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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 14th June, 2017

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CRL.A. 1078/2015

MAHENDER

..... Appellant

Through: Mr. R.P. Luthra & Mr. Sourabh
Luthra, Advs.

Versus

STATE OF DELHI

..... Respondent

Through: Mr. Tarang Srivastava, APP for
State with SI Ramesh Kumar,
PS Sultan Puri.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. By this appeal, the appellant challenges his conviction on charge of kidnapping and sexual assault on a girl child.
2. The first information report (FIR) no.460/14 (Ex.PW3/A) was registered in police station Sultan Puri on the basis of statement (Ex. PW4/A) of the first informant (PW5) at 00.45 hours on 25.04.2014 for investigation into offences statedly committed, they being punishable under Sections 376 of Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) against her daughter (PW-5), a child born, per school record (Ex. PW2/D), on 13.03.2007, in an incident that took place around 7.00 p.m. on 24.04.2014 in House no.P-85, Krishan

Vihar, Sultan Puri, Delhi, concededly the residence of the appellant herein.

3. The appellant was apprehended by PW-6, the father of the prosecutrix child, sometime after 7.00 p.m. and, upon he being handed over to the police, he was formally arrested after personal search (vide Ex. PW10/E) in terms of arrest memo (ex. PW10/D) at 01.00 hours on 25.04.2014 by SI Lata Sachdeva (PW-10), the investigating officer (IO). On the basis of evidence gathered during investigation, report under Section 173 of the Code of Criminal Procedure, 1973 was prepared and submitted in the court of the Additional Sessions Judge-01, designated as a Special Court under POCSO Act, on 27.05.2014.

4. The charge-sheet led to the appellant being put on trial on the basis of formal charge framed on 15.12.2014 for offences punishable under Sections 363 and 366 IPC besides under Section 5(m) read with Section 6 of POCSO Act and, in the alternative, under Section 376 (2) (i) IPC.

5. The trial concluded with judgment dated 22.07.2015 whereby the appellant was held guilty and convicted for offences punishable under Section 363 IPC and Section 10 POCSO Act, he having been acquitted of the charge under Section 363 IPC, the alternative charge under Section 376 (2)(i) IPC being consequentially dropped.

6. By order dated 27.07.2015, the trial court while directing sum of Rs.50,000/- to be paid by District Legal Services Authority as compensation to the victim child, meted out punishment in the shape of rigorous imprisonment for five years with fine of Rs.5,000/- for offences under Section 10 of the POCSO Act and rigorous

imprisonment for two years with fine of Rs.1,000/- for offence under Section 363 IPC. While granting benefit of Section 428 Cr. PC, the trial court also directed the substantive sentences to run concurrently.

7. The appeal at hand seeks to assail the above-mentioned judgment and order on sentence passed by the trial court.

8. The case for the prosecution lies in a narrow compass. The factual matrix may be noted.

9. As mentioned at the outset, the victim child was enrolled in a school for formal education and the record produced by the Principal of the said educational institution (PW-2), *inter alia*, based on original admission form, admission register and affidavit (Ex. PW2/A to C) confirms, by formal certificate (Ex. PW2/D), that her date of birth declared at the time of enrolment was 13.03.2007. Since the incident statedly took place on 24.04.2014, the child was a little more than seven years in age at the relevant point of time.

10. It may be mentioned here itself that the age of the prosecutrix has been variously stated at different stages in that in the FIR, lodged by the mother (PW-4), she was described as a girl aged five and half years which was the age mentioned to Dr. Rashmi Verma, Sr. Resident (Gynae) of Sanjay Gandhi Memorial Hospital, Mangolpuri (hospital) at the time of medical examination of the prosecutrix leading to preparation of the MLC (Ex. PW7/B), which was proved by Dr. M. Das (PW-7) and Dr. Akanksha (PW-8). The prosecutrix was taken before a Metropolitan Magistrate for her statement under Section 164 Cr. PC on 25.04.2014, the said statement having been recorded (vide Ex. PW5/A) indicating the child to have mentioned her

own age as five years. When PW-4, the mother of the prosecutrix appeared as a witness on 20.04.2015, she stated that her daughter had completed the age of seven years. This is the age which was mentioned by the prosecutrix child when she was called in as PW-5. The variation and discrepancy with regard to the age of the prosecutrix child, however, is inconsequential in as much as it is not the case of the defence either that the prosecutrix was an adult or even that she was a child more than twelve years of age, which would have been of some import for purposes of invoking section 9(m) of the POCSO Act.

11. The evidence on record clearly brings out that the prosecutrix with her parents and siblings lived in a house hardly any distance away from that of the appellant. While PW-5 would simply state that it was at some distance, her mother (PW-4), stated that it would take five minutes on foot to reach the place from her house, the father (PW-6) clarifying that the distance between the two houses was only 50 metres.

12. The victim comes from a very poor strata of society. PW-6 described his own avocation as that of a mason. His wife (PW-4) stated that her husband was engaged as labour in construction work in the street behind her house.

13. According to the FIR, the mother (PW-4) was busy with her household chores while the prosecutrix (PW-5) went out to visit the local temple at about 7.00 p.m. on 24.04.2014. She returned crying within 10-15 minutes. Upon being questioned by PW-4, the prosecutrix informed her mother that a boy who lived in the rear street had forcibly taken her to his own house and after bolting the door

from inside had removed her lower garment (*pajami*) and underwear (*kachchi*) and, thereafter, lowered his own trousers upto his knees and made her lie and came over her trying to put his male organ into her private parts. When the girl started crying, the assailant opened the door and the girl put on her lower garments and rushed home. PW-4 reported to the IO in the FIR that she had immediately called her husband home by informing him telephonically and when he came and learnt about the incident, he accompanied the girl who pointed out the house in question where the appellant was found present, to be apprehended and later handed over to the police.

14. The first intimation to the police was conveyed through police control room (PCR) by a call made by PW-6. This was reduced into writing vide DD no.89B (Ex. PW10/A) recorded on 7.55 a.m. on 24.04.2014. The matter was entrusted initially to SI Swaran who went to the place in question and upon learning about the nature of incident, requisitioned the services of a lady police officer. This was logged by DD no.41A (Ex. PW10/B) recorded at 8.31 p.m. on the same night. It is pursuant to this that PW-10 (IO) was deputed to take over the matter. She recorded the statement of PW-4 and on the basis of her own endorsement got the FIR registered.

15. During the course of investigation that followed, the prosecutrix and the appellant, who had been arrested, were taken for medical examination. The appellant was examined in the hospital by PW-7 who proved the MLC (Ex. PW7/A). It may be mentioned here that according to the evidence on record, particularly, the MLC, the age of the appellant on the relevant date was 21 years. The medical

examination leaves no doubt as to his capacity to engage in sexual intercourse, he having developed secondary sexual characteristics. While the medical officer noted in the MLC that the male organ of the appellant was of normal size and shape and that there was no external injury nor any indication of smegma or discharge, it was also observed that the underwear of the appellant bore semen stains.

16. The biological samples collected during the medical examination of both the prosecutrix and the appellant as also the lower garments of the prosecutrix with other exhibits were eventually sent to forensic science laboratory (FSL), the report issued by Sr. Scientific Officer (Biology) (Ex. PX), however, indicating that no semen stains could be detected on the lower garments of the prosecutrix. The report indicates the underwear of the appellant was returned without examination, there being no reasons set out for the same. Blood was detected on the underwear of the prosecutrix but then there is no proof adduced as to the result of serological examination.

17. The prosecutrix, while appearing as PW-5, corroborated the prosecution case in all material particulars. In the course of her testimony, she identified the appellant as the person who had taken her to his house and subjected to assault after removing her lower garments. Her word is supported by the deposition of her mother (PW-4) and father (PW-6). The statements are by and large consistent with the prosecution case, in general, and original version given to the investigating police, in particular.

18. The trial court found the evidence worthy of reliance and accepting it has returned the finding of guilty for offences mentioned

at the outset.

19. The learned counsel for the appellant, however, submitted that the evidence of these witnesses, particularly that of the prosecutrix child ought not be believed since there is possibility of she having been tutored, referring in this context to the defence plea of past enmity being the motive.

20. The theory of past enmity, or the case having been instituted out of vendetta, though suggested to the parents of the prosecutrix does not deserve any credence in as much as there is no evidence led in its support. Since the incident was reported with all promptitude, the version of the prosecutrix as given to her mother forming part of the FIR, registered without any delay, it matching with the version of the prosecutrix herself in the course of her statement under Section 164 Cr. PC recorded the very next day, it also forming part of the history narrated to the medical officer at the time of the MLC (Ex. PW7/B), the argument of the possibility of tutoring is also found to be devoid of substance.

21. The defence has argued that in the initial version, it had been indicated that the appellant had committed sexual intercourse by inserting his male organ into the private parts of the prosecutrix child. Reference in this context is made to the version appearing in the statement under Section 164 Cr. PC (Ex. PW5/A) wherein penetration appears to have been indicated (the words used, in vernacular, being “*meri susu wali jagah per apni susu wali jagah dal di*”). But, noticeably while giving history of the assault to the examining medical officer at the time of MLC (Ex. PW7/B), it had been clearly stated that

all that had been done by the assailant unto the prosecutrix was touching her private parts with his penis. This is the version the prosecutrix gave during her examination-in-chief, explaining it further in cross-examination by testifying that the appellant had tried to penetrate (“*dalne ki kosis ki thi*”).

22. In the considered view of this court, given the tender age of the girl child, the complete act of sexual intercourse possibly being beyond the comprehension of her very young mind, some loose expression indicative of penetration at the stage of statement under Section 164 Cr. PC cannot render her testimony incredible. The acts committed against her have been properly described, consistently and throughout, and therefore, there is no reason why her testimony should be disbelieved.

23. It does appear that PW-4, during her testimony, spoke about the clothes of the prosecutrix being found to be slightly blood-stained when she had returned home after the assault. Her husband (PW-6) had a little different version to the effect that the prosecutrix had blood stains on her body which, according to him, were wiped off by his wife. Apparently, PW-6 having entered the scene later, the version of PW-4 will have to be preferred. It seems to match with the observation in the FSL report (Ex. PX) wherein blood was detected on the underwear of the prosecutrix. But, since formal evidence on this score was not adduced, nor further confirmation as to the source of the blood made by any connecting material, this part of the evidence may not be of any consequence.

24. The fact that there was no penetration by the male organ is

confirmed by PW-8, the Gynecologist. During her cross-examination, she clarified that if the organ of an adult male were to enter the vaginal orifice of a child of such tender age, it would result in tearing of the hymen besides causing reddishness and tenderness which, in the present case, were missing. From this, it can be concluded, as rightly so done by the trial court, that the petitioner had touched the private parts of the prosecutrix with the tip of his male organ but not penetrated. This may be part of preparation, or even an attempt to commit penetrative sexual intercourse. But then, such penetration not having been made, the sexual assault occurred only by the touch. Since the trial court did not consider it as a case of attempt of rape or penetrative sexual assault and since the State has not preferred any appeal on such aspect, this court ought not proceed to consider the case in such direction.

25. The appellant had set up the plea of *alibi*. He argued that he was not even present at the scene at the relevant point of time, he being away with a female friend in the area of India Gate, New Delhi (which, as per oral submissions, is at a distance of about 15 kilometers from the place in question). He examined the said friend Versha (DW-1) in his defence.

26. DW-1, in the course of her testimony, spoke about she and the appellant being involved in an affair with each other, she being desirous of marrying him. She was candid enough to state that she had come to depose in his favour in order to save him. According to her version, she with the appellant were in the area of India Gate, having travelled from Sultan Puri by bus and having returned by 7.45

to 8.00 p.m. on 24.04.2014. She produced two photographs (Marks A and B) which depict her in the company of the appellant against the backdrop of India Gate, print-outs purporting to carry the date (24.04.2014) and time (06:05 and 06:06).

27. The trial court did not accept the evidence based on the above photographs for the reason the negatives thereof have not been produced nor the photographer who took the same examined. It has been argued that these photographs were taken by a digital camera. If it were so, this fact had to be properly proved. That in fact would bring in one more difficulty. The digital camera being a device the information stored wherein being in the nature of electronic record, admissibility of the print-outs of this nature depends on proper compliance with the provision contained in Section 65-B of Indian Evidence Act. No efforts for compliance in this direction were made. The photographs (Mark A and B), thus, cannot be treated as properly proved in accordance with law.

28. Even if the above photographs were to be accepted as good proof showing the appellant, in the company of DW-1, in the area of India Gate on 24.04.2014, there is no reason why the time reflected thereon should be taken as the time of evening hours. It is clear from these photographs that the appellant and DW-1 were facing east when the same were exposed by the camera. The shadows of their respective bodies looming in other direction are the give-away. In these circumstances, these photographs cannot be accepted as those clicked in the evening hours, as is the claim of DW-1.

29. The plea of *alibi* brought in through DW-1, even otherwise,

seems to be an after-thought. No suggestions to this effect were given to any of the witnesses during their respective statements. This was not even the defence plea raised during the statement under Section 313 Cr. PC. The plea of *alibi*, thus, was rightly rejected by the court below.

30. As noted earlier, the appellant was put to trial, amongst others, on the charge for an offence under Section 366 IPC. Given the nature of the evidence noted above, it is quite clear that the appellant had accosted the prosecutrix on the public street, finding her alone, and from there he took her to his own house on some allurements. Since he was not related to the prosecutrix in any manner, nor had any authorization to take her along, the act of enticing her to move with him amounts to kidnapping from lawful guardianship within the meaning of the expression defined in Section 361 IPC. The offence of kidnapping is ordinarily punishable under Section 363 IPC, the penal clause in Section 366 IPC being its aggravated form.

31. For bringing the case within the four corners of Section 366 IPC, it is essential that it be proved that the woman (which includes a girl child) is kidnapped, *inter alia*, in order that she may be, or with knowledge that it is likely that she is “seduced to illicit intercourse”. The trial court declined to hold the appellant guilty for the offence under Section 366 IPC, even though a separate charge had been framed, without giving any reasons. In the considered view of this court, the evidence had brought home it to be not merely a case of kidnapping punishable simpliciter under Section 363 IPC but one of its aggravated form punishable under Section 366 IPC. But since the

State did not prefer any appeal against acquittal on the charge under Section 366 IPC, there is no scope for any interference on that score.

32. The conviction for the offence under Section 363 IPC, in above circumstances, is upheld.

33. As is clear from the above discussion, the penetrative sexual assault is not shown to have been committed. Therefore, the alternative charge of rape under Section 376(2)(i) IPC, as also the charge for the offence of aggravated penetrative sexual assault under Section 6 of POCSO Act could not succeed.

34. The offence of sexual assault, as defined in Section 7, as indeed its aggravated form defined in Section 9 of POCSO Act are minor offences, ingredients whereof are inclusive within the definition of aggravated penetrative sexual assault (Section 5). The sexual assault, as defined in Section 7 of POCSO Act, stands constituted merely by touching of the vagina with the penis, with sexual intent. These ingredients are brought home by the facts proved.

35. Since the offence of sexual assault was committed against a child, less than twelve years of age, it amounts to aggravated sexual assault within the mischief of the offence defined in Section 9(m) of POCSO Act which is punishable under Section 10 of POCSO Act. Thus, in view of this court, the trial court was justified in holding the appellant guilty for an offence under Section 10 of POCSO Act.

36. The offence under Section 363 IPC attracts punishment in the form of imprisonment for either description, which may extend to seven years with fine. The trial court imposed the punishment of rigorous imprisonment for two years with fine of Rs.1,000/- only. The

offence under Section 10 of POCSO Act attracts punishment in the form of imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, with fine. The trial court opted to impose the minimum substantive punishment by awarding rigorous imprisonment for five years with fine of Rs.5,000/-.

37. The counsel for the appellant referred to *Braham Dass Vs. State of Himachal Pradesh*, AIR 1988 SC 1789; *Haripada Das Vs. State of West Bengal and Anr.*, AIR 1999 SC 1482; and *Sita Ram Vs. State*, 2004 (1) JCC 321 to submit that this court has the judicial discretion to impose punishment less than the minimum prescribed in the law.

38. In the considered view of this court, the cases cited at bar are of no assistance to the appellant. Each of them related to the prosecution for offences under the Prevention of Food Adulteration Act, 1954. The view taken in such cases to impose punishment less than the minimum prescribed in law was on account of some facts and circumstances peculiar to those cases. There is no extraordinary fact or circumstances brought to the notice of this court for it to be even considered as to whether an exception to the minimum prescription of punishment in law should be carved out. On the contrary, given the gravity of the crimes involved here, the need for bringing about some deterrence in cases of sexual offences particularly against children persuades this court to take the view that the trial court was more than necessarily indulgent and lenient in the matter of punishment. The case perhaps deserved punishment more severe than the one meted out. There, however, being no appeal by the State, or by the victim,

on the ground of inadequacy of punishment, there is no scope for any interference.

39. In the result, the appeal is found wholly devoid of merit or substance and, therefore, dismissed.

R.K.GAUBA, J.

JUNE 14, 2017

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