

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

**RESERVED ON : 19<sup>th</sup> APRIL, 2016**

**DECIDED ON : 26<sup>th</sup> APRIL, 2016**

**+ CRL.A.1612/2013**

**SHIV KUMAR**

**..... Appellant**

**Through : Mr.Azhar Qayum, Advocate.**

**VERSUS**

**STATE NCT OF DELHI**

**..... Respondent**

**Through : Mr.Raghuvinder Varma, APP.**

**CORAM:**

**HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. The appellant – Shiv Kumar challenges the legality and correctness of a judgment dated 16.07.2013 of learned Addl. Sessions Judge in Sessions Case No. 42/13 arising out of FIR No.188/12 PS Shahbad Dairy by which he was convicted under Section 376 IPC read with Section 511 IPC. By an order dated 18.07.2013, he was ordered to undergo RI for five years with fine ₹10,000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 10.06.2012 at around 11.00 a.m. the appellant attempted to commit rape upon 'A' (changed name) aged around 4 years in front of Mother Dairy, Phase-II, near Pond, Metro Vihar. The incident was reported to the police vide Daily Diary (DD) No. 18 (Ex.PW-12/A) at 07.40 p.m. The investigation was assigned to SI Mukesh Kumar who along with

Const.Vikram reached the spot. After recording statement of victim's aunt Usha Devi (Ex.PW-1/A), he lodged First Information Report. 'A' was medically examined. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed. In order to establish its case, the prosecution examined fifteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication on account of enmity. He did not produce any evidence in defence. 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. The victim was aged around 5 years. As per birth certificate (Mark PW-1/A), her date of birth was 03.09.2007. Being of tender age she did not comprehend as to what had happened with her and for that reason, she was not cited as a witness. She was very uncooperative at the time of her medical examination as a result of which, internal examination could not be conducted. Non-examination of the child witness who was incapable to give rationale answers about the incident is not fatal.

4. Crucial testimony is that of PW-1 (Usha Devi) – victim's paternal aunt (Tai). In her complaint (Ex.PW-1/A), she gave detailed account as to how and in what manner, the appellant had attempted to commit rape upon her niece 'A' when she had gone to defecate at around 10.40 a.m. that day. She had seen the accused lying over the child. He had put off his wearing pant and had disrobed the child. She rushed to the spot and saved the child by assaulting the appellant with kicks and fists. The appellant managed to flee the spot. In her Court statement as PW-1, she

proved the version given to the police without any variation. The appellant was identified being resident of the same vicinity at a short distance. She reiterated that on 10.06.2012 in between 10.00 to 11.00 a.m. she had taken the child near the pond for defecation. Leaving the child to answer the call of nature there, she came back. When she arrived at the spot after about 5 or 10 minutes, she did not find her at the place where she was left. She heard the child's cries and went towards that direction. There, she saw the appellant making an attempt to commit rape upon her. In the process to rescue the child, the appellant got an opportunity to flee. She brought the child in her lap. She further informed that police was called at 100. In the evening, they went to the police station to lodge the FIR. In the cross-examination, she reiterated that place where she had taken the child for defecation was used for that purpose. She denied that they were having friendly relations with a 'shopkeeper' inimical to the appellant and at his instance, the appellant was falsely implicated in this case.

5. On scanning the testimony of this witness, it reveals that material facts proved by her have remained unchallenged in the cross-examination. The accused did not deny his presence at the spot at the relevant time. He did not claim if he was present at any other specific place at that time. The appellant did not disclose as to what was the purpose of his visit to the secluded place used for defecation by the children. No sound reasons exist to disbelieve the testimony of victim's aunt. Her presence at the spot is quite natural and probable as she had taken the child to enable her to answer the call of nature. No ulterior motive was assigned to the witness prompting her to make false allegations against the appellant at the cost of bringing the little girl child into disrepute. In the absence of prior enmity or

history of hostile relations PW-1 (Usha Devi) was not imagined to level serious allegations of sexual assault against the appellant. PW-5 (Shriman Narayan @ Sanjay) - victim's father fully supported her version. The incident was narrated to him in the evening when he returned home after finishing his work. He was not cross-examined on material facts.

6. Delay of few hours in lodging the FIR is not fatal. It has been duly explained by the prosecution witnesses. Victim's father was not available at house. PW-1 (Usha Devi) was not expected to immediately lodge the FIR in the absence of her father. Apparently, she opted to put the police machinery into motion only when victim's father arrived and they all went to lodge the FIR in the evening.

7. In 313 Cr.P.C. statement the accused did not give plausible explanation to the incriminating circumstance proved against him. He did not name the 'shopkeeper' with whom the prosecution witnesses were friendly, and at whose instance, the FIR was falsely lodged against him. It is unbelievable that victim's parents would use their tiny daughter for any trivial issue between the appellant and the 'shopkeeper'. The defence deserves outright rejection.

8. It is true that no injuries whatsoever were found on victim's body at the time of her medical examination. It was not the prosecution case that the victim was sexually assaulted. Only an attempt was made by the appellant to commit rape. Timely arrival of her aunt - PW-1 (Usha Devi) prevented the appellant from accomplishing the object in his mind. The appellant had taken the child aged around 5 years to a secluded place without her relative's consent without any justifiable reason. Not only that, the appellant after undressing himself had also disrobed the child. When

PW-1 (Usha Devi) heard victim's cries, she found the appellant lying over her naked body. Apparently, the appellant had done whatever he could do to carry out the object. The appellant took advantage of the innocence of the child finding her alone while answering the call of nature.

9. The Trial Court has discussed the appellant's contentions minutely in the impugned judgment. The conviction based upon fair appreciation of the evidence warrants no intervention.

10. Sentence Order is based upon fair reasoning. The appellant was aged around 60 years and was well aware of the consequences and implications of the act. The victim was like her granddaughter. To satisfy his lust, the appellant attempted to ravish the innocent child. Timely arrival of PW-1 (Usha Devi) at the spot prevented a horrible incident to occur. Nominal Roll dated 20.03.2015 reveals that he was involved in case FIR No. 325/2011 under Sections 354/363 IPC PS Shahbad Dairy. The appellant deserves no leniency. Sentence Order is, however, modified to the extent that the default sentence for non-payment of fine ₹10,000/- shall be SI for one month. Other terms and conditions of the Sentence Order are left undisturbed.

11. The appeal stands disposed of in the above terms.

12. 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.

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

**APRIL 26, 2016 / tr**