

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

**RESERVED ON : 1st MAY, 2018
DECIDED ON : 16th MAY, 2018**

+ CRL.A. 82/2018
SHYAMU Appellant
Through : Mr.M.L.Yadav, Advocate.

versus

STATE Respondent
Through : Mr.Ravi Nayak, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 27.09.2017 of learned Addl. Sessions Judge in Sessions Case No.7154/2016 emanating from FIR No.218/2014 PS Neb Sarai whereby the appellant Shyamu was held guilty for committing offences punishable under Sections 354/354A/354B IPC and Section 10 POCSO Act. By an order dated 14.10.2017, the appellant was sentenced to undergo RI for six years with fine ₹10,000/-.

2. Briefly stated, the prosecution case was that on 17.03.2014 at around 01.30 p.m. at House No.1265, Gali No.29/6, L-1st, Sangam Vihar, New Delhi, the appellant outraged the modesty of a minor girl 'X' (assumed name) aged around 4 years and committed rape by touching her vagina by hand and mouth. Information about

the incident was conveyed to the police and DD No.33A (Mark 'A-1') came to be recorded at 2.07 p.m. on 17.03.2014 at PS Neb Sarai. The Investigation was assigned to ASI Makkhan Singh who along with Const.Sunita went to the spot. After recording statement (Ex.PW-10/A) of victim's mother, the Investigating Officer lodged First Information Report. The prosecutrix was medically examined; she recorded her 164 Cr.P.C. statement. The appellant was arrested. The exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of the offences referred above. The appellant pleaded not guilty to the charge and claimed trial. In order to establish its case the prosecution examined eleven witnesses in all and relied upon several documents. In 313 Cr.P.C. statement the appellant pleaded false implication due to dispute of non-return of loan by the victim's father in which he had stood 'guarantor'. The trial resulted in appellant's conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and committed grave error to base conviction on the sole testimony of the child witness aged around 4 years. The appellant aged around 70 years was not expected to outrage the modesty of the girl who used to play with his grandchildren in his house. Counsel also urged to

modify the sentence considering the appellant's age and detention period.

4. The incident in which the child aged around 4 years was defiled took place on 17.03.2014 at around 01.30 p.m. Information to the Investigating Agency was conveyed promptly and DD No.33A (Mark 'A-1') came into existence at PS Neb Sarai at around 2.07 p.m. Specific information was given to the police that an old aged man had attempted to commit 'wrong act' with a girl aged around 4 years. In the complaint (Ex.PW-10/A), victim's mother - Jyoti Goswami gave detailed account of the occurrence and informed as to how and in what manner, the appellant had outraged the modesty of the child when she had gone to his house in the neighbourhood. The appellant was named in the FIR and specific role was attributed to him in the crime. Since the FIR was lodged without any delay and the appellant's involvement emerged in the FIR, there was least possibility of the complainant to have concocted a false story in such a short period.

5. The victim was taken for medical examination on the said date; PW-5 (Dr.Rinchen) medically examined the prosecutrix vide MLC (Ex.PW-5/A). It was informed to the examining doctor that 'X' was sexually assaulted by a neighbour Shyam Babu aged around 65 years by touching her genitals at around 12.30 p.m. on 17.03.2014. In her 164 Cr.P.C. statement, the prosecutrix implicated the appellant by attributing specific and certain role to him. In her Court statement as PW-1 in response to the question "Kya Hua Tha? "; she responded "Haath Diya Tha". When clarified "Kahan Pai Haath Diya Tha?"; the child pointed towards inside of her underwear. When specifically

asked as to who had done it, she informed “Budhe Ne Haath Diya Tha”. The child was able to identify the appellant to be the individual who had committed the crime. In the cross-examination, the child informed that she used to go to the house of the appellant daily. She fairly admitted that prior to that, the appellant had not indulged in any such ‘wrong act’ with her.

6. On scanning the testimony of the child witness, it stands established that the appellant had outraged the modesty of the child ‘X’ by touching her vagina. ‘X’ was aged around 4 years; she was immature and did not know the consequence of the appellant’s act. It is not expected from a child aged around 4 years to give more vivid account of the incident. Nothing more can be expected from a child aged around 4 years who was able to point out the body part which was touched by the appellant. She used to call / address the perpetrator of the crime as ‘Budha’ and was able to identify him in the Court. No ulterior motive was assigned to the witness for making a false statement. The appellant did not deny arrival of the child in his house at the relevant time. Material facts stated by the witness remained unchallenged in the cross-examination.

7. PW-2 is Jyoti Goswami – victim’s mother who had put the police machinery into motion has deposed that it was ‘Holi’ on that day. After taking bath, the victim along with her father had gone in his auto to take a ride for some distance. Thereafter, she went to the appellant’s house. When she called her by name, she came out of the appellant’s house. She informed that the appellant who lived in the neighbourhood had put his hand on her private part; he had also put

his finger inside it. On checking, she found that the victim's private part was dirty / wet. Thereafter, she made a call to her husband and apprised him of the incident. The police was called. 'X' was taken to the Police Station and thereafter, she was medically examined. In the cross-examination, she informed that on the day of incident, the appellant had consumed liquor. She admitted that appellant's elder daughter-in-law was present inside the house. She, however, clarified that she was in other room.

8. Scrutinizing the testimony of material witness, it reveals that nothing material has been elicited in the cross-examination to discard her version. Nothing was suggested if her husband had taken a loan of ₹1.5 lac or that the appellant had stood surety / guarantor. Nothing was suggested if there was any enmity or ill-will between the parties forcing the complainant to lodge a false complaint. In the absence of prior animosity, the complainant is not expected to use her own tiny child to settle score. Her testimony inspires confidence. The child immediately informed about the wrong doings of the appellant to her mother and it was her quite natural reaction. On checking the victim's private parts, it was found dirty.

9. Material piece of evidence is the DNA / FSL report. As per FSL report (Ex.PW-10/D), spermatozoa were detected on Ex.1c (underwear of the victim) and Ex.4 (underwear of the accused). The DNA profile generated from the male fraction, DNA obtained from the source of Ex.1c (victim's underwear) and Ex.4 (appellant's underwear) was found to be consistent with the DNA profile of the appellant (source of Ex.5 and Ex.6 blood sample). The genuineness

and authenticity of the FSL reports were not challenged by the appellant.

10. The prosecutrix is consistent throughout; her testimony has been corroborated by her mother on material aspects. FSL and medical reports have confirmed that the spermatozoa detected on the victim's underwear was that of appellant. The appellant did not offer any explanation as to how and in what manner, his semen emerged on the victim's clothes. This Court finds no valid reasons to disbelieve the natural testimony of the child witness who had no concern with the monetary transaction (if any) between the appellant and her parents.

11. In 313 Cr.P.C. statement, the appellant did not furnish any plausible explanation to the incriminating circumstances. For the first time, it was claimed by the appellant that victim's father had taken a loan of ₹1.5 lac and he had stood a surety / guarantor for that. The appellant, however, did not furnish the detailed particulars as to when victim's father had taken loan or what property documents were given by him to be kept as mortgage with the dealer. He did not specify the name of the dealer from whom the victim's father had taken loan. The defence deserves outright rejection.

12. The learned Trial Court has dealt with all the arguments minutely in the impugned judgment; it warrants no intervention being based upon fair appreciation of evidence. The conviction is confirmed.

13. The appellant does not deserve any leniency as the crime committed by him with a child aged around 4 years is reprehensible and cannot be pardoned. The victim was akin to his grand-daughter.

The appellant aged around 65 years was aware as to what he was doing and what were the consequences of the wrong doings. The Court can well understand the trauma of the parents, when they came to know that the appellant who lived in their neighbourhood ravished the innocent child who had unsuspectingly gone to play in his house.

14. The appeal being unmerited is dismissed.

15. Trial Court record be sent back forthwith with the copy of the order.

16. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MAY 16, 2018 / tr