

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

**RESERVED ON : 22nd FEBRUARY, 2016
DECIDED ON : 27th APRIL, 2016**

+ CRL.A.851/2015

MOHAN Appellant

Through : Mr.K.Singhal, Advocate.

VERSUS

STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Vinod Diwakar, APP.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 30.01.2015 of learned Addl. Sessions Judge in Sessions Case No.144/13 arising out of FIR No. 411/13 PS Sultan Puri by which the appellant – Mohan was held guilty for committing offence under Section 5(m) of POCSO Act punishable under Section 6 of POCSO Act read with Section 18 of POCSO Act, he has filed the instant appeal. Vide order dated 02.02.2015, he was sentenced to undergo RI for five years with fine ₹5000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 07.07.2013 at around 10.00 a.m. at Budh Bazar Road, Sultan Puri, the appellant kidnapped the prosecutrix 'X' (name withheld) aged around 11 years from the lawful guardianship of her parents and took her towards bushes adjacent to the wall of Bhalla factory, Sultan Puri and

committed aggravated penetrative sexual assault by penetrating his penis into her vagina and anus. He also allegedly deprived the victim of ₹500/- dishonestly. In the alternative, charge under Section 376 (2) (i) IPC was framed vide order dated 21.10.2013.

3. Police machinery was set in motion vide Daily Diary (DD) No.15A recorded at Police Station Sultan Puri at 10.50 a.m. Information was conveyed by HC Khem Raj that an 'unknown' person had caught hold of a boy and a girl in objectionable position and they were produced before him. The investigation was assigned to SI Rohtash Mudgal who along with Const. Dhan Singh went to the spot. The investigation was taken over by W/SI Manju Yadav. After recording victim's statement (Ex.PW-5/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The appellant was arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of offences punishable under Sections 363/376/379/511 IPC and Section 10 of POCSO Act. In order to establish its case, the prosecution examined thirteen witnesses. In 313 Cr.P.C. statement the appellant denied his complicity in the crime and pleaded false implication. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment, acquitted the appellant of the charges under Section 379 IPC. The trial resulted in conviction of the offences mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

4. I have heard the learned counsel for the parties and have examined the file. 'X' was a child aged around 11 years. In her statement

(Ex.PW-5/A), MLC (Ex.PW-3/A) and statement under Section 164 Cr.P.C. (Ex.PW1/B) throughout she claimed herself to be of 11 years. The Investigating Officer collected school certificate (Ex.P4) where her date of birth recorded was 25.04.2002. At no stage, the appellant challenged the date of birth recorded in the school certificate. Apparently, the prosecutrix was below 12 years of age on the day of incident.

5. Certain discrepancies have emerged in the statements of the prosecution witnesses. Initially, vide DD No.15A recorded at 10.50 a.m. the information conveyed to the police was that an 'unknown' person had produced a boy and a girl who were found in objectionable circumstances in the bushes near Kirari Phatak. It was also informed that the girl child was accusing the 'boy' of attempting to commit rape (Galat Kaam) upon her. In her complaint (Ex.PW-5/A), the victim disclosed that when she was going to her aunt Reena to purchase clothes, on the way ₹500 note in her hand fell down on the road. An 'individual' standing on the road picked the said note. When she demanded back the note, the said 'individual' asked her to accompany him to get the note. He took her towards the bushes of Kirari Phatak. The said individual put off his clothes and took off her salwar. When he started touching her body, she cried. She was scolded by the assailant as a result of which she kept quite. Thereafter, he attempted to commit rape and unnatural sex. At that time, she saw an 'unknown' person going by the side of railway lines and cried to attract his attention. The said 'uncle' caught hold of the assailant and produced both of them to a police official standing near railway phatak. She was, thereafter, medically examined at Sanjay Gandhi Hospital.

6. The victim, thus, levelled allegations of attempt to rape and of unnatural sex against an 'unknown' assailant. She categorically disclosed that the assailant had attempted to insert his penis in her vagina and anus.

7. In her 164 Cr.P.C. statement (Ex.PW-1/B) recorded on 08.07.2013, the victim disclosed that on the previous day her mother had given her a currency note of ₹500 to give it to her mausi. When she was at some distance away from Nangloi Phatak, the said currency note fell down from her hand and a boy lifted the said note and started to move. When she pleaded to return her money, he asked her to follow him. She started going behind him. Suddenly the said boy caught hold of her hand and dragged her towards the bushes. She was threatened to be killed if raised alarm. Thereafter, the said 'boy' took off her salwar. A passer-by going by that side saw her hand; arrived at the spot and saved her. He, thereafter, took her to the police.

8. In 164 Cr.P.C. statement, the victim did not level allegations of attempt to insert penis into her vagina or anus. The allegations were that the assailant had put off her salwar.

9. In her Court statement, the victim while appearing as PW-6 disclosed that about a year before at around 09.00 a.m. her mother had sent to her maternal aunt with ₹500 currency note to purchase clothes from Sunday bazaar. When she was going to her residence in a hurry, at Budh bazaar road, her ₹500 rupee note fell down. The moment she tried to lift it an 'individual' picked it up. She identified the said 'individual' to be the appellant in the Court. She further disclosed that when she asked the appellant to give her money back, he took her towards bushes near the railway phatak; she was threatened there. The appellant put off his clothes

and started touching her body. Thereafter, he put off her salwar and attempted to insert his penis into her vagina and anus. On seeing an 'uncle' coming that side, she cried loudly. The appellant was armed with a blade and had showed it to her to scare. She fairly admitted that she was not caused any injuries with the blade. The said unknown saviour took both of them to the police and she narrated the incident to them. In the cross-examination, she denied if the statement made by her was tutored to her.

10. PW-7 (Jareena) – victim's mother corroborated her version. She further deposed that when 'X' did not return, she asked her husband to go and trace her. In the meantime, a phone was received from the hospital that someone had attempted to sexually assault her daughter. Thereafter, her husband rushed towards the railway phatak near railway line. Similar is the testimony of PW-12 (Mohd. Mustaq Ansari) – victim's father. He, however, disclosed that on 07.07.2013, he was informed by the police that her daughter 'X' was sexually assaulted by 'someone'.

11. On scrutinising the above statements during investigation and trial, it reveals that two versions have emerged. One is about an attempt by the appellant to commit rape and unnatural sex upon the prosecutrix and the other version disclosed in 164 Cr.P.C. statement is that the appellant had only removed the victim's salwar. The prosecution has failed to reconcile two versions. No independent public witness was associated at any stage of the investigation. The 'individual' who had produced both the prosecutrix and the appellant before the police was not cited as a witness. His identity has not been established. It is unclear as to why the police officials permitted the said material witness to go without recording his statement or his detail particulars. PW-8 (HC Khem Raj) to whom the custody of the

prosecutrix was handed over by the said 'individual' did not furnish plausible explanation as to why the said 'individual' was not associated in the investigation. He merely disclosed that request was made to ascertain his name and address but he declined and left stating that he did not want to involve himself in the litigation. This explanation inspires no confidence. No description of the said individual has come on record. Apparently for obvious reasons, the prosecution did not intend to bring on record the testimony of that crucial witness. Adverse inference is to be drawn against the prosecution for not recording his version and producing him as a witness before the Court.

12. The prosecutrix was medically examined vide MLC (Ex.PW-12/A) at around 01.20 p.m. The alleged history mentioned therein records that "sexual assault by some unknown person while she was going to her anut's house; there was no history of annus or oral intercourse." No fresh external injuries were visible on victim's body. Hymen appeared to be old torn. The Trial Court rightly observed that it was not appropriate to dwell any further upon that aspect as there are various factors responsible for tear in the hymen other than indulgence in the sexual act.

13. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. As per DNA Finger Printing Unit Report dated 31.01.2014 semen could not be detected on Ex.'1A' (two microslides described as 'vaginal smear'); Ex.'1B' (two cotton wool swab described as 'vulval swab'); Ex.'1C' (two pieces of cotton wool swab described as 'vaginal swab'); Ex.'1D' (a piece of cotton wool swab described as 'anal swab'); Ex.'1E' (two pieces of cotton wool swab described as 'nail scrapping'); Ex.'1G-1' (one lady kurta), and Ex.'1G-2'

(one salwar). Due to non-availability of semen on these exhibits, the Ex. '1F-1' (a piece of gauze cloth having dark brown stains), Ex. '1F-2' (dark brown liquid described as blood sample) & Ex. '2' (dark brown liquid blood described as "Blood sample of accused") were not processed for further DNA examination.

14. It appears that certain exaggerations have been made by the victim in her statement before the Court. A child witness is prone to tutoring.

15. 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. The evidence of a child witness can be the foundation for conviction provided it inspires the confidence of the Court. Since two contradictory versions have come before the Court, quite naturally the version in favour of the accused has to be taken into consideration. From the above contradictions, it can only be concluded that the appellant had removed only the victim's salwar and had not attempted to insert penis into her vagina and anus.

16. Since the prosecution was able to establish that the appellant had only removed victim's salwar, the offence apparently did not fall within the definition of Section 5(m) of POCSO Act punishable under Section 6 of POCSO Act read with Section 18 of POCSO Act to base conviction. In my considered opinion, the above said act of the accused would clearly fall

within Section 11 (ii) of the POCSO Act. The expression making the child to exhibit her body' as employed in Section 11 (ii) of the POCSO Act, is a larger term which would include the removing of the child's wearing dress so as to get the body of the child exposed. Therefore, the appellant is liable to be convicted under Section 12 of the POCSO Act for committing offence under Section 11(ii) of the POCSO Act. The conviction is accordingly altered to Section 11 (ii) of the POCSO Act.

17. The offence committed by the appellant is serious and grave. He was aged around 22 years whereas the victim was a child aged around 11 years. Nominal Roll dated 08.10.2015 reveals that the appellant has already undergone two years, three months and one day incarceration besides remission for one month as on 07.10.2015. He is involved in FIR No.192/11 under Sections 354/363 IPC PS Mundka in which he has been convicted and sentenced to undergo SI for eight months. His conduct in jail is unsatisfactory. He deserves no leniency. Considering the facts and circumstances of the case, the appellant is sentenced to undergo RI for three years with fine ₹5,000/-; default sentence for non-payment of fine shall be SI for one month.

18. The appeal stands disposed of in the above terms. 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 27, 2016 / tr