

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

RESERVED ON : 27th JULY, 2016

DECIDED ON : 10th AUGUST, 2016

+ **CRL.A.992/2015 & CRL.M.B.7773/2015**

MOTI LAL

..... Appellant

Through : Ms.Sunita Arora, Advocate.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Arun K.Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. This appeal is directed against a judgment dated 25.04.2015 of learned Addl. Sessions Judge in Sessions Case No.111/2/2013 emanating from FIR No.395/2013 registered at PS Chhawla by which the appellant – Moti Lal was held guilty for committing offence punishable under Section 10 of POCSO Act (In short ‘Act’). By an order dated 19.05.2015, he was sentenced to undergo RI for five years with fine ₹10,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 12.11.2013, at about 01.20 p.m. in Gali No.1, Qutub Vihar, Near Hanuman Chowk, the appellant made the prosecutrix ‘X’ (assumed name) aged around three years hold his penis in her hands.

3. On 12.11.2013, victim’s mother – Kiran had gone to take her elder daughter from her school. At about 01.20 p.m. when she returned to house, she noticed that the accused was sitting outside her house and ‘X’

was in his lap; he had made her to hold his penis in her hands. She immediately made a call at 100. The police arrived at the spot. The Investigating Officer after recording victim's mother – Kiran's statement (Ex.PW-2/A) lodged First Information Report. 'X' was taken for medical examination. Victim's mother recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In order to establish its case, the prosecution examined eight witnesses. In 313 Cr.P.C. statement, the accused denied his involvement in the crime and pleaded false implication due to previous quarrels. The trial resulted in conviction under Section 10 of the Act.

4. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Since the prosecution did not examine the victim, adverse inference is to be drawn against it. The Trial Court committed material irregularity in convicting the appellant under Section 10 of the Act; the offence for which he was not charged. The victim's mother nurtured a grievance against the appellant as a quarrel had taken place over the issue of taking water. Learned Addl. Public Prosecutor urged that the Trial Court after due appreciation of the evidence has found the accused to be the perpetrator of the crime and no intervention is warranted.

5. The victim is a child aged around 3 years. The appellant has not challenged or disputed her age. Sincere efforts were made by the prosecution to produce and examine the victim before the Court. Record reveals that she was examined as PW-1 on 11.02.2014. When her examination was under-way, various questions were asked to understand if

she was a competent witness. Since 'X' being a child of tender age was unable to give rationale answers to the questions put to her, the learned Presiding Officer in her wisdom opted not to examine her as a witness. No adverse inference can be drawn against the prosecution for non-examination of this material witness as sufficient reasons have come on record for that. It is relevant to note that 'X' was unable to record her 164 Cr.P.C. statement completely except to disclose that when she was playing, one 'uncle' had 'loved' her.

6. The occurrence took place on 12.11.2013 at around 01.20 p.m. Soon after the victim's mother noticed the indecent act, she immediately made call at 100. DD No.17A (Ex.PW-5/A) came into existence at 01.40 p.m. where there is specific mention that at Hanuman Chowk a small child has been teased by a man. The Investigating Officer after recording statement of victim's mother (Ex.PW-2/A) lodged First Information Report promptly without any delay by sending rukka (Ex.PW-7/A) at 03.20 p.m. The victim's mother gave graphic account as to how and in what manner, the accused had indulged in sexual assault upon the tiny girl. The petitioner was named in the FIR. Since there was no delay in lodging the FIR and the appellant was named to be perpetrator of the crime, there was least possibility of the victim's mother to concoct a false story implicating the accused in a short interval.

7. In her 164 Cr.P.C. statement the complainant – Kiran implicated the appellant to be the author of the crime. In her Court statement as (PW-2) she proved the version given before the police and the Metropolitan Magistrate without any variation. She identified the accused to be the perpetrator of the crime and assigned a specific and definite role to

him. She deposed that after noticing the sexual assault, she immediately called 100 and raised alarm. The accused tried to flee but was apprehended by the public. PCR van arrived at the spot and accused's custody was handed over to them. Her statement (Ex.PW-2/A) was recorded at the Police Station. She specifically deposed that the accused sitting outside his house had made 'X' to hold his penis in her hand. In the cross-examination, she, in fairness, admitted that none else had witnessed the incident. Some construction was going on in the neighbouring plot and the accused was working there as a labour. She denied if any altercation had taken place between them and the workers and that was the motive for false implication of the accused.

8. On scanning the whole testimony of the victim's mother, it transpires that no infirmities whatsoever could be extracted to discredit her. Material facts stated by her in the examination-in-chief remained unchallenged and uncontroverted. The accused did not deny his presence at the relevant time at the spot. He did not deny if child was not in his lap and he was not involved in the indecent sexual assault. No ulterior motive was assigned to the witness for making a false statement against the accused. The defence taken by the appellant for false implication is inconsistent and contradictory. In the cross-examination, a suggestion was put that a quarrel had taken place between the complainant and the workers at the construction site. The accused did not examine any co-worker in defence to substantiate his defence. Changing his version, in 313 Cr.P.C. statement, he came up with another inconsistent plea that on that day he was under the influence of liquor and a quarrel had taken place between him and the victim's mother over the issue of taking water from her house. The accused being under the

influence of liquor had no occasion to visit the complainant's house in her absence. He had no plausible reason to take the child in his lap without prior consent and permission of her parents and guardians. The appellant who admittedly was working as a labour in the nearby house which was under construction had no reasons to consume liquor and to visit the complainant's house in her absence. It appears that taking advantage of the loneliness of the child outside the house when her mother had gone to fetch her elder sister from school, the accused indulged in the nefarious act.

9. No valid reasons prevail to suspect the testimony of the victim's mother in the absence of any prior animosity or ill-will. It is unbelievable that victim's mother would level serious allegations of sexual assault falsely to put her tiny child in disrepute. Over petty issue, if any, she is not expected to 'use' her own female child to settle personal score. Needless to say, the appellant was guilty of sexual assault upon 'X' aged around three years.

10. True, the appellant was charged for commission of offence under Section 8 POCSO Act. His conviction under Section 10 POCSO Act is not unsustainable. The appellant was charged for the 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 (m) of Section 9 POCSO Act

provides that whoever commits 'sexual assault' on a child below twelve years 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.

11. The plea raised on behalf of the appellant that without framing charge under Section 10 of the Act, he could not have been convicted is not tenable as mere non-mention of the provision of law in the charge would not absolve him if he was otherwise found guilty of the offence. In the instant case, the appellant was specifically charged that on a particular date and time, he had made the child aged around three years hold his penis. Apparently, it was a 'sexual assault' within the meaning of Section 7 of the Act. Since the victim in this crime was a child below 12 years, apparently provision of Section 9 of the Act came into operation. The non-mentioning of Section 10 of the Act in the charge is inconsequential as the substance of the allegations which the appellant was required to answer were well disclosed to him. All the ingredient of Sections 7 and 9 of the Act were made known to the accused. No prejudice whatsoever has been caused by non-mentioning Section 10 of the Act in the charge. The Trial Court has dealt with this aspect and the findings on this aspect warrant no intervention. Besides this, the Court was empowered to award RI for five years even under Section 8 of the Act.

12. Considering the gravity of the offence whereby an innocent child of tender age was sexually assaulted in the aggravated form, the appellant deserves no leniency. The impugned judgment based upon fair appreciation of the evidence deserves no intervention.

13. The appeal lacks in merits and is dismissed. Pending application also stands disposed of. 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

AUGUST 10, 2016 / *tr*

