

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

Judgment Reserved on: 4th May, 2018
% *Judgment Delivered on: 14th September, 2018*

+ **CRL.A. 1033/2016**

DINESH TIWARI Appellant
Represented by: Ms. Saahila Lamba, Advocate

versus

STATE Respondent
Represented by: Ms. Meenakshi Chauhan, APP
for the State with SI Mahipal
Singh, PS Prasad Nagar

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the appellant challenges the impugned judgment dated 10th May, 2016 convicting him for the offence punishable under Section 6 of Protection of Children against Sexual Offences Act, 2012 (in short 'POCSO Act') and Section 376(f) IPC and the order on sentence dated 18th May, 2016 directing him to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹15,000/- and in default of payment of fine to undergo simple imprisonment for a period of six months for the offence punishable under Section 6 of POCSO Act. No separate sentence was awarded for the offence punishable under Section 376(f) IPC.

2. Learned counsel for Dinesh Tiwari submits that the appellant has been falsely implicated in the present case as he had given money to the mother of the victim who did not return it. Mother of the victim in her

cross-examination admitted that on the day of the incident, since Saloni was not in the house, she took the key with her, thus, the prosecution has failed to prove how Dinesh Tiwari got the key of the house. No foreign material was found in the nail clipping of the appellant. The appellant was arrested from the spot which falsifies the prosecution case because if he would have committed the alleged act, he would not have remained present at the spot and would have fled away. There is contradiction in the testimony of the mother of the victim with regard to insertion of finger or penis. As per the statement of mother of the victim, she made the first call to her brother who called the PCR van, however, he has not been cited as a witness.

3. Learned APP for the State on the other hand contends that the learned Trial Court has rightly convicted the appellant on the basis of testimony of the victim (PW-2) and her mother (PW-4) who are the material witnesses duly corroborated by the MLC of the victim which shows blood on her vagina, cervix and clothes and finger marks on her face. The presence of the appellant at the place of incident is not disputed.

4. Process of law was set into motion on 20th February, 2013 around 11:00 P.M. when information was received regarding rape of a 6 year old girl at Bapa Nagar, Karol Bagh, Delhi. Aforesaid information was recorded vide DD No. 39A (Ex.PW-6/A) and entrusted to SI Abhishek Kumar (PW-16) and Ct. Diwakar (PW-13). They reached the spot and met the victim, mother of victim (complainant), father of victim and Dinesh Tiwari. On enquiry, mother of victim informed that Dinesh Tiwari committed rape upon her daughter. In the meantime, W/Ct. Anita (PW-12) and Ct. Sanjiv also reached the place of incident. Victim and her mother were sent to the Hospital for medical examination. Dinesh Tiwari was also taken to LHMC

hospital. Statement of mother of victim was recorded in the hospital wherein she stated that she was working in a Jeans Factory at Tank Road and her husband worked in a shop of seat cover at Karol Bagh. On 20th February, 2013, her husband left for work at 10:00 A.M. Her elder son had gone out for some work and she left for her work at 3:00 P.M. when her daughter (victim herein) and her younger son were playing in the street. She locked the house and gave the key to her neighbour Saloni. Around 6:30 P.M. while she was at work Dinesh Tiwari, who is her mama, called her and asked her when she would be coming back to which she replied that she would be coming back home after 7:30 P.M. To this, Dinesh asked her for the keys of the house stating that his wife would be coming to her house to which she told Dinesh that she had given the keys to her neighbour Saloni. After sometime, Dinesh again called up on her mobile and gave his phone to her younger son who was crying on the phone. When she asked him the reason for crying, her younger son replied that Dinesh had beaten him. After hearing this, she immediately left and reached her home around 7:30 P.M. Her husband had already reached home before her and her children were standing on the door and her son, while crying, told her that Dinesh had beaten both of them and as a result of which there was blood on the skirt of the victim. Immediately, she checked the victim and found that there was blood on the pant and skirt of her victim daughter and when she asked her daughter, she told her that Dinesh had inserted his penis into her vagina and because of it she felt pain and blood also came out. Her daughter further told her that Dinesh asked them to come inside the house after showing some eatables, did the aforesaid act and scolded her that if she would tell her mother or father he would beat her.

5. On the basis of the aforesaid statement (Ex.PW-2/A), FIR No. 37/2013 (Ex.PW-9/A) was registered at PS Prasad Nagar for the offences punishable under Sections 6/8 of POCSO Act and Section 376 IPC.
6. Further investigation of the case was handed over to SI Rekha (PW-14). She prepared the site plan (Ex.PW-2/B) on the pointing out of mother of the victim. Statement of victim was recorded. Dinesh Tiwari was arrested vide arrest memo Ex.PW-13/A, his personal search was conducted vide Ex.PW-13/B and his disclosure statement was recorded vide Ex.PW-14/A.
7. On 22nd February, 2013, victim was produced before CWC and on 23rd February, 2013, her statement under Section 164 Cr.P.C. was recorded. After completion of investigation, charge sheet was filed. Charge was framed under Section 6 of POCSO Act and Section 376(f) IPC vide order dated 18th April, 2013.
8. During the course of trial, the date of birth of the victim was proved to be 11th July, 2007 on the basis of the admission form (Ex.PW-1/A) and the certificate (Ex.PW-1/B) produced by Anita Rani (PW-1), Principal, Nigam Pratibha Vidhyalaya, Delhi.
9. After ascertaining that the victim (PW-4) was capable of understanding the questions and giving rational answers, her statement was recorded which is reproduced herein:

Q: Do you know any person by the name of Dinesh Tiwari?

Ans: Yes.

Q: How?

Ans: I used to call him Mama.

Q: What your mother call him?

Ans: I do not know.

Q: What you were doing after coming back from the school?

Ans: I was playing in the gali.

Q: With whom you were playing?

Ans: I was playing with my brother.

Q: Did Dinesh Tiwari at that time?

Ans: Yes.

Q: Did the house was lock or open?

Ans: It was locked.

Q: What did Dinesh Tiwari do?

Ans: He took me upstairs. He asked for key of the room. Key was with aunty who was residing at ground floor.

Q: Did you give key to Dinesh Tiwari?

Ans: Yest. After taking from my aunty.

Q: What did Dinesh Tiwari do after taking upstaris.

Ans: He has inserted his finger in my shushu (vagina).

Q: Did you were wearing pant/nickar etc.?

Ans: I was wearing pant.

Q: Did he insert finger without removing pant or after removing pant?

Ans: He inserted finger after removing pant.

Q: Did bleeding start from your shushu when he inserted finger?

Ans: Yes.

Q: Whether any other person was present at that time in the house or not?

Ans: None was present.

Q: Did you tell the incident to anyone, if yes when?

Ans: I told the incident to my mother when she returned from factory.

Q: Did you appear before any aunty (Magistrate) to make the statement?

Ans: Yes.

10. Mother of the victim was examined as PW-2. She deposed in conformity with her statement made before the police.

11. Saloni (PW-5) stated that on the day of incident mother of the victim had given her the key of her house to give the key to her children when they

returned from school. In the evening she gave the key to victim and her brother.

12. Dr. Deepti Kaur (PW-10), SR, Gynae Department stated that on 21st February, 2013 at about 12:15 A.M., she had examined the victim. On examination, finger marks were found on the face of the victim. Hymen was found to be ruptured. MLC was proved vide Ex.PW-10/A. During her cross examination, she stated that it was correct that if the finger is inserted and due to said reason, hymen was torn or ruptured, the saliva of vagina would appear on finger and in the nail of the person. There was no external injury on genital parts.

13. Dr. Pankaj Kumar (PW-11), SR/CMO, LHMC stated that on 21st February, 2013, he had examined Dinesh Tiwari. No fresh injury was found on his body. After examination, his underwear and three biological samples were taken and handed over to the police. His MLC was proved vide Ex.PW-11/A.

14. Dinesh Tiwari, in his statement recorded under Section 313 Cr.P.C., stated that on 20th February, 2013, he was present at his home. At about 10:45 P.M., police officials came to his home along with brother of mother of victim and asked about him. When he asked what was the matter, they asked him to accompany them and made him sit in the police vehicle. On the way, brother of mother of victim told him that he had committed galat kaam with the victim but he denied the same. After, he was taken to the police station, he was beaten by the police officials. He told the police that he had gone to the house of mother of victim as she had taken a sum of Rs.1,700/- from him as loan.

15. Considering the evidence of the victim, her mother and the MLC of

the victim, the prosecution has proved the case beyond reasonable doubt that Dinesh Tiwari had inserted his finger in the vagina of the victim, thereby, committing penetrative sexual assault. Merely because the appellant continued to stay at home does not lead to an inference that he was innocent. As regards the money owed by the victim's mother is concerned, a suggestion in this regard was given to the complainant which she denied. The complainant fairly stated that in her bad days, Dinesh helped her. Thus it is highly unlikely that the complainant would falsely implicate such a person.

16. Consequently, the appeal is dismissed. Appellant is directed to undergo the remaining sentence.

17. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and for communication to the appellant.

18. TCR be returned.

SEPTEMBER 14, 2018
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(MUKTA GUPTA)
JUDGE