

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

Judgment Reserved on: May 18, 2016

% *Judgment Delivered on: June 03, 2016*

+ **CRL.A. 751/2014**

CHANDER SINGH

..... Appellant

Represented by: Mr. Biswajit Kumar Patra,
Adv.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for the
State with SI Uma Dutt, PS
Mangol Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the instant appeal, the appellant Chander Singh challenges the impugned judgment dated 17th December, 2013 whereby he has been convicted for the offence defined under Section 9(k), punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2002 (in short the POCSO Act) in FIR No.80/2013 registered at PS Mangol Puri and the order on sentence dated 18th December, 2013 directing him to undergo rigorous imprisonment for a period of six years and fine of ₹5,000/- in default whereof to undergo simple imprisonment for a period of three months.

2. The prosecution case in brief is that on February 09, 2013 at about 7.28 PM, PW12 HC Laxman Singh was handed-over DD No.18, Ex.PW-12/A informing that a boy was kidnapping a girl and the said boy was apprehended by the caller at K Block complex. On reaching the spot, he

found Chander Singh apprehended by public. Raj Kumar who made the call to the PCR was found to be the maternal uncle of the prosecutrix, who was a minor, deaf and dumb girl aged 12 years. Statement of the mother of the prosecutrix was recorded wherein she stated that at around 7.00 PM her daughter aged 12 years who was deaf and dumb had gone to throw garbage in the dustbin. She returned back in a perplexed and perturbed condition. When she and her brother asked her, she explained by sign language that near the dustbin one man pressed her mouth, her breast and the lower abdomen. The prosecutrix ran towards her house after freeing herself from his clutches. She and her brother along with the prosecutrix went to the dustbin where her daughter pointed out towards a boy whose name was revealed as Chander Singh, S/o of Sukhbir Singh who was apprehended by her brother. Her brother made the PCR call. Chander Singh was apprehended at the spot and both the prosecutrix and Chander Singh were got medically examined.

3. Statement of prosecutrix was recorded under Section 164 Cr.P.C. with the help of interpreter Ms.Rita Kanojia PW-3 before the learned Metropolitan Magistrate. Learned Magistrate questioned her generally. When she was able to tell the name of her parents, sister and replied that she had no brother, her statement was recorded under Section 164 Cr.P.C. wherein she stated *“He had mustache. He gagged my mouth with his hand. He pressed my breast with his hand. Then he caught hold of my hand. He was taking me by catching hold of my hand. He tried to press me by both his hands. When I tried to run away he gave a slap on my face. He had done it twice earlier. Do not want to say anything more”*.

4. Though MLC of the prosecutrix was conducted obviously there would

be no such injury which could be reflected in the MLC. After investigation was completed and charge-sheet was filed, Chander Singh was charged for offence defined under Section 7 and punishable under Section 8 of POCSO Act, besides Section 354-A IPC to which he pleaded not guilty.

5. During the course of trial, besides the prosecutrix who was examined as PW-2, her father, mother and maternal uncle were examined as PW-1, PW-4 and PW-5 respectively. The interpreter Ms.Rita Kanojia was examined as PW-3 and the learned Metropolitan Magistrate as PW-8. To prove the age of the prosecutrix the investigating officer produced the certificate from the school Ex.PW-14/D which noted her date of birth as February 17, 2000. Thus the prosecutrix was 8 days less than 13 years on the date of incident.

6. This Court need not note the testimony of any other witness except the prosecutrix PW-2 for the reason no other person witnessed the incident and her mother PW-4 whose evidence would be relevant and admissible under Section 6 and 8 of the Evidence Act. Statement of the prosecutrix in the Court was recorded with the assistance of PW-3 Rita Kanojia, Assistant Teacher/ Support Person working at Nursery Primary School for Deaf, Sector-4, Rohini, an institution run by the Delhi Government, Social Welfare Department. The learned Trial Court after being satisfied noted the relevant portion of the testimony of the prosecutrix as under:

“Q. Aap batao ki kya hua tha?

Ans. The witness has stood up and look back towards the back wall of the Court room where the accused is sitting. She has then made a gesture with her hand by closing her mouth and then holding her hand. She has also made gesture by putting hand on her abdomen and on her lower back. The gesture has been interpreted by Ms.Rita Kanojia to state that the accused,

present in the Court today, had shut the mouth of witness by his hand and had held her hand. He also put his hand on her abdomen and lower back.

The witness has now made gesture by holding both her hands in a cross position in front of her and pointed towards accused. The gesture has been interpreted by Ms.Rita Kanojia to state that accused had embraced her.

Q. Phir kya hua:

Ans. The witness has again held her hand and made gesture of being dragged and then getting her hand free and then gesture of running. The gestures have been interpreted by Ms.Rita Kanojia to state that accused had dragged the witness and that the witness managed to free herself and run away.

Q. Phir Kya hua:

Ans. The witness has made lip formation of word 'mummy' and also gesture of holding her hand and calling. This gesture has been interpreted by Ms.Rita Kanojia to state that the victim went to her mother and brought her at that place.

Q. Phir Kya hua?

Ans. The witness has made lip formation of word 'mummy' and also made gesture of pulling of cart with her hands. This gesture has been interpreted by Ms.Rita Kanojia to state that the mother and father of the victim came there. She also states that by gesture of pulling of cart, the witness referring to her father, who is working as labourer.

Q. Phir Kya hua:

Ans. The witness has made gesture with lips to state that 'mummy' and pulling of cart gesture with her hand and pointed towards accused and then made gesture of holding her hand. These gestures have been interpreted by Ms.Rita Kanojia to state that the accused was caught hold of by the parents of the witness.

Q. Phir Kya hua?

Ans. The witness made round bangle like gesture around her hand, this gesture has been interpreted by Ms.Rita Kanojia to state that the police had come and taken the accused.”

7. Questions such as whether the incident took place in the morning or evening or at what distance were asked which the witness could not explain by gestures, however she made a drawing which was taken on record as Annexure P-1 wherein she drew a house in the form of a hut and a passage thus clearly showing that the incident took place just a few yards away from her house on the road. The testimony of the prosecutrix through her sign language inspires confidence and is sufficient to prove the offence committed by Chander Singh.

8. The twin arguments raised by learned counsel for the appellant are that since the prosecutrix could not be cross-examined her testimony cannot be read in evidence and even if the offence is proved against the appellant, the same would fall under Section 7 punishable under Section 8 of POCSO Act and not under Section 9(k) punishable under Section 10 of the POCSO Act.

9. As noted above the prosecutrix is a deaf and dumb girl and obviously would not be able to face grilling cross-examination which learned counsel for the appellant attempted to do. However even in cross-examination on the relevant point as to where the incident took place she was able to explain by drawing. The purpose of cross-examination is to test the veracity of the version of the complainant which in this case was explained by gestures by the prosecutrix to her mother on whose statement the FIR was registered and who also deposed as PW-4 in the witness box. Nothing could be elicited from the mother of the prosecutrix in cross-examination. The prosecutrix

had stood by her complaint even in her deposition before the Court and her testimony cannot be brushed aside merely because she has not been able to answer irrelevant and unnecessary questions put to her in the cross-examination.

10. Section 119 of the Indian Evidence Act, 1872 provides:

“119. Dumb witnesses.- A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.”

11. While dealing with the mode of recording, non-administration of oath to a deaf and dumb witness and involving an interpreter for understanding the evidence of such a witness, the Supreme Court in the decision reported as (2012) 5 SCC 789 State of Rajasthan Vs. Darshan Singh @ Darshan Lal held:

“26. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs.

27. *In Meesala Ramakrishnan v. State of A.P. [(1994) 4 SCC 182 : 1994 SCC (Cri) 838]* , this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that “verbal” statement does not amount to “oral” statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that the witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

28. *Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing, if literate or through signs and gestures, if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.*

29. *To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”*

12. It is further required to be noted that the purpose of cross-examination is to ascertain the truth in relation to the accusation leveled against an accused person and a discretion is vested in the Court to control the cross-examination. A party cross-examining a deaf and dumb witness like any other witness is required to act within the bounds of law and cannot be permitted to cross-examine the witness all and sundry on irrelevant questions. Section 138 of the Indian Evidence Act itself provides that the examination and cross-examination of a witness must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. The purpose is that in cross-examination besides relevant facts, facts which impeach the credibility of the witness and shake his creditworthiness can also be asked. However still the first portion of Section 138 of the Evidence Act qualifies this right confining the cross-examination to relevant facts though it may not have been so deposed in the examination-in-chief. It is the duty of a Judge to control the cross-examination to prevent any abuse and to protect a witness from being unfairly dealt with. Sections 149 to 152 of the Evidence Act prohibit asking questions without reasonable grounds, which are indecent and scandalous in nature, or which are intended to insult or annoy the witness.

13. When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for that witness to answer, or in detail explain every answer by sign language. This disability of a limited vocabulary of sign language does not

affect either the competence or the credibility of such witness. The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions.

14. From the examination of the witness which was in question-answer form and the response to the cross-examination wherein the witness drew and explained the distance where the incident took place, it can safely be held that there was sufficient compliance of the right to cross-examination provided to an accused and the testimony of this witness is not required to be effaced.

15. It would be now apposite to note the testimony of PW-4 the mother of the prosecutrix who deposed that on February 09, 2013 at about 7.00 PM her daughter had gone to throw the garbage in the public dustbin near her house. When her daughter came back from the public dustbin she was very nervous and perplexed. When she asked from her by making gestures the prosecutrix told her by gestures that one person misbehaved with her by pressing her mouth and breast and putting his hand on her lower back side. On hearing this she along with her husband and the prosecutrix went to the said place i.e. public dustbin at 'K' block where the appellant was present and her daughter pointed towards the appellant as the person who had misbehaved with her. On seeing them, appellant tried to run away from there but in the meanwhile her brother also came there and apprehended the appellant. The conduct of prosecutrix pointing out towards appellant as the person soon after the incident when she was in a perplexed and nervous condition forms part of the transaction of the incident itself and is thus admissible under Section 6 and 8 of the Evidence Act. On being pointed out, the conduct of the appellant trying to run away from the spot is also

relevant and admissible under Section 8 of the Indian Evidence Act. The evidence on record as discussed aforesaid proves beyond reasonable doubt the offence committed by Chander Singh.

16. The only issue which now arises for consideration is whether appellant can be convicted for offence defined under Section 7 and punishable under Section 8 of the POCSO Act or defined under Section 9(k) and punishable under Section 10 of POCSO Act. The appellant was charged for offence defined under Section 7 and punishable under Section 8 of POCSO Act i.e. “sexual assault”. Section 7 POCSO Act defines the term sexual assault as physical contact without penetration. The punishment for the same is provided in Section 8 wherein the minimum sentence is 3 years which may extend to 5 years with fine. Section 9 of POCSO Act defines “aggravated sexual assault” which is punishable under Section 10 POCSO Act. Section 9 POCSO Act defines different types of sexual assault which would be termed as aggravated sexual assault. Sub-clause (k) of Section 9 POCSO Act provides that whoever, taking advantage of a child’s mental or physical disability, commits sexual assault on the child would be punished for aggravated sexual assault as per Section 10 of POCSO Act wherein the minimum punishment is of 5 years imprisonment which may extend to 7 years and fine.”

17. In the facts of the case this Court is not required to go into whether aggravated sexual assault is made out or not from the evidence on record, for the reason there was no charge for aggravated sexual assault framed against the appellant. It is trite law that though charged with a major offence an accused can be convicted for a minor offence, however the vice-versa is impermissible which has been done by the learned Trial Court.

18. Section 222 of Cr.P.C. provides –

“222. When offence proved included in offence charged (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.”

19. Dealing with Section 237 Cr.PC 1898 which is akin to Section 222 of Cr.PC 1973, the Constitution Bench of the Supreme Court in the decision reported as AIR 1956 SC 116 Willie (William) Slaney Vs. State of Madhya Pradesh giving illustrations held-

“There is no reason to think that section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where, a trial which proceeds without any kind of charge at the outset can be said to be a trial wholly contrary to what is prescribed by the Code. In such case the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration the following classes of cases may be mentioned :

(a) Where there is no charge at all as required by the Code from start to finish - from the Committing Magistrate's court to the end of the Sessions trial; the Code contemplates in section 226 the possibility of a committal without any charge and it is not impossible to conceive of an extreme case where the Sessions trial also proceeds without any formal charge which has to be in writing and read out and explained to the accused (section 210(2) and section 251(A)(4) and section 227).

The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement cannot be cured by the assertion that everything was orally explained to the accused and the assessors or jurors, and there was no possible or probable prejudice.

(b) Where the conviction is for a totally different offence from the one charged and not covered by sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence, e.g., grievous hurt or rioting and murder. The omission to frame a separate and specific charge in such cases will be an incurable irregularity amounting to an illegality.”

20. Consequently, the conviction of Chander Singh is altered to one for offence defined under Section 7 and punishable under Section 8 of POCSO Act. The punishment for sexual assault prescribed under Section 8 is imprisonment for not less than 3 years which may extend upto 5 years and to pay fine as well. The conduct of Chander Singh in sexually assaulting a deaf and dumb girl who was not in a position to protect herself fully warrants maximum punishment. Consequently, the order on sentence of Chander Singh is altered and modified. Chander Singh is directed to undergo rigorous imprisonment for a period of 5 years and to pay a fine of ₹10,000/- in default whereof to undergo simple imprisonment for a period of

1 month.

21. Appeal is disposed of.

22. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

23. TCR be returned

(MUKTA GUPTA)
JUDGE

JUNE 03, 2016
'ga'