

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

RESERVED ON : 25th JULY, 2016

DECIDED ON : 04th AUGUST, 2016

+ **CRL.A.1336/2015**

HAZARI PASWAN

..... Appellant

Through : Dr.M.K.Gahlaut, Advocate with
Mr.H.K.Chaturvedi, Advocate.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant – Hazari Paswan impugns a judgment dated 17.10.2015 of learned Addl. Sessions Judge in Sessions Case No.107/2014 arising out of FIR No.280/2014 PS North Rohini whereby he was convicted for committing offence punishable under Section 10 of POCSO Act (In short 'Act'). By an order dated 02.11.2015, he was sentenced to undergo RI for five years with fine ₹5,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 30.04.2014, at about 12.00 noon to 12.30 p.m., at House No.174, Second floor, Village Nahar Pur, Delhi, within the jurisdiction of PS North Rohini, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around five years; he also inserted his hand in the victim's vagina. The occurrence conveyed to PCR at 1.09 p.m. by one Mukesh Kumar was reduced into writing (Ex.PW-2/A). DD No.23A

(Ex.PW-3/A) came into existence at PS North Rohini at 01.15 p.m. The Investigating Officer after recording statement of victim's mother – Durga (Ex.PW-5/A) lodged First Information Report. 'X' was taken for medical examination; she recorded her 164 Cr.P.C. statement. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, the appellant was charge-sheeted. In order to establish its case, the prosecution examined thirteen 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 and it is under challenge.

3. Appellant's counsel urged that the Trial Court committed material irregularity while recording victim's statement and put various leading questions. It ignored the material infirmities and inconsistencies emerging in the statements of the prosecution witnesses. It overlooked the fact that victim aged about five years was not competent to depose and the statement given by her was at her mother's behest. X's mother did not permit her medical examination to be conducted. 'X' has made vital improvements in her Court deposition. No independent public witness was associated at any stage of the investigation. Learned Addl. Public Prosecutor urged that when the child had gone to appellant's house to watch TV she was sexually assaulted there. No sound reasons prevail to disbelieve the statement of the child witness.

4. Admitted position is that the appellant used to live in a rented accommodation on the second floor. PW-1 (Mahender Singh), landlord, informed that a room was let out to him in the year 2007 on a monthly rent of ₹1,000/-. The victim's family used to live in the said premises in a room

on the third floor. The appellant was father of five children. The victim was aged around five years. Her birth certificate (Ex.PW-13/E) records her date of birth as 27.05.2009. In her Court deposition, 'X' claimed herself to be five years old. Nothing was suggested to her in the cross-examination if she was more than five years old on the day of incident. Authenticity and correctness of the date of birth recorded in MCD certificate (Ex.PW-13/E) was not suspected. The date of birth came to be recorded long before when X's parents had not anticipated such an unfortunate incident to happen in future to manipulate her age.

5. The occurrence whereby a tiny child aged around five years was sexually assaulted took place at around 12.00 noon when she had innocently gone to the appellant's room to watch TV. The police machinery was set in motion promptly without any delay and information about a child aged around five years to have been teased by an 'old' man was reduced into writing in the PCR form (Ex.PW-2/A) at 01.09 p.m. It led to recording of DD No.23A (Ex.PW-3/A). In her statement (Ex.PW-5/A), victim's mother named the appellant to be the perpetrator of the crime. She informed the police that at about 12.35 p.m. her daughter came crying and apprised her that Suraj's father had inserted finger in her vagina and she was in pain. Soon thereafter, the child was taken for medical examination. MLC (Ex.PW-5/B) records the arrival time of the patient at Dr.Baba Saheb Ambedkar Hospital, Rohini at 04.05 p.m. It records the alleged history whereby a child aged around five years was sexually assaulted by the accused by inserting his finger in her vagina. Since the FIR was lodged soon after the crime, there was least possibility of the victim's mother to concoct a false story implicating the accused in a short interval.

6. In her 164 Cr.P.C. statement (Ex.PW-6/B) recorded on 01.05.2014 'X' implicated the appellant and accused him of putting his hand in her vagina. She even informed the learned Presiding Officer that the accused had put his penis in her vagina. Before recording her Court statement, the learned Presiding Officer had put various questions to ascertain if she was a competent witness. After recording satisfaction that 'X' was able to give rationale answers to the questions put to her and was competent to depose, her statement came to be recorded without oath. She was examined in question-answer form. She named the appellant to be the author of the crime and assigned a specific and definite role to him in the crime. In response to a question "Phir Kya hua?", she responded "Suraj ke papa ne hath (hand) dala tha". To get the answer clear, the Court put another question, "Kaha par dala tha?". The witness touched her hand on her vaginal region and said "yaha par dala tha". The accusations are very specific, certain and clear. What else can be expected from a child aged around five years? Her statement on material and vital facts remained unchallenged. In the cross-examination, no suggestion was put if she had not visited the appellant's house to watch TV that day. The accused did not set up plea of 'alibi'. The prosecutrix claimed that Suraj - Appellant's son was present in the house but had gone to the toilet. The appellant did not examine him to deny the victim's assertion. She categorically claimed that her mother had not tutored her the statement and she had deposed facts on her own.

7. The child was very intelligent. She was examined in a congenial atmosphere and was made comfortable to narrate her ordeal; she drew a beautiful sketch of coloured flower; which is part of record. The

child had nothing to do with any animosity over any issue with her parents. No valid reasons whatsoever exist to suspect the version given by the child and to discredit her testimony.

8. PW-5 (Durga) has corroborated X's version in its entirety and no infirmities could be extracted in her cross-examination. She in fairness disclosed that their relations with the appellant were cordial and she was unable to fathom as to what had gone 'wrong' with the accused that day. She denied the suggestion that quarrels used to take place over throwing of dirty water or on fetching fresh water from the common tap. This defence deserves outright rejection. The accused did not examine any witness in defence to establish if on any particular date any altercation or scuffle had taken place any time over any such issue. No complaint whatsoever was ever lodged to the police or to the landlord (PW-1). For petty quarrels (if any), victim's mother is not believed to 'use' a child aged around five years to settle score. Sexual assault 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. The parents are reluctant to involve their children over such trivial issues.

9. No question described as 'leading' causing prejudice to the appellant has been put at the time of X's examination. The Presiding Officer is expected to remain sensitive particularly when a child of tender age is under examination. While conducting trial, Court is not required to sit as a silent spectator but to take active part within the boundaries of law, to bring on record the relevant facts for the purpose of eliciting truth. True, 'X' was not medically examined. However, it is inconsequential. Medical evidence was not required in the absence of mere specific allegations of penetrative

sexual assault. Moreover, in '*Dayal Singh vs. State of U.P.*', 2012 (8) SCC 263, the Supreme Court held that where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusion. Besides it, plausible explanation has been offered for it. Victim's mother was apprehensive about the painful procedure to be adopted at the time of such internal medical examination and she did not like 'X' to undergo the said trauma.

10. The impugned judgment based upon fair appreciation of the evidence deserves no intervention.

11. The sentence order is based upon fair reasoning. Minimum sentence prescribed under Section 10 of the Act has been awarded and it cannot be altered or modified. The crime committed by the appellant is horrible as a child aged around five years was ravished by an individual aged around 42 years, father of five children. 'X' was like his own daughter; she had gone to his residence unsuspectingly to watch TV. The appellant exploited her innocence and betrayed the trust of her family members as neighbour.

12. The appeal lacks in merits and 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.

(S.P.GARG)
JUDGE

AUGUST 04, 2016 / tr