

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

RESERVED ON : 15th JANUARY, 2016

DECIDED ON : 5th FEBRUARY, 2016

+ CRL.A.1449/2011

HARI LAL PANDIT Appellant

Through : Mr.J.K.Singh, Advocate.

versus

STATE OF NCT OF DELHI Respondent

**Through : Mr.Tarang Srivastava, APP with SI
Pratap Singh.**

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The present appeal is directed against a judgment dated 09.09.2011 of learned Addl. Sessions Judge in Sessions Case No.52/2010 emanating from FIR No.139/2010 PS Uttam Nagar by which the appellant – Hari Lal Pandit was held guilty for committing offence under Section 376 IPC. By an order dated 12.09.2011, he was awarded RI for ten years with fine ₹2,000/-.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 28.04.2010 at around 03.30 p.m. the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around eight years at House No.114, Gali No.10, Vipin Garden Extension, Delhi. Police machinery came into motion on getting information about a quarrel at the spot vide Daily Diary (DD) No.32A (Ex.PW-14/C) recorded at

06.14 p.m. The investigation was assigned to ASI Kailash Chand. The Investigating Officer lodged First Information Report after recording victim's statement (Ex.PW-1/A). In the complaint, the victim gave vivid description of the incident and implicated the appellant by name to be the perpetrator of the crime. She was medically examined; she recorded her 164 Cr.P.C. statement. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Statements of the witnesses conversant with the facts were recorded. The accused was arrested and medically examined. Upon completion of investigation, a charge-sheet was filed against the appellant. To bring home the appellant's guilt, the prosecution examined twenty-four witnesses in all and relied upon various documents. 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 mentioned previously. Being aggrieved and dissatisfied, the appellant has preferred the appeal.

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. The Trial Court committed grave error to base conviction on the testimonies of interested witnesses without independent corroboration. It overlooked vital

infirmities and inconsistencies in the version narrated by PW-1 - the victim and PW-4 (Kiran) – her ‘mausi’. Age of the prosecutrix was estimated in between 12 – 14 years during ossification test. It belies her statement that she was aged around 8 years on the day of occurrence. It is highly unbelievable that no individual in the neighbourhood could hear victim’s screams / cries at the time of incident. Learned Addl. Public Prosecutor urged that the victim is consistent throughout and no valid reasons exist to disbelieve her.

4. The unfortunate incident took place on 28.04.2010 at around 03.30 p.m. when the prosecutrix had left her house to take tuition after coming back from school at around 03.00 p.m. The victim’s ‘mausi’ PW-4 (Kiran) after coming to know about the occurrence at around 04.00 p.m., promptly informed victim’s parents. Victim’s mother PW-2 (Rekha Chandel) who worked at Gurgaon rushed back to the house. Her spontaneous reaction on coming to know about the horrible incident was to rush to the appellant’s shop and thrash him. Someone informed the police at 100 and DD No.32A (Ex.PW-14/C) regarding a quarrel came into existence at the police station. The victim’s statement (Ex.PW-1/A) was recorded and rukka (Ex.PW-20/A) for lodging the FIR was sent at around 10.30 p.m. In the complaint, the prosecutrix gave detailed account

as to how and under what circumstances, the appellant had sexually abused her. The appellant was named in the FIR and a specific and definite role was assigned to him. In her 164 Cr.P.C. statement (Ex.PW-10/C) the victim reiterated her version and implicated the appellant to be the individual who had ravished her inside his shop when she had gone to take toffees. In her Court statement as PW-1 - the victim proved the version given by her to the police and before the learned Metropolitan Magistrate without any variation. Before her examination, learned Presiding Officer had put various questions in a preliminary enquiry to ascertain if the victim was able to give rational answers to the questions put to her. She also ensured that 'X' was making her statement voluntarily without any fear or pressure. After recording her satisfaction, learned Presiding Officer recorded X's statement without oath. She deposed that on the day of incident, she was a student of class 3rd in Yaduvanshi Siksha Niketan. At around 03.30 p.m. when she was going for tuition, the 'uncle' called her inside his shop and showed her toffees. When she went inside the shop, the appellant started talking to her and asked her to remove her underwear which she declined. She was threatened by the appellant as a result of which, she got scared and removed her underwear. Thereafter, the appellant committed rape upon her. She felt a lot of pain and burning;

her cries remained unheard. She identified the appellant to be the individual who had committed rape upon her and to whom she used to call “uncle”. In the cross-examination, she informed that the measurement of the shop was about 9 / 10 feet X 8 / 10 feet. It had a small table and small takhat; there were toffees and one fridge containing water and pepsi. At the time of incident the shutter was half-down. The accused had spread a piece of cloth on the floor and had committed wrong act with her. She was kept in the shop till about 05.00 p.m. After the incident, she felt pain and had difficulty to walk. She admitted that the appellant was beaten by her mother after the occurrence. She denied that injuries sustained by her were due to fall.

5. On scanning the testimony of the victim in entirety it stands established that material facts deposed and proved by her remained unchallenged and uncontroverted in the cross-examination. The appellant did not deny the victim’s visit to the shop at the relevant time. He also did not deny his presence at the shop at that point of time. No ulterior motive was assigned to the child witness to level serious allegations of rape against him. In the absence of any prior animosity or enmity, the child victim is not expected to level all such allegations suddenly against an individual aged around 60 years running a shop in the neighbourhood

since long. Unless such an incident really happens, the victim or her parents would be highly reluctant to rope in an innocent person for the ghastly crime to put the honour of their child at stake. There was no delay in lodging the FIR. X's ocular testimony has been fully supported and corroborated by medical evidence. Soon after the incident, she was medically examined by PW-24 (Dr.Alok) vide MLC (Ex.PW-24/A) and a bruise was noticed on her left cheek. PW-19 (Dr.K.V.Mahalakshmi) during medical examination of the victim vide MLC (Ex.PW-18/A-11) observed that her hymen was torn. She did not rule out possibility of fresh tear. In the cross-examination, she reasoned that since the hymen was torn, the tear appeared to be 'fresh'. She was of the view that forceful entry could not be ruled out. She ruled out tear of hymen due to cycling etc as there was redness and inflammation at the local site.

6. Settled law is that the testimony of a child witness cannot be rejected out-rightly. The evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and a child witness is an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the court is voluntarily expression of the victim and that she was not under the influence of others. As observed above, there is no indication if the

prosecutrix was tutored; her statement is consistent throughout. She had no extraneous motive to falsely implicate the appellant and let the real offender go scot free.

7. It is true that there are discrepancies in the testimonies of PW-1 - the victim and that of PW-4 (Kiran). In her Court statement, PW-4 (Kiran) claimed that on getting information about the incident from a lady, she went to the spot and found the prosecutrix lying on the floor on a newspaper inside the appellant's shop. She had seen the appellant there and he had started cleaning some white material from the floor. When she confronted the appellant as to what he was doing, he started abusing her. This version is inconsistent with the victim's statement wherein she categorically claimed to have apprised about the incident to her mausi after coming back to the house. This inconsistency, however, is not fatal to absolve the appellant. The crux remains that the appellant was the perpetrator of the crime and as per victim's statement, she was ravished by him inside the shop on the pretext to provide her toffees. It appears that PW-4 (Kiran) has exaggerated the version claiming her presence at the spot soon after the incident. Even if PW-4's statement is ignored, the evidence in the form of testimony of the victim coupled with medical evidence is sufficient to establish the prosecution case.

It is also true that the exact age of the prosecutrix has not surfaced on record. The victim and her family members had claimed that 'X' was around 8 or 9 years on the day of incident. PW-17 (Ashish) brought the summoned record from the school and proved the documents (Ex.PW-17/A, Ex.PW-17/C & Ex.PW-8/A). As per school record, the date of birth of the child was 26.07.2001. In ossification test, however, the doctors were of the view that the approximate age of the victim was more than 12 years and less than 14 years. Victim's age is not material as she was not a consenting party. Apparently, being below 16 years, she was incapable to give consent for physical relations.

8. In 313 Cr.P.C. statement, the appellant did not give plausible explanation to the incriminating circumstances proved against him. He did not claim if his false implication was due to any specific ulterior motive. He did not assign any ill-will to the victim or her family members to falsely implicate him. The accused did not examine any witness from the neighbourhood in his defence to falsify the victim's statement that no such incident had occurred at the relevant time. The judgment based upon fair appreciation of the evidence needs no intervention. The conviction is upheld.

9. The appellant was awarded RI for ten years with fine ₹2,000/-. Nominal Roll dated 06.05.2014 reveals that he has already undergone four years and seven days incarceration besides remission for eight months and twenty-six days as on 06.05.2014. His overall jail conduct is satisfactory. Sentence Order records that the appellant was above 60 years of age. The appellant's conduct is really reprehensible. He exploited the innocence of a child aged around 9 years, who unsuspectingly visited his shop to have toffees; it is a case of child sexual abuse. 'X' was like appellant's daughter. Rape on a tender aged girl is bound to create a permanent impact and impression on the mind of such a girl, which may permanently affect her adversely. Considering the gravity of the offence and the nature of crime committed by the appellant aged above 60 years, no leniency is called for. No sufficient and adequate reasons exist to modify the sentence order.

10. The appeal lacks merit and it is dismissed. 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.

FEBRUARY 05, 2016 / tr

**(S.P.GARG)
JUDGE**