

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

*Reserved on: 26<sup>th</sup> September, 2018*

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*Delivered on: 24<sup>th</sup> May, 2019*

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**CRL.A. 860/2016**

TEJ KUMAR @ TINKU

..... Appellant

Represented by: Mr. Sumer Kumar Sethi,  
Advocate

versus

STATE

..... Respondent

Represented by: Mr. Ashok K. Garg, APP for  
State with SI Sohan Lal, PS  
Prasad Nagar.

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

1. By the present appeal Tej Kumar @ Tinku challenges the impugned judgment dated 28<sup>th</sup> February 2014, whereby he was convicted for the offences punishable under Sections 377/342 IPC read with Section 6 of Protection of Children from Sexual Offences Act (in short POCSO Act) and the order on sentence dated 4<sup>th</sup> March 2014 directing him to undergo rigorous imprisonment for the period of ten years and to pay a fine of Rs.10,000/-, in default whereof to undergo simple imprisonment for a period of six months for the offence punishable under Section 6 POCSO and rigorous imprisonment for a period of six months for the offence punishable under Section 342 IPC.

2. Assailing the conviction, learned Counsel for the appellant submits that the Trial Court failed to appreciate that the incident had taken place on 21<sup>st</sup> December 2012 while the statement of the victim under Section 164

Cr.P.C. was recorded on 11<sup>th</sup> January 2013. Hence, there is unexplained and inordinate delay of 20 days which casts serious doubts upon his statement and is a tutored one. ₹20/- currency note which was given by the appellant to the victim has not been recovered even after thorough search by the police officers. As per the MLC, there is no injury on the rectum of the victim or on the male organ of the appellant even though as per the prosecution, there was insertion of penis. Moreover, Dr. Shyam Sunder (PW-14) in his cross-examination has clearly stated that if a male of 25 years old has anal sex with a boy of 6 years old with full insertion of penis, there is every likelihood that there would be an injury on the anus of the boy, thus, falsifying the case of the prosecution. The independent witnesses, that is, Roop Chand (PW-2) and Sonu Kumar (PW-5) have turned hostile and failed to support the case of the prosecution. The Trial Court has also completely ignored the defence taken by the appellant in his statement recorded under Section 313 Cr.P.C. and version of the two defence witnesses Tej Kumar (DW-1) and Bharat Bhushan (DW-2). The Investigating Officer has stated that he recorded the statement of the nani of the victim at 7:50 P.M. while she stated that her statement was recorded at 11:00 P.M. There are material contradictions in the prosecution story with respect to attempt to sodomy and sodomy being committed. Nani of the victim in her complaint stated that she had accompanied the victim to the toilet and was an eye-witness to the incident whereas in her deposition she has stated that the victim on coming back to home informed her of the incident.

3. Per contra, Learned APP for the State submits that the impugned judgment and order on sentence suffers from no illegality.

4. Process of law was set into motion on 21<sup>st</sup> December 2012 at 6:16

P.M. when information was received regarding an unnatural offence that had been committed with a boy at I-Block, House No. 16/186, Hardyan Singh Road. Aforesaid information was recorded vide DD No. 25A (Ex.PW-4/A) which was assigned to SI Mangej who along with HC Raghu Raj reached the public toilet, Gali Ambedkar Nagar, Hardhayan Singh Road. On reaching there, he met the nani of the victim and recorded her statement vide Ex.PW-3/A wherein she stated that her grandson 'P' who was 6 years old had gone to use the public toilet at 6:00 P.M. situated at Gali Ambedkar Nagar, Hardhayan Singh Road. She had followed him to the toilet. When her grandson was in the toilet, the appellant also entered the toilet and bolted the door from inside. When she heard her grandson crying, she started screaming for help. Public persons standing there came, banged the door open and took out the victim and the appellant. When the door opened, the pant of the victim was down and the public started beating the appellant. The victim informed her that the appellant had given him ₹20 and was trying to make him to do '*galat kaam*'. One of the public persons called on 100 number.

5. On the basis of the aforesaid statement, FIR No. 266/12 (Ex.PW-4/B) was registered at PS Prasad Nagar for the offences punishable under Sections 342/377/511 IPC read with Section 4/18 POCSO Act.

6. The appellant was taken to the hospital with Ct. Anil and the victim was taken to the hospital by Ct. Suresh along with his Nana for their medical examination. SI Mangej prepared the site plan at the instance of the nani of the victim vide Ex.PW-13/B. On 22<sup>nd</sup> December 2012, the appellant was arrested vide arrest memo Ex.PW-13/D and his personal search was conducted vide Ex.PW-13/E.

7. Statement of the victim was recorded under Section 164 Cr.P.C. Documents confirming date of birth of the victim as 18<sup>th</sup> February 2006 were collected vide Ex.PW-10/A-C. After completion of investigation, charge sheet was filed. Vide order dated 12<sup>th</sup> March 2013, charge was framed for the offences punishable under Sections 342/377 IPC read with Section 6/8 POCSO Act against the appellant.

8. Victim child was examined in Court as PW-1. After ascertaining that he was capable of understanding the questions put to him and was capable of giving rational answers thereof, victim child deposed as under:

*"Q. With whom you were residing?"*

*Ans. With my Nani*

*Q. Where did you go?"*

*Ans. I went to toilet after intimating to my Nani*

*Q. Where did you go for toilet?"*

*Ans. Nani asked me to go outside. Accordingly, I went outside.*

*Q. Where toilet was located?"*

*Ans. At some distance from my house.*

*Q. What happened there?"*

*Ans. When I was sitting inside the toilet, one uncle came there and pushed my water pot inside the toilet and he also entered the said toilet.*

*Q. What did said person do?"*

*Ans. That uncle had bolted the door from inside and down his pant and gave me Rs.20/- and stated that gand mara le.*

*Q. Then what happened?"*

*Ans. That uncle had hugged me from behind and inserted his penis in my anus. I cried as I felt severe pain. One person opened the door by pushing hard and rescued me.*

*Q. Then what happened?"*

*Ans. That uncle was beaten by the person who rescued me. Other persons also came and they had beaten him.*

- Q. What was the name of the uncle?*  
*Ans. His name was Tinku*
- Q. Can you identify that uncle?*  
*Ans. Yes*
- Q. How can you identify him?*  
*Ans. He was working near our house and I saw him there.*
- Q. Where was the Rs.20/- which was given by the accused?*  
*Ans. The same had fallen in the toilet.*
- Q. Where did you go after the incident?*  
*Ans. To the house of my Nani and narrated all the incident to my Nani. At time my mother is also there.*
- Q. Whether you were taken to the hospital?*  
*Ans. Yes*
- Q. Whether you appeared before any Judge/Magistrate prior to this. If yes for what purpose?*  
*Ans. Yes I was brought in the court where my statement was recorded."*

During his cross-examination, he stated:

- "Q. Who were residing with your nani?*  
*Ans. My mama, mami, mausi, mausa, my mother, my two brothers were residing with my Nani.*
- Q. How many rooms have in the house of your Nani?*  
*Ans. Four rooms*
- Q. Whether there is kitchen and toilet in the said house?*  
*Ans. There is a kitchen at the courtyard and the toilet at the roof.*
- Q. What is the distance between the house of your Nani and public toilet?*  
*Ans. It is at some distance but I cannot tell about the distance. The public toilet is visible from the house of my Nani and vice-versa.*
- Q. Whether there was only one toilet there or more*  
*Ans. There were many toilets. Even at the first floor also.*
- Q. Whether any public person was present when you went to*

*toilet?*

*Ans. Yes.*

*Q. For how long accused remained inside the toilet?*

*Ans. He remained inside for a short while. I cannot tell the duration in minutes.*

*Q. When public persons beating the accused whether any member of your family was present there or not.*

*Ans. No one was present from my family.*

*Q. Did you know anyone from the persons who gathered there at the spot?*

*Ans. I recognise one chaiwala but I do not know his name. I do not know the other persons.*

*Q. How did you go to your house after the incident?*

*Ans. I went to my house alone.*

*Q. Who met you in the house?*

*Ans. My Nani, Mummy and my younger brother were met me in the house.*

*Q. Where did you go thereafter?*

*Ans. Nani called the police. Thereafter, police came there.*

*Q. Whether police interrogate you?*

*Ans. Yes. I told all the facts to the police.*

*Q. Whether did you tell the police in your statement that the accused had inserted his penis in your anus or not and you felt severe pain?*

*Ans. Yes. (confronted with the statement recorded under Section 161 Cr.P.C. on 21.12.2012 wherein it is not so recorded now Ex.PW-1/DA)*

*Q. Whether did you tell the police in your statement Ex.PW-1/DA that the name of the said person was Tinku?*

*Ans. I had told that his name was Tinku (Confronted with Ex.PW-1/DA wherein it is not so recorded).*

*Q. Whether did you tell the Ld. Magistrate in your statement recorded under Section 164 Cr.P.C. that the name of said*

*person was Tinku?*

*Ans. No.*

*Q. What does your Mama do?*

*Ans. He is a driver.*

*Q. When did your Mama reach home on that day?*

*Ans. Some one called Mama, thereafter, my Mama reached at home.*

*Q. Who did tell you the name of Tinku?*

*Ans. He was working near outhouse in a factory and the said factorywala told that his name was Tinku.*

*Q. When did he tell his name?*

*Ans. Much prior to the incident.*

*Q. What is name of said factorywala?*

*Ans. His name is Ladoo and the thread of pant are manufactured there.*

*Q. What is the distance between the house of your Nani and the said factory?*

*Ans. Very close as there is only one house between the house of my Nani and factory."*

9. Nani of the victim stated in her testimony that on 21<sup>st</sup> December 2012, when the victim came back from the school at about 6:00 P.M., he told her that he had to go to the toilet but since there was no light she asked Praveen to go outside. Accordingly, he went to the public toilet located near their house. After about 30-45 minutes, the victim returned while weeping and told her that his maternal uncle had beaten him. She also noticed finger marks on his cheek. The victim further told her that public persons were beating the appellant and the tea-vendor had taken him out from the toilet. She went out of her house and noticed that public persons were beating the appellant. She made a call to the police on 100 number and also called her son. She along with the police went to the house of the appellant who was arrested there.

10. Roop Chand (PW-2), deposed that he was running a tea shop opposite the public toilet at Bapa Nagar. On 21<sup>st</sup> December 2013, at about 6:00 P.M., he was present at his shop and saw that some people had gathered near the toilet who were watching some quarrel and due to curiosity he also went there but he was standing behind to guard his shop. The quarrel was going on between Manish and Tej Kumar. Tej Kumar was in a drunken condition and there was blood coming out from his mouth. After some time, PCR Van came there and took Tej Kumar.

11. Sonu Kumar (PW-5) deposed that he was working at the Public Toilet at Bapa Nagar. In the winter of 2012, he was inside his room which was located outside the public toilet. At about 3:00 P.M., he saw that there was a crowd outside the public toilet. When he came out from his room public persons told him that one boy was inside the toilet. He stated that it was a small boy but he does not know how the boy got inside the toilet.

12. Rajesh Kumar (PW-10), Primary Teacher at Primary School, PL Road stated that as per the school record, the victim was admitted to school on 27<sup>th</sup> July 2012 and his date of birth was 18<sup>th</sup> February 2006.

13. Dr. Shyam Sunder (PW-16), Medical Officer, Kalawati Hospital stated that on the day of the incident at about 10:30 P.M., the victim aged 6 years was brought in the hospital with the history of sexual assault by a male of 25 years in the neighborhood. As per MLC (Ex.PW-16/A), no fresh injury was noticed on the victim. In his cross examination, he stated that if a male of 25 years old has anal sex with a boy of 6 years old with full insertion of penis, there is every likelihood that there would be an injury on the anus of the boy. However, injury may not appear if there is partial insertion of penis.

14. Dr. Avinash (PW-14), Emergency Medical Officer, DDU Hospital

stated that on the day of the incident the appellant was examined by Dr. Ramesh, Senior Resident under his supervision vide MLC (Ex.PW-14/A). After examination, his blood and semen sample were taken. There was nothing in the medical reports to suggest that the patient could not perform sexual intercourse.

15. Tej Kumar @ Tinku in his statement recorded under Section 313 Cr.P.C. stated that on the day of the incident, a quarrel had taken place between him and Manish, maternal uncle of the victim. He was consuming liquor near the public toilet and Manish was also consuming liquor near the public toilet. Manish offered a drink to him and thereafter gave him some money to fetch half a bottle of liquor. Since, he was under the influence of liquor, he lost the money which resulted in a quarrel between him and Manish who also beat him up.

16. Tej Kumar (DW-1), deposed in sync with his statement recorded under Section 313 Cr.P.C.

17. Bharat Bhushan (DW-2), brother of Tej Kumar, stated that on 21<sup>st</sup> December 2012 at around 5:30 P.M. someone informed him that his brother was in the middle of a quarrel. Accordingly, he rushed in front of the public toilet where the quarrel was going on between Manish and his brother. He stated that Manish was residing behind his gali. His brother informed him that Manish was beating him as he had lost ₹500/- that Manish had given him. He took his brother to his house and informed him that he had made a complaint to the police. After a while, the police reached their house and took his brother to the hospital and asked him to come and make the complaint at the police station. On reaching the police station he was informed that they had already registered a case and thus whatever he had to

say he would have to depose in front of the court.

18. Contention of learned counsel for the appellant that a doubt is caused in the prosecution case due to the inordinate delay of 20 days in recording the statement of the victim under Section 164 Cr.P.C. deserves to be rejected for the reason PCR call was made immediately and FIR on the statement of the victim was registered on the same date. Victim was also medically examined whereafter the appellant was arrested. The stand of the victim in his statement under Section 164 Cr.P.C. is not different from his complaint. Relying on the deposition of Dr. Shyam Sunder in his cross-examination that if a male of 25 years old has anal sex with a boy of 6 years old, there is every likelihood of an injury, learned counsel for the appellant has contended that the version of the victim is not corroborated by his medical evidence which assertion fails to notice further deposition of Dr. Shyam Sunder who stated that injury may not appear if there is partial insertion of penis. Even with partial insertion of penis offence under Section 377 IPC would be made out. The victim has clearly stated that in the scuffle the ₹20 note fell down and hence his testimony cannot be disbelieved for non-recovery of the ₹20 note.

19. Though the case of the appellant in his statement under Section 313 Cr.P.C. and in his deposition as DW-1 is that he was falsely implicated at the instance of the maternal uncle of the victim with whom he had a quarrel, however no such suggestion has been given to the victim. In view of the evidence led by the prosecution this Court finds no infirmity in the impugned judgment of conviction or order on sentence.

20. Appeal is accordingly dismissed.

21. Copy of this order be sent to Superintendent Central Jail Tihar for

update of the Jail record and information to the appellant.

22. TCR be returned.

**(MUKTA GUPTA)**  
**JUDGE**

**MAY 24, 2019**

**‘vj’**

