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

DECIDED ON : 1st APRIL, 2016

+ **CRL.A.1316/2010**

TARA CHAND @ TAUR Appellant

Through : Mr.Pankaj Kumar, Advocate.
versus

STATE (GOVT. OF NCT of Delhi) Respondent

Through : Mr.Raghuvinder Varma, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.Garg, J. (Oral)

1. By the impugned judgment dated 15.07.2010 of learned Additional Sessions Judge in Sessions Case No.101/09 arising out of FIR No.159/09 PS Seemapuri, the appellant – Tara Chand @ Taur was held guilty for committing offences punishable under Sections 363/376 IPC. By an order dated 21.07.2010, he was sentenced to undergo RI for ten years with fine ₹7,000/- under Section 376 IPC and RI for three years with fine ₹3,000/- under Section 363 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the allegations as reflected in the charge-sheet against the appellant were that on 08.05.2009 at about 08.30 p.m. he

kidnapped the prosecutrix 'X' (changed name), aged around 6 years out of the lawful guardianship of her parents and committed rape upon her on a vacant plot behind Mangalam Hospital, Hanuman Colony, Dilshad Garden, Delhi. Victim's father conveyed the incident to the police and Daily Diary (DD) No.66B (Ex.PW-12/A) came into existence at 10.58 p.m. The investigation was taken over by SI Ajeet Kumar, who after recording statement of victim's mother – Munni (Ex.PW-1/A) lodged First Information report. 'X' was medically examined. The accused was arrested. 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 filed against the appellant in the Court. To prove its case, the prosecution examined 12 witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The trial resulted in his conviction as aforesaid. 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. At the outset, it may be recorded that the prosecutrix 'X' though appeared in the Court to record her statement remained unexamined. She was not in a position to communicate properly; she was

unable to understand the questions put to her. Learned Presiding Officer after putting certain preliminary questions to ascertain her capability to understand the questions and answer them rationally came to the conclusion that the witness was not able to understand the questions and answer them; she was not speaking despite repeated questioning. It was further noted that even on the previous date of hearing efforts were made twice to record her statement but due to her tender age, she was unable to disclose / speak anything. It was not possible to record her statement; she was discharged.

4. In the information recorded vide Daily Diary (DD) No.66B (Ex.PW-12/A) victim's age was disclosed seven years. The Investigating Officer did not collect any document to ascertain her exact date of birth. No school record was gathered to find out her date of admission and age. In her 161 Cr.P.C. statement recorded on 12.05.2009 'X' had implicated the appellant for the crime and had given detailed account as to how and in what manner, she was defiled. PW-1 (Munni) victim's mother in her complaint (Ex.PW-1/A) categorically informed that she had come to know about the horrible incident from the victim. When she got suspicion on finding blood on her inner clothes and enquired about it, the victim named the appellant to be the perpetrator of the crime. Victim's mother did not

reveal in her Court statement if 'X' was incapable to understand the questions or to give rationale answers due to any physical or mental problem. No medical record to show 'X' suffering from any mental problem to divulge the facts has been produced. Her statement under Section 164 Cr.P.C. was not got recorded. If the victim was able to disclose the sequence of events in detail before the Investigating Officer under Section 161 Cr.P.C. and also to her mother PW-1, it is unclear as to why she was not in a position to utter a word in her Court statement. Learned Presiding Officer also noted that looking at her physique, she seemed to be less than 6 years as claimed.

5. There can be no dispute that non-examination of the prosecutrix due to her incapability to give coherent answers in the court cannot be ground for acquittal. In such cases, the Court has ample power to revert to circumstantial evidence in order to find out whether or not the accused on trial was guilty. In the instant case, it is to be ascertained if there is sufficient evidence available to prove the appellant's guilt beyond doubt.

6. In 161 Cr.P.C. statement, the victim disclosed that on the appellant's asking to get her chocolate in the evening, she accompanied him. He took her in his lap but did not get any chocolate. Thereafter, he

took her on a vacant plot behind the street and under a 'peepal' tree committed rape upon her after putting off her underwear as a result of which she felt pain and bled. After that, she was left by the accused near her house and he told her not to disclose the incident to her mother. Her mother made her to take bath; the blood, however, continued to ooze out. Police was called by her mother and her statement was recorded. The victim did not reveal at what time in the evening, the accused had taken her to the crime spot. She also did not disclose if she had narrated the incident to her mother immediately on her return to the house.

7. In her complaint (Ex.PW-1/A), PW-Munni informed the police that on 08.05.2009 at around 08.30 p.m. when she was preparing food, her daughter 'X' came to the house weeping. When she was going to sleep, she noticed blood on her underwear. On enquiry from 'X' she disclosed that the accused had taken her on the pretext to get her chocolate and had committed rape upon her on a vacant plot. She apprised her husband about it and made a call at 100. In her Court statement as PW-1, she deposed that at about 08.30 p.m. her daughter 'X' came from outside when she was preparing food and went to sleep. Since she was not in the habit of sleeping so early, she asked as to why she was going to bed. She noticed blood on her underwear. On that, 'X' told her that the accused

had taken her to a shop on the pretext to give her a toffee. He did not give her chocolate and took her beneath a tree at some distance from her jhuggi and committed rape upon her. She further disclosed that her husband was not present at the jhuggi that time and she called him on phone. Thereafter, she, her husband and 'X' went to PS Seemapuri and lodged the complaint (Ex.PW-1/A).

8. Certain improvements have been made by PW-1 (Munni) in her Court statement. There is no mention in her complaint (Ex.PW-1/A) if the victim was taken to any 'shop' for getting chocolate. It was not ascertain during investigation as to at which shop the appellant had taken the victim; the said shopkeeper was not associated in the investigation. The Investigating Agency did not examine any witness to show if at any time the victim was seen in the appellant's company soon before the incident. It is unbelievable that the victim aged around 6 years would not exhibit any abnormal behaviour after being raped by a grown up person and would return to home in normal way. In her Court statement, PW-1 (Munni) did not disclose if the victim had returned home while weeping. PW-1 (Munni) did not disclose as to where the victim was before the incident and when she was taken / kidnapped by the appellant. It is not clear if the victim was in the company of her friends when allured by the

appellant to accompany him. No such child has been examined during investigation. The prosecution also did not examine victim's father to corroborate PW-1's version that he had come to know about the incident from her on phone or when he had reached home. It is not clear as to where the victim's father was at that time.

9. Appellant's conviction solely on PW-1's (Munni) testimony without corroboration from any other source cannot be sustained. 'X' was too young to depose properly in the court. That being the case, can it be inferred with certainty if she was capable to tell her mother Munni as to what had happened on the date of occurrence. The victim was examined by MLC (Ex.PW-10/A) at Guru Teg Bahadur Hospital at around 02.00 a.m. No visible injuries were found on her body, her hymen was found torn. In FSL reports (Ex.PW-9/A & Ex.PW-9/B), human semen could not be detected on Ex.1 (victim's underwear); Ex.2a & Ex.2b (Two micro-slides having faint whitish smear); Ex.3a, Ex.3b, Ex.3c & Ex.3d (four micro-slides having faint whitish smear). Only on the appellant's underwear (Ex.6) semen was detected. It does not indicate that the victim was sexually assaulted by him. Human blood was detected on victim's underwear (Ex.1), however, it was not ascertained if it was that of the appellant. The appellant was medically examined vide MLC (Ex.PW-

8/A) on 09.05.2009 at around 05.00 a.m. No injury mark was found on penis; there was smegma over it. No doubt, that absence of injuries on the genitals of an accused in a rape case by itself cannot always be a reason to presume the innocence of the accused, provided that reliable evidence leading towards the guilt of the accused is available. In the instant case, in view of the circumstances noted above, the version of the prosecution witnesses appears to be doubtful. Conviction cannot be based on the basis of mere suspicion.

10. In the light of above discussion, the appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. The appellant is acquitted and he shall be released forthwith if not required to be detained in any other case.

11. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to Superintendent Jail for information / compliance.

(S.P.GARG)
JUDGE

APRIL 01, 2016 / *tr*