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

***Decided on :- 19<sup>th</sup> November, 2018***

+ CRL.A. 28/2018

SANTOSH KUMAR

..... Appellant

Through: Mr. Saurabh Kansal, Advocate  
with Mr. Pallavi Sharma  
Kansal, & Mr. Deepak Pandey,  
Advocates / DHCLSC

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP  
for the State

**CORAM:**

**HON'BLE MR. JUSTICE R.K.GAUBA**

**ORDER (ORAL)**

1. Appellant Santosh Kumar stood trial in Sessions Case (No.58634/2016) in the court of Special Judge (POCSO Act) on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted upon conclusion of investigation into first information report (FIR) No.803/2015 of Police Station Alipur and, by judgment dated 30.10.2017, he was held guilty and convicted on the charge for offences punishable under Section 376(2)(i) of Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). By order dated 31.10.2017, the trial court has awarded rigorous imprisonment for fourteen years for the offence punishable under Section 376(2)(i) IPC,

no separate punishment having been awarded under Section 6 of the POCSO Act.

2. The appeal at hand challenges the abovesaid judgment and order on sentence, the plea of the appellant being that he was falsely implicated on mere suspicion and that the act of penetrative sexual assault against the prosecutrix – a child stated to be aged about ten years – has not been brought home.

3. During the course of hearing at the appeal, reference was made to the MLC (Ex.PW-2/A) which was prepared in the casualty of Satyawadi Raja Harish Chandra Hospital, (SRHC) Hospital, Narela, Delhi-110040 at 10:15 p.m. on 05.09.2015 in respect of the prosecutrix. The said MLC (Ex.PW-2/A) purports to have been prepared in the handwriting and under signatures of Dr. Pallavi of Obst. & Gynae Ward of the said hospital. It was pointed out that aside from the narration of the observations based on physical examination of the prosecutrix, there are atleast three additions, one in the nature of a statement of the mother of the prosecutrix recorded at 10:15 p.m., with endorsement by the father of the prosecutrix by his thumb impression and another statement of the same persons, *i.e.*, parents of the prosecutrix, recorded at 10:30 p.m., they having first refused to permit internal examination of the child and later having acceded to it, the third addition (shown by penciled bracket in the record) concerning observations of the examining medical officer regarding internal examination, the crucial portion whereof refers to positive indication of bleeding per vagina.

4. The trial court record would show that Dr. Pallavi, the examining medical officer was not examined at the trial. It would also show that no summons was ever served on the said examining medical officer. Though summons addressed to her were issued on several dates, but on each such summons liberty was given to the medical superintendent of the hospital to depute some other doctor (“substituted doctor”) in case she (Dr. Pallavi) had left the services of the hospital. It appears that, pursuant to such liberty, the medical superintendent of the concerned hospital deputed Dr. Shweta Jain (PW-7), who appeared as witness for prosecution on 03.08.2016, she only proving the handwriting and signatures of Dr. Pallavi on the MLC (Ex.PW-2/A), the deposition sheet showing that opportunity for cross-examination having been given to the accused. The corresponding order sheet of 03.08.2016 reveals that the appellant was produced from custody, presence of his counsel not having even been ascertained or recorded.

5. This court agrees with the grievance of the appellant that the above was not the appropriate manner of gathering evidence or recording statement of such a crucial witness. No doubt, the prosecution may rely on the evidence of an alternative witness if the witness earlier cited has become unavailable or her presence cannot be secured without unreasonable delay. But the suggestion for alternative witness cannot come from the Court on assumption that the witness may not be readily available, not the least without an attempt being made to reach out to such witness.

6. Non-examination of the examining medical officer Dr. Pallavi may lead to serious miscarriage of justice. The MLC, in case of this nature, is crucial piece of evidence, particularly against the backdrop of the fact that the forensic scrutiny of biological sample is statedly not of any assistance either way in this case. The deposition of the concerned medical officer is essential to just decision of the case and in its absence there is likelihood of miscarriage of justice.

7. For the above reasons, the impugned judgment and order on sentence are set aside. The case is remanded to the trial court for further proceedings in accordance with law with direction that Dr. Pallavi shall be summoned and examined as a witness, she being tendered for cross-examination by the defence, for which purposes the trial court shall ensure due availability of legal assistance to the appellant at all stages hereafter. The case shall be taken to further stages as per procedure prescribed in law, after the statement of Dr. Pallavi has been recorded, including by recoding afresh the statement of the appellant under Section 313 Cr.P.C. with renewed opportunity afforded to him for leading evidence, if any, in defence.

8. The trial Court will render a fresh decision after completion of the exercise as indicated above. Needless to add, the trial Judge will not feel bound by the decision earlier taken or any observations made in this order. Nothing referred to above will be treated as expression of opinion on merits of the case.

9. Given the nature of the case and the period of incarceration already undergone by the appellant, further proceedings in terms of

the remit order will have to be expeditious. The trial Judge will make endeavor to render fresh decision within three months of the date of first appearance now being fixed. The case will be taken up by the concerned court on 19.12.2018.

10. A copy of this order shall be sent and served on the appellant through the concerned Jail Superintendent.

11. The trial court record shall be returned forthwith along with copy of this order for needful compliance.

12. The appeal stands disposed of in above terms.

**R.K.GAUBA, J.**

**NOVEMBER 19, 2018**

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