

\$~R-1A

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 12th November, 2018

+ CRL.A. 544/2016 and Crl.M.(Bail) 1973/2017

MOHD. MOIM

.... Appellant

Through: Mr. Angaj Gautam, Advocate

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Ahlawat, APP for the
State with SI Praveen Kumar,
PS Mandawali.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The appellant was arrested on 14.11.2011 during the course of investigation of first information report (FIR) No.503/2011 (Ex.PW-8/A) registered by Police Station Mandawali at 22:55 hours on the basis of statement (Ex.PW-2/A) of Raju Sahi (PW-2). On the basis of evidence which was collected during the said investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was presented on which the appellant stood summoned and eventually put on trial in sessions case No.18/2012 on the charge for offences punishable under Sections 363/376(2)(f) of Indian Penal Code, 1860 (IPC), as it stood prior to its amendment in 2013. The trial culminated in judgment dated 20.01.2014 whereby the appellant was found guilty, as charged. By order dated 24.01.2014, he was sentenced by the trial

Judge to rigorous imprisonment for five years with fine of Rs.1,000/- for offence under Section 363 IPC and rigorous imprisonment for ten years with fine of Rs.2,000/-for offence under Section 376 (2)(f) IPC, it having been directed that in case of default he would undergo further simple imprisonment for one month and two months respectively, the substantive sentences to run concurrently.

2. By the present appeal, challenge is brought to the judgment and order on sentence passed by the court of sessions, it being the submission of the appellant that he has been falsely implicated on mere suspicion, there being no complicity in the crimes for which he has been found guilty on the evidence of the prosecution witnesses, particularly the two home guard constables – Constable Brahm Jeet (PW-4) and Constable Satish (PW-5) their testimonies being incredible. It is also the submission of the appellant that the medical and forensic evidence do not conclusively prove any penetrative sexual assault and, in this context, reliance is placed by him on the decision of a division bench of this court in *Pappu vs. State of Delhi*, 2009 CrL.L.J. 3342.

3. The submissions of both sides have been heard and the trial court record, which has been called for, carefully perused.

4. The victim was a female child, then aged about 3½ years. The first informant (PW-2) is her father. He earns his livelihood as a rickshaw puller, his wife (PW-3), mother of the victim, being in private employment. The couple has four children including the victim, she being the youngest. As per their evidence, while the wife

would go out for work, the father (PW-2) would take care of the children. The incident relates to 14.11.2011.

5. As per the evidence of PW-2 and PW-3, as corroborated by neighbour Ikram (PW-6), the children including the victim, were playing outside their house in gali no.3 of the locality in question while the father (PW-2) was present nearby. It has come in the evidence of both PW-2 and PW-6 that a rickshaw bearing the label “Pankaj 93” was also parked nearby, the victim child playing around it. The said rickshaw indisputably is from the rickshaw garage of Pankaj Mehta (PW-9) who runs the business of giving such rickshaws for being plied on hire from a premises in gali no.2 of the same locality.

6. The version of PW-2 in the FIR was that he was constrained to go away for sometime after 4:30 p.m. to collect money from some customers and when he had returned he found his youngest daughter (the victim) missing. He learnt from Ikram (PW-6) that the child had been taken away by the appellant who had been earlier present with the rickshaw at the place where it was then parked. The couple made a search for the child but with no result. Eventually, they reported the matter to the police by making a call phone number 100. It was while they were at the police station that the two home guard constables – Ct. Brahm Jeet (PW-4) and Ct. Satish (PW-5) – came there with the victim child, they also having brought along the appellant.

7. It has been the prosecution case that the two said home guard constables had found the appellant in a park near certain bushes with

his lower garment removed, the girl being in his company, she having been concealed in the bushes and brought out by the appellant upon his presence at the spot being questioned. It is stated that, on suspicion, the two home guard constables had brought the victim child, and the appellant, to the Police Station, it being found upon inquiry and inspection by the mother Smt. Rani (PW-3) that the girl had bleeding from her private parts.

8. On the statement of father (PW-2), recorded vide Ex.PW-2/A, the FIR was registered. During the course of investigation, the victim child was taken to Lal Bahadur Shastri Hospital where she was medically examined vide medico-legal certificate (Ex.PW-8/B), the examination having been conducted by Dr. Pinki (PW-12), Senior Resident (Gynaecology). The appellant was also taken for medical examination including for purposes of ascertaining his radiological age, it having been found vide Ex.CW-1/A that he was 21-22 years old on the relevant date.

9. During the course of investigation, the rickshaw which was allegedly used in the kidnapping was seized vide Ex.PW-4/A. Further, during investigation, the medical examination of both the victim and the appellant was followed by collection of biological samples, this including the blood sample and semen sample of the appellant and the vaginal swab of the victim. The lower garment (*payjama*) of the victim child was also seized, it statedly bearing certain biological stains. The said exhibits were sent to forensic science laboratory (FSL) where the same were examined, reports (Ex.PW-8/I and Ex.PW-8/F)

in such regard having been issued by Ms. Seema Nain (PW-11) Senior Scientific Officer (Biology).

10. The evidence which was presented before the trial court primarily was the factum of the victim child having been taken away in the rickshaw by the appellant, this having been witnessed by PW-6 and the recovery of the child from out of control of the appellant inside a public park in the close vicinity, by the two home guard constables (PW-4 and PW-5) later. At that stage, when the appellant was with the girl in the DDA park, near the bushes, he was found without his lower garment (trousers) while the girl – screaming at the time – was kept hidden in the bushes. The two home guards constables had approached the place on their curiosity being aroused, they having noticed the rickshaw standing in front of the gate of the park. The appellant had given the explanation that the girl was his relative and that he was helping her in defecating at the place. The evidence shows that the two home guard constables questioned as to why he had removed his trousers if the purpose of his presence at the place was to assist the child in defecating, and to this he had no plausible answer.

11. Aside from the above evidence, the prosecution also relied on FSL report confirming the presence of DNA of the appellant in the vaginal swab and the biological stains on the lower garment of the victim child. Additional to this is the evidence of the medical officer (PW-12) confirming that the victim child had suffered ruptured hymen along with presence of slight oedema in vulval, this having produced the bleeding.

12. The trial court was satisfied on the basis of evidence adduced, to the above effect, as to the complicity of the appellant in the crimes for which he has been found guilty and, in the opinion of this court, justifiably so.

13. The learned counsel for the appellant submitted that the evidence about the appellant being in use of the cycle rickshaw in which the girl was taken away is not believable. He argued that it is strange and incredible that the rickshaw garage owner (PW-9) would not even know the appellant while his friend Dalip Kumar (PW-7) could be the person who would have given the rickshaw for being plied on hire to the appellant merely for the asking. It may be that PW-9 is not able to identify the appellant as the rickshaw puller. But then, his statement about his temporary absence from the garage for some time when his friend PW-7 was present there, is confirmed by the latter. The connection between the rickshaw from the garage of PW-9 with the appellant is corroborated not only by PW-6 but also by the father of the victim, *i.e.*, PW-2.

14. The submission of the learned counsel for the appellant that the evidence of PW-4 and PW-5 cannot be relied upon because of some discrepancies appearing in their testimony does not appeal to this court. It does appear that while PW-4 testifies that the appellant had introduced the victim child as his daughter, PW-5 spoke of the appellant having introduced her to be his sister. It also does appear that the time of the recovery of the child from the possession and control of the appellant as stated by the PW-4 and PW-5 has some

variations. But then, in a case of this nature, the witnesses cannot be expected to be meticulous in taking note of the time and deposing about it. The evasive answers of the appellant about his relations with the child are pointers to conduct which reflects guilty mind. Broadly speaking, both the witnesses are consistent, that the recovery was made sometime after 6:45 p.m. which coincides with the testimony of PW-2 and of Inspector Amit Kumar (PW-1) who had recorded the statement of the first informant for registration of the FIR. The discrepancies in statements of PW-4 and PW-5 about the distance of the bushes from the gate of the park or the place where the cycle rickshaw was noticed to be stationary are of no consequence.

15. Undoubtedly, the prosecution did not examine the victim child. But, as rightly observed by the trial court in the impugned judgment, this would be of no consequence. After all, the victim child was hardly 3½ years old. She would not even be able to comprehend as to what acts she had been subjected to.

16. There is indeed no direct evidence of sexual assault presented by the prosecution. But then, the sequence of events tell their own story. The victim child was playing outside her house. Her father had gone away for some time. It is during his absence that the child who had been playing on or about the rickshaw was taken away by the appellant, this being confirmed by the testimony of PW-6 who had no reasons to falsely implicate the appellant. The victim child subsequently came to be found by PW-4 and PW-5 in the clutches of the appellant at a secluded place, inside DDA park, late in the evening

of 14.11.2011. He had no plausible reason to have the child in his control or custody at such a place except for some illicit purpose. When PW-4 and PW-5 noticed the appellant present inside the park close to the bushes, his lower garment was missing. When questioned by them, he came up with the frivolous and specious explanation of he having brought the victim child, describing her as a relative, to assist her in defecating. This clearly was a story which had been spun out by the appellant to avoid further probe. But then, conscious and vigilant as they were, the two home guard constables persisted. They found the girl inside the bushes and rescued her bringing her along with appellant back to the police station. Since the child was bleeding from the private parts, it does not call for much imagination to conclude that she had been subjected to sexual assault.

17. The circumstances in which the victim child was found in the unauthorized control and custody of the appellant leaves no room for doubt that it is he who had subjected her to assault with sexual intent. The presence of slight oedema in the vulva coupled with bleeding and ruptured hymen leave no room for doubt that the victim had been subjected to penetrative sexual assault. The judgment cited at bar is of no assistance to the appellant as there cannot be a thumb rule that unless there is physical injury or hurt caused to the *labia majora* there cannot be a case of penetrative sexual assault against the child of tender age.

18. For the above reasons, this court finds no error or infirmity in the judgment of the trial court in finding the appellant guilty for offences under Sections 363 and 376(2)(f) IPC which charge has been

properly brought home. In the given facts and circumstances, this court finds no scope for any leniency in the matter of sentence. The appeal is dismissed.

19. The appellant shall be informed by a copy of this judgment being served on him through the superintendent jail.

R.K.GAUBA, J.

NOVEMBER 12, 2018/vk

