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

DECIDED ON : 3rd FEBRUARY, 2018

+ **CRL.A. 715/2017**

ASHOK KUMAR Appellant

Through : Ms.Manika Tripathy Pandey,
Advocate.

Versus

THE STATE (NCT OF DELHI) Respondent

Through : Ms.Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

HON'BLE MR. JUSTICE C.HARI SHANKAR

S.P.GARG, J. (OPEN COURT)

1. The appellant – Ashok Kumar impugns a judgment dated 30.01.2017 of learned Addl. Sessions Judge in Sessions Case No.8967/2016 arising out of FIR No.136/2014 PS Delhi Cantt. by which he was held guilty for committing offences punishable under Section 376 IPC and Section 6 Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By an order dated 31.01.2017, he was sentenced to undergo imprisonment for life with fine ₹50,000/- each under both the offences.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 28.02.2014 at around 04.30 p.m. in Jhuggi No.T-61, East Mehram Nagar, Delhi Cantt., New Delhi, the appellant committed aggravated penetrative sexual assault upon the prosecutrix 'X'

(assumed name) aged around 4 years. Incident was reported to the police and DD No.32A (Ex.P-4) came into existence at PS Delhi Cantt. at around 08.19 p.m. The investigation was entrusted to SI Kaptan Singh who along with Const. Shiv Ram and lady Const.Renu went to the spot. After recording statement of the victim's father Deenanath (Ex.PW-5/A), FIR was lodged. In the complaint (Ex.PW-5/A), Deenanath gave graphic account as to how and in what manner the appellant had sexually assaulted his daughter 'X'. 'X' was taken for medical examination; she recorded her 164 Cr.P.C. statement. The appellant was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant for the commission of the offences under Section 376 IPC and Section 6 POCSO Act. To establish its case, the prosecution examined eighteen witnesses in all. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication due to his declining to pay certain amount demanded by victim's mother Usha to discharge the rent. The appellant did not opt to examine any witness in defence. The trial resulted in conviction as mentioned previously. Being aggrieved and dissatisfied, the present appeal has been preferred.

3. We have heard the learned counsel for the parties and have examined the file. The victim, indisputably, was aged around 4 years at the time of incident. PW-4 (Jairam Singh), Sub-Registrar, Birth and Death Department, brought the summoned record and proved the documents (Ex.PW-4/A & Ex.PW-4/B) depicting date of birth of the

victim as 05.05.2010. In 313 Cr.P.C. statement, the appellant admitted that the age of the victim was around 5 years. Since this date of birth came to be recorded much prior to the happening of the incident, there was hardly any possibility of the victim's parents to manipulate it.

4. It is not at issue that the appellant was familiar with the victim's family; he lived in a rented accommodation nearby. The victim and other siblings addressed him 'Mama'; he being distantly related to PW-3 (Usha) – victim's mother. Relations between the two families were cordial. Nothing has emerged on record to infer if there was any previous animosity with the appellant to falsely implicate him in the case. It has come on record that on the day of incident, victim's family was in the process to vacate the rented accommodation in their possession.

5. The occurrence took place on 28.02.2014 at around 04.30 p.m. After the victim's parents came to know about X's ordeal, the appellant was called and slapped. The matter was reported to the police vide DD No.32A (Ex.P-4) at around 08.19 p.m. Soon thereafter the victim was taken for medical examination at Safdarjung Hospital. MLC (Ex.PW-8/A) records the arrival time of the patient at 09.45 p.m. The alleged history recorded in the MLC implicates the appellant by name for committing sexual assault upon the child. The Investigating Officer lodged FIR sending rukka (Ex.PW-13/A) at 11.20 p.m. In the complaint (Ex.PW-5/A), victim's father attributed specific and definite role to the appellant in the commission of the

crime. Since the FIR was lodged promptly, there was least possibility of the victim's father to concoct a false story in such a short period.

6. Victim's statement came to be recorded under Section 161 Cr.P.C.; she also recorded her 164 Cr.P.C. statement (Ex.PW-1/A) on 01.03.2014. Before recording her statement, the learned Presiding Officer put several questions to ascertain if 'X' was competent to make the statement without any fear or pressure. After recording her satisfaction, the learned Presiding Officer recorded X's statement without oath. In 164 Cr.P.C. statement, the prosecutrix again assigned specific role to the appellant by name for committing sexual assault upon her.

7. 'X' also appeared as PW-1 in the Court to record her statement. Before recording the statement again preliminary inquiry was conducted by the learned Presiding Officer to ascertain if the witness was able to give rational answers to the questions put to her. After recording the satisfaction that the witness was capable and competent to give rational answers, her statement was recorded without oath. In her Court statement 'X' disclosed that the appellant was her 'Mama' who lived in a nearby house. On the day of occurrence, in the evening, he had taken her from the house to his house. He gave her two "O Yes packets", one for her and the other for her sister. The appellant also gave her some raw vegetables in a packet to give to her 'Bua'. Thereafter, the appellant locked the door and asked her to lie down on the mattress. Then the appellant removed his clothes and rubbed his 'susu' from which some liquid came out on her forehead, cheeks and also in her mouth; she was made to drink it. Thereafter,

the appellant put his 'susu' in her 'susu' after opening her panty. In the meantime, her sister 'Y' (assumed name) aged about 11 years arrived and knocked at the door. The appellant opened the door and she went out along with her sister. On the way, she narrated the occurrence to her sister and at house, her parents were apprised of the incident. The appellant was brought to the house and was slapped. She was taken to the hospital for medical examination. Her statement (Ex.PW-1/A) was recorded under Section 164 Cr.P.C. The victim identified the appellant to be the perpetrator of the crime. In the cross-examination, the witness reiterated that the appellant had taken her in the evening to his house when all her family members were present in the house. No person was present near the appellant's house. She denied if her father had demanded any money from the appellant.

8. On perusal of the statement of the child in its entirety, it stands established that it was the appellant who has defiled the prosecutrix at his room after taking her there on the allurements to give certain snacks. Material facts deposed by the witness remained unchallenged and undisturbed in the cross-examination. No ulterior motive was attributed to the child to make a false statement for this heinous offence. In the absence of any prior animosity or ill-will, the victim aged around 4 years was not expected to level serious allegations of commission of rape upon her to bring herself in disrepute. Nothing was suggested in the cross-examination if victim's mother - Usha had demanded any money from the appellant. It is unbelievable that the victim would falsely implicate an individual to whom she used to call 'Mama'.

9. PW-1 - X's statement has been corroborated on all aspects by PW-2 'Y' – her sister, aged around 11 years. When 'X' did not return after a considerable delay, after being taken by the appellant to his room, PW-2 'Y' went to appellant's room; she found the room locked. From a crack in the door, she peeped through it and saw that the appellant was lying on 'X' and had opened his underwear as well as that of 'X'. She then banged the door; it was opened by the appellant and she brought 'X' to home. The incident was informed to her by 'X' on the way. They apprised their parents at home. In the cross-examination, she reaffirmed that the appellant had taken 'X' with him in evening hours to his house situated at some distance. She further informed that her father had brought the accused from his house. She denied that the appellant's house was not visited by her.

10. Again, the testimony of this child witness is without any flaw. Nothing material has been elicited in the cross-examination to suspect her version. Nothing was suggested either to 'X' or PW-2 that the appellant was not present in his room at the relevant time or had not taken 'X' there.

11. Similar are the testimonies of PW-3 (Usha) and PW-5 (Deenanath) – victim's parents. They have also spoken that on the day of occurrence in the evening hours, the child 'X' was taken by the appellant to his room on the pretext to give some snacks. When 'X' did not return, PW-2 went to the appellant's room and found her inside the locked room. On their return, 'X' and PW-2 narrated the incident to them. They confronted the appellant and he denied his

involvement in the crime. The cross-examination did not yield any worthwhile infirmities to discard their statements.

12. Statement of the prosecutrix 'X' is consistent throughout. Her ocular version has been confirmed and supported by PW-2 'Y', PW-3 (Usha) and PW-5 (Deenanath). No extraneous consideration was attributed to the victim's parents for appellant's false involvement in the crime. Appellant's defence for false implication was that on the day of occurrence when the victim's parents were to vacate the rented accommodation, they had demanded certain amount to discharge the rent and on his refusal to do so, he was involved in the crime. This defence deserves outright rejection. Nothing has emerged on record as to when any such demand of money was raised by the victim's parents from the appellant, and if so, how much. The allegations are without any foundation. Moreover, for this trivial issue, the victim's parents are not believed to use their tiny daughter, aged around 4 years, to falsely implicate the accused for this grave offence.

13. Victim's statement has been confirmed and strengthened by medical and scientific evidence too. Soon after the occurrence, the victim was medically examined by PW-8 (Dr.Neha Rani) vide MLC (Ex.PW-8/A). On local examination, it was found that there was yellowish white discharge on the folds of labia minora and majora; labia minora was congested; hymen was congested and intact. The history of oral sex was present; ejaculate seen on the forehead between two eye-brows and on the outer side of the left eye.

14. At the time of appellant's medical examination vide MLC (Ex.PW-9/A), PW-9 (Dr.Mohd.Shadab Raheel) sealed blood sample

on gauge, one shirt, inner thermal, vest, jeans and underwear of the appellant and handed over to W/SI Sushil. During investigation, the exhibits collected were sent to Forensic Science Laboratory for examination. As per FSL report (Ex.PW-14/A), blood was detected on Ex. '1d' (cotton wool swab), '1g3' (cotton wool swab), '1i3' (cotton wool swab), '1f' (cotton wool swab), '1k1' (dark brown foul smelling liquid), '1k2' (dark brown foul smelling liquid), '1L2' (dark brown foul smelling liquid) & '7' (brown gauze cloth piece along with fungal growth). Semen was detected on Ex. '1f' (cotton wool swab), '1g3' (cotton wool swab), '1i3' (cotton wool swab), '2a' (one dirty high neck baby t-shirt), '2b' (one dirty woolen inner), '2d' (one baby pyjama), '2e' (one baby underwear) and '6e' (one underwear). These exhibits were subjected to DNA examination and as per DNA report performed on Ex. '1f' (cervical mucus), '1g3' (vaginal secretion), '1i3' (anal swab), '2a' (baby T-shirt), '2b' (baby inner), '2d' (baby pyjama) and '2e' (baby underwear), it was opined that it was sufficient to conclude that DNA profile generated from the source of Ex. '1f' (cervical mucus), '1g3' (vaginal secretion), '1i3' (anal swab), '2a' (baby T-shirt), '2b' (baby inner), '2d' (baby pyjama) and '2e' (baby underwear) matched with the DNA profile generated from the source of Ex. '7' (blood stained gauze cloth piece of accused). The medical and scientific evidence thus confirmed the participation of the appellant in the crime at the relevant time whereby he sexually assaulted the child 'X'. The identity of the appellant is not at issue.

15. In 313 Cr.P.C. statement, the appellant did not give plausible explanation to the incriminating circumstances proved against him.

Nothing was suggested as to where else he was at the relevant time. He did not examine any witness in defence to prove his presence at somewhere else. No evidence came on record to infer if any money was ever demanded by the victim's parents from the appellant or he was financially capable to give it. The ample evidence on record establishes the guilt of the appellant beyond reasonable doubt. The findings of the Trial Court based on fair appreciation of the evidence deserve no intervention on conviction.

16. The prosecution has proved commission of offences under Section 376 IPC as well as Section 6 of POCSO Act. Under Section 42 of the POCSO Act, there is a provision for alternate punishment; where an act or omission constitutes an offence punishable under POCSO Act and also under various Sections of India Penal Code including 376 IPC, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence is liable to be punished under POCSO Act or under the Indian Penal Code as provides for punishment which is greater in degree. Apparently, only one punishment can be awarded either under the POCSO Act or under India Penal Code. In the present case, the learned Trial Court has sentenced the appellant both under Section 376 IPC as well as Section 6 POCSO Act, which cannot be sustained. Learned APP fairly admits that only one sentence is to be awarded to the appellant either under India Penal Code or POCSO Act.

17. The offence committed by the appellant is highly grave. The appellant who was acquainted with the victim's family defiled the child taking advantage of her innocence and incapability to desist and

resist him. The appellant betrayed the trust of X's parents who had unsuspectingly permitted their daughter of tender age to accompany him to his room. Considering the inhuman conduct of the appellant, no leniency is called for; 'X' was akin to his daughter.

18. In the light of above discussion, confirming the conviction, Sentence Order is modified to the extent that the appellant shall be punishable under Section 376 IPC and the sentence shall be imprisonment for life with fine ₹50,000/-; default sentence being SI for three months.

19. The appeal stands disposed of in the above terms.

20. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

S.P. GARG
(JUDGE)

C.HARI SHANKAR
(JUDGE)

FEBRUARY 03, 2018 / tr