and at the time of her statements under Section 164 Cr.P.C, that she was not acquainted by name or face with the person with whom she may have

gone away, or stayed, from the morning of 11.08.2012 till she resurfaced on 17.08.2012. She was quite categorical on 19.09.2012 that the person was not known to her from before. If so, it is a matter of concern as to how PW-16 would have mentioned the name of the respondent as the perpetrator of the crime in his complaint (Ex PW-3/A) lodged on 18.09.2012. We are unable to fathom any good reasons why Dalip Kumar (PW-16) was not inclined to affirm the facts stated in the said complaint when called to depose in the court. If the respondent was not known to the prosecutrix by name or face, it is not clear how Puja (PW-19) was able to gather this fact from her daughter and pass on the information to her husband.

15. We agree with the view taken by the learned trial court that there has been inordinate and unexplained delay in lodging the complaint (Ex PW-3/A) with the police. If the mother (PW-19) had found bleeding from the private parts of the girl on 18.08.2012, there were reasons to suspect that sexual assault had been committed against her. Nothing of this nature was noticed in the medical examination at Maharishi Valmiki Hospital, Poothkhurdh, Delhi. No discomfort or unusual behaviour was noticed at that time. Since the girl had been restored to the parents one week after having gone missing, they would have immediately lodged report with the police to such effect. If the girl had indeed disclosed the complicity of the respondent in the sexual assault against her 10-15 days after recovery, there was no reason why the parents would wait for another two weeks to pass by before bringing the information to the notice of the police.

16. The incident, if it happened in the manner narrated by the prosecutrix, it would have occurred in broad day light. Though no evidence has been adduced in this regard, given the age of the prosecutrix, we assume that the distance between her house and the shop of the person named Radhe *Baniya* would not be much. If the respondent indeed had taken the child with him to his house, some local persons would have noticed this fact. If we take the testimony of the child on its face-value, she was kept in confinement for not more than one day. The evidence of the parents of Aanchal, supported by their landlord and neighbour, shows that the girl met her said schoolmate in village Sannoth only on 17.08.2012. It is not the version of the prosecutrix that she had been confined by the person who had abducted her for six days. Instead, her version is that she was made to run away from the house of her abductor after one day. If this were the sequence, it is not clear as to where or in whose custody (or care) the girl had remained till 17.08.2012.

17. There are particular aspects to the testimony of PW-21 which make us perturbed and raise doubts. She stated in the course of her statement that her abductor had taken her to put her on sale. It is not clarified as to what is the basis of such allegation to be made. Prosecution has not adduced any evidence that could even remotely confirm this to be a fact. She stated in the court that her abductor had burnt her clothes. This could not be true as the only piece of clothing which had undergone a change, as per the evidence of her mother (PW-19), was the underwear. Noticeably, the theory of clothes having been burnt came for the first time on 19.08.2013, when she was deposing in the court, one year after her alleged abduction. Pertinently, the

prosecutrix after recovery was counselled and had interacted with an NGO before her statement under Section 164 Cr.P.C. had been recorded. It is, therefore, apparent that due and adequate care and caution was taken to ensure that the prosecutrix was not under any internal compulsion, fear and stress or concealing true and correct facts as to the occurrence because of external pressures. On 21.8.2012, the child was produced before the Child Welfare Committee, from where she was handed over in custody of her parents.

18. We also have reasons to doubt the prosecution case about the girl (PW-21) having met her classmate Aanchal in village Sannoth on 17.08.2012 and having found shelter in her house, as deposed to by PW-8, PW-9, PW-10 and PW-20. Their statements are not in *sync* with DD No.19A (Ex PW-11/A) lodged in police station Narela at 9:14 am on 18.08.2012. As per the said record, the PCR had come to know from some source that the girl had been noticed sitting unattended at a public place. This scenario is reinforced by the evidence of SI Inderjit Singh (PW-12) who had lodged report about the action taken vide DD No.70B (Ex PW-12/A) at 3:55 pm on 18.08.2012 in police station Narela. If the girl had been found sitting alone, unattended and without any person taking her care (*laawaris*) at a public place, the version of Aanchal, her parents and two others (PW-8 and PW-20) cannot be true.

19. In view of the foregoing facts and in the circumstances, we find that the view taken by the trial court in the impugned judgment cannot be faulted and does not require interference. We are, therefore, not inclined to issue notice on the application for condonation of delay.

Consequently, the said application and the petition for leave to appeal are dismissed.

R. K. GAUBA
(JUDGE)

SANJIV KHANNA
(JUDGE)

DECEMBER 16, 2015
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