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

RESERVED ON : JUNE 06, 2017

DECIDED ON : AUGUST 04, 2017

+ **CRL.A. 658/2015**

DURGESH JHA

..... Appellant

Through: Mr. B.S. Chowdhary and Ms.
Chitra Goswami, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Ms. Meenakshi Dahiya, APP

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P GARG, J.

1. Challenge in this appeal is a judgment dated 16.03.2015 of learned Additional Sessions Judge in Sessions Case No.101/13 emanating from FIR No.241/13 registered at Police Station Aman Vihar by which the appellant-Durgesh Jha was held guilty for committing offences punishable under Sections 6 and 10 of POCSO Act (hereafter referred to as 'the Act') and Section 506 IPC. By an order dated 23.03.2015, the appellant was sentenced to undergo Rigorous Imprisonment for ten years with fine ₹20,000/- under Section 6 of the Act and Rigorous Imprisonment for ten years with fine ₹10,000/- under Section 10 of the Act. The sentences were to run concurrently.

2. Briefly stated the prosecution case, as reflected in the charge-sheet, was that on 01.01.2013 at house No.O-13, Gali No.1, Prem Nagar II, Delhi-86, the appellant, victim 'X's (changed name) real paternal uncle (chacha), touched her breast and had physical contact with sexual intent. 'X' was aged around 13 years at the time of the incident. In February, 2013 and thereafter at different times at house No.O-13, Gali No.1, Prem Nagar II, the appellant committed penetrative sexual assault on 'X' repeatedly and also criminally intimidated her. The incident was reported to the police on 13.06.2013. 'X' along with her mother went to police station Aman Vihar at about 5.00 p.m. and lodged the complaint (Ex.PW3/A). The Investigating Officer registered the FIR. 'X' was taken for medical examination; she recorded her 164 Cr.P.C. statement. The appellant was arrested; statements of witnesses conversant with the facts were recorded during investigation. The exhibits collected were sent for examination at Forensic Science Laboratory and its reports were collected. Upon completion of investigation, a charge-sheet was filed against the appellant in the court for commission of offences punishable under Sections 376 (2) (f) (i) (j) IPC and Section 6 of the Act. By an order dated 11.9.2013, the appellant was charged for commission of offence punishable under Sections 9(n) of the Act; under Section 5(n) punishable under Section 6 of the Act and under Section 506 IPC. The appellant pleaded not guilty of the charged and claimed trial. In order to establish its case, the prosecution examined 13 witnesses in all. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication due to property dispute. DW-1 (Rajeev Kumar Jha), DW-

2(Punita Devi) and DW-3 (Parvati Devi) were examined 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. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the sole testimony of the prosecutrix without any independent corroboration. Counsel urged that there were material discrepancies and infirmities in the statement of the prosecution witnesses. No explanation was offered for inordinate delay in lodging the FIR; no weightage was given to defence witnesses who have spoken about the appellant's innocence. Testimony of DW-1 (Rajeev Kumar Jha) was not taken into consideration to falsify 'X's version if he had accompanied them to the SGM hospital. 'X' has made vital improvements in her deposition before the court. The FSL report did not support the version of the prosecution. No injuries were found on 'X's body during her medical examination. The doctor who had medically examined the prosecutrix was not examined. The learned Additional Public Prosecutor urged that no sound reasons exist to disbelieve the statement of the child witness. She had no ulterior motive to make a false statement against her real paternal uncle. Minor inconsistencies or trivial discrepancies in the statement of the witnesses are inconsequential.

4. Admitted position is that the appellant is 'X's real paternal uncle (chacha). Earlier, all of them lived together at J-368, Prem Nagar, Part-II. The appellant's father subsequently sold the said property and

property O-13, Prem Nagar, Part –II was purchased. After disposal of the property, both the appellant and his brother Parkash Jha ('X's father) shifted to rented accommodation. Subsequently, father of the accused and Parkash Jha built ground floor of property No.O-13, Prem Nagar, Part-II and the first floor of the said property was constructed by the appellant. It is also not in dispute that 'X's father used to live along with his family on the ground floor whereas the appellant lived along with his family on the first floor. Relations between the parties were cordial during their stay at J-368, Prem Nagar.

5. The victim 'X' is a child aged around 13 years. In her complaint (Ex.PW-3/A), MLC (Ex.PW-6/A), in 164 Cr.P.C statement (Ex.PW-2/B) and in her deposition before the Court as PW-3, she claims herself to be about 13 years on the date of incident. The prosecution examined PW-1 (Jolly Dagar), MCD Teacher, Nigam Pratibha Vidhyala, Prem Nagar-Ist, Delhi. She brought the relevant school record (Ex.PW-1/A to Ex.PW-1/D). As per her testimony, 'X' was admitted in the school in class Ist on 18.07.2005 on the basis of admission form and the affidavit filed by her mother Ranjana Devi wherein her date of birth was mentioned as 24.12.1999; 'X' studied in the school upto 5th class. In the cross-examination, the witness admitted that no independent verification of the date of birth was made and no MCD birth certificate was produced.

6. This Court finds no valid reasons to suspect the date of birth recorded in the school register at the time of seeking 'X's admission in 1st standard on 18.07.2005. This date of birth was recorded much prior to the incident. 'X' or her family members had not imagined or

anticipated such an unfortunate incident to happen in future to manipulate her date of birth. No other date of birth of the prosecutrix has been suggested or proved by the appellant or defence witnesses who are closely related to the victim. Apparently, the prosecutrix was below 16 years on the day of occurrence.

7. In her complaint (Ex.PW-3/A) lodged on 13.06.2013 forming basis of the FIR, 'X' gave detailed account to the police as to how and in what manner, she was sexually assaulted on various occasions by the appellant on different pretexts. She further informed that due to fear she was unable to narrate the incident to her parents. Finally when subjected to sexual assault repeatedly, she gathered courage and divulged the occurrence to her mother who brought her to the police station where her statement was recorded. In her 164 Cr.P.C. statement (Ex.PW-2/B) recorded on 14.06.2013 without any delay, the prosecutrix reiterated her version before the learned Metropolitan Magistrate and implicated the appellant for committing rape upon her on several occasions.

8. In her court statement as PW-3, 'X' proved the versions given to the police as well as before the Magistrate without any major variations. At the time of her court examination, she was studying in 8th class in a Government school at village Nithari. She deposed that in the month of January, 2013 she had a severe stomach pain. Since her father was away to work, her mother called the appellant and her another uncle (foofa) to take her to the hospital. From the hospital, the appellant brought her to his house. When she was taking rest in a quilt, finding her alone in the room, the appellant entered inside the quilt and inquired

from her as to what was wrong with her. At the same time, he started touching her entire body with hand. She did not feel comfortable with his touch, got up and started crying. When her aunt enquired as to what had happened, she wished to go home. In the meantime, her mother came and brought her to the house.

9. Regarding the other episode in the month of February, 2013, 'X' deposed that at about 7 p.m., she was at her new house and her paternal grandmother was in the kitchen cooking food; her mother had gone to the market. Her grandmother asked her to bring the key from appellant's house who was to go to his in-laws. When she went there, the main door of the house was open and she entered in the house. The appellant came out of the toilet, caught hold her from behind; gave her beatings and did wrong act with her. When specifically asked to clarify as to what wrong the appellant had done, she elaborated that he committed rape upon her and threatened to rape again and kill her mother if she reported the incident to anyone. She further deposed that when she enquired from the appellant after he removed her clothes 'chacha kya kar rahe ho' the appellant told her 'tu chup rahe' and thereafter, he slapped her and committed rape upon her. She reasoned that due to fear, she remained quiet. Regarding another incident in the month of February, 2013 on Friday, 'X' detailed that her mother had gone to drop her younger brother to school at around 8.30 a.m. At that time, the appellant came in the room and asked 'beta kya ho raha hai'. She told him 'chacha aap yaha se jao'. The appellant caught hold of her and started touching her breast and again committed rape upon her. She deposed that her grandfather (dada) was at home in other room. He

was, however, hard of hearing; her dadi and younger 'chacha' had gone to her bua's house. She did not tell the incident to anyone in the house due to threats extended by the appellant.

10. The child further deposed that later on similar act was done by the appellant several times. Finally, she took courage and informed her mother after ten days of the incident. Her mother informed her 'dadi' who told 'beta koi baat nahin chacha hai, yet beti ki jaat hai' and silenced her mother.

11. In the cross-examination, she expressed inability to inform if any prescription of the SGM hospital for her treatment was given to the police. She, however, informed that she was given an injection in emergency and thereafter discharged. She further informed that it was a rented house which consisted of one big room, one kitchen and one bathroom. Her chachi was not visible from the bed where she was lying under a quilt due to a wall between the kitchen and the room. She fairly admitted that she did not raise alarm when touched by the appellant. She denied the suggestion that she had not gone to the hospital that day. Regarding the incident in February, 2013 at 7.00 p.m., she elaborated that when she had gone to take key from the accused, his wife was not present as she has gone to her parents' house. Rape was committed upon her that day for the first time on the floor. The second time, the appellant committed rape upon her at her house on the bed even when her grandfather was present. On both the occasions, she had offered resistance but was beaten and threatened. She further admitted that she did not suffer any injuries and her clothes were not torn. After the first sexual assault, she had missed her periods and her mother had taken her

to government dispensary nearby where she was prescribed certain medicines. She used to feel severe pain in her private parts and lower abdomen.

12. The prosecutrix further responded that her father had accompanied them to the police station but did not participate in the proceedings as the sexual assault pertained to his daughter and her mother was taking care of it. She denied if statement under Section 164 Cr.P.C. was given at her parents' behest. She admitted that appellant's wife had filed a case against her father but she was not aware of its details. She denied any property dispute between her father and the appellant.

13. On scrutinizing the victim's statement in its entirety, it reveals that despite indepth cross-examination, no worthwhile or material infirmities could be extracted or elicited to suspect her version. Her statement is consistent throughout. She was categorical to assign specific and definite role to the appellant in the crime on different dates. No ulterior motive was attributed to the child witness to make a false statement against her own relative who was akin to her father. Her ocular testimony is in consonance with medical evidence. On the night intervening 13/14.6.2013, she was medical examined at Sanjay Gandhi Memorial Hospital, Mangolpuri vide MLC (Ex.PW-6/A). Name of the perpetrator of the crime was disclosed to the examining doctor. The alleged history recorded therein mentions that it was a case of sexual assault by her own uncle Durgesh in January, 2013; it was repeated 3-4 times till February 2013. Apparently, the appellant was named at first instance to be the culprit. Hymen was found to be torn. In the cross-

examination, the victim had specifically stated that no other individual had done such wrong act with her prior to the commission of it by the appellant.

14. Victim's statement has been corroborated in material particulars by her parents PW-6 (Rajni Devi) and PW-10 (Prakash Jha).

15. True, there was considerable delay in lodging the report with the police. The first occurrence had taken place sometimes in January, 2013. The appellant repeated the act several times thereafter. The report was made to the police only on 13.06.2013. It, however, does not belittle the appellant's crime. The victim has explained the delay in narrating the incident to her parents and the police. She was a child aged around 13 years and was afraid of the appellant who had extended threats to her. Due to fear and threats, she did not dare to inform her parents and continued to suffer the ordeal. Even her passive consent to have physical relation with the appellant was of no consequence or relevance, she being below 16 years of age. Due to immature age, she was unable to understand the consequences of physical relations at such a young age and that too with a grown up individual-her paternal uncle. Delay in lodging the report in sexual offences, *per se* is not fatal. Recently in the *State of Himachal Pradesh vs. Sanjay Kumar alias Sunny*, AIR 2017 SCC 835 in similar circumstances where the child aged around 9 years was sexually assaulted by her own real uncle, the delay of three years in informing the parents by the victim was considered inconsequential. The Supreme Court held as under:-

“23. As per the prosecutrix, she was called by the Respondent to his room, which is on the first floor of the

house. Unmindful of what could be the motive of an uncle to call her, she obliged as a dutiful child. However, according to the prosecution, unfortunate incident happened. It happened with a nine year old child who was totally unaware of the catastrophe which had befallen her. Her mental faculties had not developed fully; she was in the age of innocence; unaware of the dreadful consequences. Further, at the time when she was being sexually assaulted, her mouth was gagged so that she was not able to scream and after the incident she was threatened not to disclose this incident to anybody. In fact, she kept mum out of this fear. It is quite understandable that a nine year old child, after undergoing traumatic experience and inflicted with threats, would be frozen with fear and she could not find voice to speak against her uncle. In cases of incestuous abuse, more often, silence is built into the abuse. Incident came to light and tragedy struck on the prosecutrix only when her mother noticed that she was continuously suffering from stomach ache and was, therefore, taken to a Gynecologist for her treatment. But for the above, matter may not have come to light. It is only after she was examined by Dr. Jasbir Kaur (PW-8), who had medically examined and formed the opinion that the prosecutrix had been sexually assaulted forcibly about 2-3 years ago, since her hymen was ruptured and her external and internal sphincters were also torn, that PW-1 queried the prosecutrix and she revealed the incident, hitherto hidden by her from the entire world out of fear, not only as a result of the threats extended by the Respondent but for varied other reasons.

24. When the matter is examined in the aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly understandable. We would like to extract the following passage from the judgment of this Court in *Tulshidas Kanolkar v. State of Goa*:

5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle.”

25. In *Karnel Singh v. State of Madhya Pradesh* MANU/SC/0497/1995 : (1995) 5 SCC 518, this Court observed that:

7...The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts

doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false...

26. Likewise, in *State of Punjab v. Gurmit Singh and Ors.* MANU/SC/0366/1996 : (1996) 2 SCC 384, it was observed:

8.....The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged...

27. Notwithstanding the fact that the trial court accepted the explanation for delay as satisfactory by giving detailed reasons, we are dismayed to find that the High Court has been swayed by this delay in reporting the matter with omnibus statement that it is not satisfactorily explained without even an iota of discussion on the explanation that was offered by the prosecution in the form of testimonies of PW-1 and PW-2.

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30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is

trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevent such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long lasting effects on such victims.”

16. It is well settled that the testimony of a victim in cases of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone. The victim's testimony, however, must inspire confidence. In the instant case, no compelling reasons exist to disbelieve the statement of the prosecutrix. It was emphasized by the appellant's counsel that appellant's false implication is due to property dispute. The defence deserves outright rejection as there is no cogent material on record to show if there existed any property dispute between

the two brothers. The ground floor is being occupied by the victim and her family members whereas the first floor is in occupation of the appellant and his family members. No complaint, whatsoever, regarding any quarrel over property dispute was ever made to the police. No civil proceedings regarding the property in question were ever initiated by any of the parties. Moreover, for a trivial property dispute (if any) the victim's parents cannot be imagined to use their minor school going child to settle score with the appellant. In that eventuality, they could not have waited for long four-five months to lodge the report. Contrary to that, appellant's wife purportedly has lodged an FIR No.331/2013 at Police Station Aman Vihar against the victim's father Prakash Jha for commission of offence punishable under Sections 323/354/452/506/34 IPC. It is no clear as to what is the status of the said case. PW-10 (Prakash Jha) in the cross-examination informs that this FIR was lodged after the filing of the present complaint. Photo-copy of the said FIR is in appeal file, the FIR was lodged on 11.08.2013 when the appellant was in custody. Undisputedly, the defence witnesses DW-1 (Rajiv Kumar), DW-2 (Punita Devi) and DW-3 (Parwati Devi), appellant's brother-in-law, sister and mother respectively, have opted to support the appellant in one voice. They have spoken that no such incidents had, in fact, taken place and there was property dispute between the two brothers. The Trial Court rightly did not give weightage to their testimonies as they all were interested to save the appellant from punishment due to sympathy with him particularly when he had lost a new born child and the other one was not keeping good health. They were not witnesses to the incident. Only 'X' who had suffered the

trauma was aware as to what had happened to her. Such offences are not committed in open. The appellant used to take advantage of the loneliness of the child and committed rape upon her frequently.

17. Since the victim had approached the police after several days of the physical assault, chances of her suffering injuries on her body including private parts was rare. No benefit can be given to the appellant merely because during medical examination, no injuries were found on victim's body.

18. Minor contradictions or discrepancies highlighted by the appellant's counsel are of no consequence as they do not affect the core of the prosecution case.

19. In 313 statement, the appellant did not give plausible explanation to the incriminating circumstances proved against him. All the issues raised by him have been dealt with in the impugned judgment with reasons. The judgment based upon fair appreciation of evidence does not call for any interference. The conviction for the aforesaid offences stands affirmed.

20. Regarding sentence, the appellant does not deserve any leniency. The victim was his own close relation akin to her daughter. She was a child of tender age around 13 years, unaware as to what was being done with her at a young age. The appellant violated her body and betrayed the trust reposed in him by the victim's family. It is relevant to note that the appellant himself was a married man and was well-aware as to what were the consequence and impact of the crime upon the unsuspecting child.

21. The appeal being devoid of merits is dismissed. Trial Court record along with the copy of the order be sent back forthwith.

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

AUGUST 04, 2017/sa

