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

Decided on: 16th June, 2017

+ CRL.A. 153/2016 and CrI.M.A.2464/2016

OM PRAKASH @ FUFA JI

..... Appellant

Through: Mr. D.S. Paweriya, Advocate
along with appellant produced
from JC

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Mr. Tarang Srivastava, APP for
the State with W/SI Shivali, PS
Bharat Nagar.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The appeal at hand brings a challenge to the judgment dated 03.11.2015, followed by order dated 05.11.2015, of the court of Additional Sessions Judge-01, North-West, Rohini, Delhi in Sessions case no.166/2013 whereby the appellant was held guilty and convicted for offence under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and awarded sentence of rigorous imprisonment for five years with fine of Rs.5,000/-, with further simple imprisonment for six months for default in payment of fine. The Sessions case, it may be mentioned here itself, was registered on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which had been submitted by the

investigating office on conclusion of investigation into First Information Report (FIR) No.194/2013 of Police Station Bharat Nagar registered on 25.07.2013 for investigation of offences punishable under Sections 363/376/511 of the Indian Penal Code, 1860 (IPC) and Sections 8, 10 and 12 of POCSO Act. It may further be mentioned here that though the trial was held on the basis of charges framed on 07.02.2014, *inter alia*, for offences punishable under Sections 363/354/506 IPC besides under Section 9 (m) read with Section 10 of POCSO Act, by the impugned judgment the trial court did not return any finding, for reasons not indicated, qua the other charges, i.e., the offences punishable under Sections 363/354/506 IPC. This may not have been proper approach and rather is reflective of process being unnecessary hurried.

2. The appellant claims to be innocent and falsely implicated. He has raised a number of contentions in defence, some over and above the arguments which were repelled by the trial court by the impugned judgment. One of his contentions, however, stands out, it concerning demands of fair trial procedure. It is this contention which, as the following discussion would show, must be accepted resulting in the impugned judgment and order on sentence being vacated and the matter being remanded to the trial court for further proceedings, as directed hereinafter, and afresh adjudication.

3. It is trite that investigating police officer is an important witness for the prosecution, also from the perspective of defence. A person facing criminal charge is entitled to demonstrate, *inter alia*, by cross

examination of the investigating police officer to show that the investigation was not fair or suffers from lapses which may have caused prejudice to the defence.

4. The investigating officer of this case, W/SI Shashi Lata (PW-10) was examined at the end, as is the usual practice, on 24.04.2015. The record would show that the opportunity to cross examine the said very important witness was given but not availed. It is the submission of the learned counsel for the appellant, he also having been counsel for him at the trial, that on 24.04.2015 when PW-10, the investigating officer, was examined, the Bar Association of Rohini Courts had called for a strike and, therefore, he along with other Advocates were not allowed to enter the court premises. His submission to this effect is confirmed by the proceedings recorded by the trial court on 24.04.2015. Both the deposition sheet containing the evidence (examination in chief of PW-10) as also the corresponding order sheet dated 24.04.2015 records the presence of the appellant as accused produced from judicial custody with “a proxy counsel appointed by the bar”.

5. Apparently, the proxy counsel nominated by the Bar Association had no authority nor the necessary brief to conduct the proceedings. It is inherent in the said proceedings that the Bar Association had actually taken over the affairs in the courts at Rohini on that date and its proxies were representing the Advocates who had been engaged by the litigants thereby disallowing the latter from appearing.

6. The anxiety on the part of the learned trial Judge to proceed with the recording of evidence for which the witness had also come up in attendance, and not wasting the precious judicial time, is very well understood and appreciated. But, this would not mean that the rights of the accused to fair trial procedure, particularly his right to cross-examine the witness of such great import, could or should have been sacrificed at the altar of expeditious proceedings. Possibly after recording the chief-examination of PW-10, the matter could have been adjourned for the next date so that counsel engaged by the appellant to defend him could have discharged his responsibility by cross-examining the witness. Closing the right of cross-examination by giving an opportunity to the proxy appointed by the Bar Association appears to be compliance with the procedure more in form than in substance. This cannot be accepted.

7. In the above facts and circumstances, while the net result having been found to be vitiated on account of denial of important right of the accused to cross-examine the investigating officer, it must be added that this case could possibly go down in the history as one such case where the strike by the Bar Association has resulted in denial of justice. It is hoped the Bar Associations would have a re-think on the mode and forum of lodging protests in a manner other the stalling the judicial process in the courts of which they are an important limb.

8. For the foregoing reasons, the impugned judgment and order on sentence are set aside. The case is remanded to the trial court for fresh adjudication after recalling W/SI Shashi Lata (PW-10), the

investigating officer, and giving an opportunity to the appellant (accused) for her cross-examination. Needless to add, after the said exercise has been concluded, the statement of the appellant under Section 313 Cr.P.C. will have to be recorded again, followed by further opportunity for him to lead additional evidence in defence, if any.

9. For removal of doubts, it is clarified that the defence has not sought, and shall not be permitted to move, for recall of any witnesses for cross examination other than W/SI Shashi Lata (PW-10).

10. Further, it is hoped and expected that the trial court will render the fresh judgment not being influence or feeling bound by the view taken in the judgment which has been set aside in this appeal.

11. The learned counsel for the appellant has pointed out from the trial court record that the appellant was released on bail during the pendency of the trial and that he was taken in custody after he had been held guilty and convicted by judgment dated 03.11.2015. This is confirmed by the nominal roll.

12. In view of the result of the appeal at hand, in all fairness, the liberty of release on bail should be restored to the appellant in terms of the order passed during the pendency of the trial. The said bail order is, thus, revived. The appellant will, however, furnish fresh bail bond in its terms, to the satisfaction of the trial court (or Vacation Judge) whereupon he shall stand released on bail, pending conclusion of trial. He shall appear, or be produced from custody, as the case may be, for further proceedings in above light, and in accordance with law, on

24.07.2017, before the trial court.

13. The trial court record shall be returned forthwith alongwith copy of this judgement.

14. *Dasti* under the signatures of Court Master.

R.K.GAUBA, J.

JUNE 16, 2017

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