

Hunny vs.state

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SooperKanoon Citation : sooperkanoon.com/1206521

Court : Delhi

Decided On : Jun-06-2017

Appellant : Hunny

Respondent : State

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI HUNNY STATE
RESERVED ON : JUNE01 2017 DECIDED ON : JUNE06 2017 CRL.A.841/2016
..... Appellant Through : Mr.Tarun Khanna for Ms.Saahila Lamba, Advocate.
versus Through : Ms.Meenakshi Dahiya, APP. Respondent CORAM:
HON'BLE MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Aggrieved by a judgment dated 12.04.2016 of learned Additional Sessions Judge in Sessions Case No.1

arising out of FIR No.4

registered at Police Station Bharat Nagar by which the appellant Hunny was held guilty for committing offences punishable under Sections

IPC and Section 10 POCSO Act, the instant appeal has been preferred by him. By an order dated 19.04.2016, the appellant was sentenced to undergo Rigorous Imprisonment for five years with fine `5,000/- under Section 10 POCSO Act; Rigorous Imprisonment for two years with fine `1,000/- under Section 363 IPC and Simple Imprisonment for one month with fine of `500/-, under Section 323 IPC. The sentences were to operate concurrently. Crl.A.841/2016 Page 1 of 10 2.

Briefly stated the prosecution case as set up in the charge- sheet was that on

21.07.2014 at around 9.00 am, the appellant kidnapped the prosecutrix/victim X (changed name), aged around five years from the lawful guardianship of her parents when she was going along with her brother to her school. The appellant after kidnapping took the child to Police Colony, Narela with an intent to force/seduce her for illicit intercourse. The appellant sexually assaulted the child and also slapped her.

3. On 21.07.2014, when the victim X had gone along with her brother Y (changed name) to school at around 8.15 a.m., she was kidnapped. Y, on return to the home informed his parents that an individual had kidnapped X near the school gate. Efforts were made to find out X but she could not be traced. Hiralal (PW1), victim's father, lodged missing report (Ex.PW-5/A) with the Police Station Bharat Nagar. The Investigating Officer after recording his statement lodged FIR under Section 363 IPC.

4. At around 12:30 p.m., Neelam (PW-3), who lived in the neighbourhood of victim's parents noticed X standing near Gol Chakkar of Partap Bagh. She brought the child to her home. The police was intimated. X was taken for medical examination but her mother did not permit her internal medical examination. Her statement under Section 164 Cr.P.C. was recorded. The appellant was arrested and was medically examined. Statements of the witnesses conversant with facts were recorded. Upon completion of investigation, a charge-sheet was submitted against the appellant for the commission of aforesaid offences. The prosecution examined thirteen witnesses to establish its case. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false CrI.A.841/2016 Page 2 of 10 implication. The trial resulted in conviction as mentioned previously. The said conviction under challenge in this appeal.

5. I have heard the learned counsel for the parties and have examined the file. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence on record in its proper perspective and fell into grave error to base conviction on the sole testimony of the child witness who was unable to respond to the questions put to her. In her deposition before the Court, she did not utter if sexual assault was committed upon her. CCTV footage relied upon by the

prosecution is not admissible in evidence in the absence of Certificate under Section 65B Evidence Act. Material discrepancies emerging in the statements of the prosecution witnesses have been ignored without cogent reasons. Learned Additional Public Prosecutor refuting the contentions urged that the evidence of the prosecutrix is beyond suspect and can be believed.

6. The victim in the instant case is a child, aged around five years. On the day of incident she had gone with Y, his elder brother aged around ten years to her school. She was, however, kidnapped near the school gate. PW-4 Y, victims brother aged around ten years appeared in the court. The learned Presiding Officer conducted preliminary enquiry to ascertain if he was capable to understand the questions and answer them properly. The court was satisfied that the witness was capable to understand the questions and answer them reasonably. His statement was recorded without oath. He deposed that at around 8.30 a.m. he had taken her sister X to school and an individual who was wearing a pink shirt and jeans pant came and gave him a ten rupee note to purchase some eatables. He further informed that the said Crl.A.841/2016 Page 3 of 10 individual took her sister and fled. He chased him and raised alarm but he could not find him. Thereafter, he came to home weeping and informed his parents. They also attempted to search her but of no use. At around 1.00 p.m. her sister could be traced. He identified the appellant to be the individual who had taken X with him. The witness also elaborated as to how the appellant was apprehended when he was pointed out by him at a dhaba. He also identified clothes (Ex.PW-1 and P-2), which the appellant was wearing at the time of Xs kidnapping. In the cross-examination, he informed that earlier also he used to take his sister to the school in the bus. He elaborated that when his sister was kidnapped, he had raised alarm; and had informed Xs madam also. To a question if he had seen the appellant before, the child responded that he had not seen the appellant prior to it. He added that wo hamare pados mein nahin rehta hai. To the question as to what happened to the ten rupee note given by the appellant, the innocent answer of the child was mami ne pant dho di thin, wo `10/- usme gal gaye honge. The witness denied if the statement given by him was at his parents behest.

7. On scanning the entire testimony of the child, it reveals that despite searching cross-examination, no material discrepancy could be elicited to suspect his version. No ulterior motive was attributed to the child for falsely implicating the appellant in the kidnapping of his sister. The child was not acquainted with the appellant prior to the incident and did not nurture any animosity or ill-will to make a false statement in the court.

8. PW-10 is the victim; her statement was recorded in camera. She was provided a baby doll (Ex.P-1) having upper and lower clothes to keep her occupied. She was made comfortable and her statement was CrI.A.841/2016 Page 4 of 10 recorded in congenial atmosphere. Learned Presiding Officer put various questions to ascertain if she was capable of understanding and answer them. After recording satisfaction that she was able to give rational answers, her statement was recorded in question-answer form reproduced as under: Q: Beta Kya hua tha A: Ek ladka mujhe pakad kar le gaya tha. Q: Beta, kab pakad kar le gaya tha?. A: Jab bhai mujhe school chodne gaya tha. Q: Beta, phir kya hua?. A: (Witness did not answer despite repeated questions and she was holding the baby doll in her hands and she started putting one of her finger of right hand in the lower wear of the doll). The doll was taken on record as Ex. P1. (hereinafter referred to as doll for the sake of convenience) Beta, kya uss ladke ne aapke saath wahi keya tha jo abhi aap Q: doll ke saath ker rehe ho?. A: Haan (the child started scratching the vaginal region of the doll with her nails). Beta, kya uss ladke ne aapko waise hi nakhun mare the jaise Q: aap doll ko maar rahe ho?. A: Haan (the child had all of a sudden become numb and was not responding to further questions. She was again made comfortable by the Ld. Addl. PP and the Ld. Advocate from DCW). Q. Beta, phir kya hua?. CrI.A.841/2016 Page 5 of 10 A. Woh mujhe bus mein Pratap Bagh chod gaya. Uss ladke ne mujhe gaal par thapad bhi mara tha. Court observation: The Ld. Addl. PP has asked questions w.r.t the clothes being worn by the witness at the time of incident and as to whether the accused having removed the same and the place where the same was done. The witness despite repeated questions, has answered only to the effect that the accused had put her skirt in her school bag. Q: Beta kya aap us ladke ko pehchan sakte ho?. A: Haan. (the child correctly identified the accused from the designs made in the wooden partition). xxx During cross-examination by the learned defence counsel, the witness stated

as under:-

"Q: Beta, kya aapke bhai aapko daily school chodne jata hai?. A Ab bhai nahi jata, papa chodne jate hai school. Beta, jab aapko woh bhaiya le kar jaa rahe the, to kya aapne Q: shor machaya tha?. Court observation: The child is too small to firstly understand this question and secondly to react to it. A. Nahin. Q: Beta aapne shor kyon nahin machaya tha?. A: Jab bhaiya le kar jaa rahe the, tab wah aur log nahin the. Crl.A.841/2016 Page 6 of 10 Q; Beta, jab bhaiya aapko bus mein le kar jaa rahe the to kya aapne kisi ko bataya tha?. Court observation: The child is too small to firstly understand this question and secondly to react to it. A: Nahin. Q: Beta, jahan wo bhaiya aapko le gaye the, kya uss ghar mein aur bhi koi tha?. A: Haan the. Q: Beta, kya wo bhaiya aapko lekar gaye the yaa aaj aap ye sab apne mummy papa ke kehne par keh rahe ho?. A: Nahi, bhaiya lekar gaye the. Q: Beta, dekho aapko koi bhaiya nahi lekar gaye the aur na hi aapko mara tha?. Court observation: The child has denied this suggestion through gestures. 9. Scrutinizing the testimony of the tiny child, it stands established that the appellant had kidnapped X when she had accompanied her elder brother to the school. No discrepancies or infirmities have emerged in her cross-examination. Again, no ulterior motive or extraneous consideration has been assigned to the child witness for false implication. The statement of the child is consistent. She identified the appellant to be the perpetrator of the crime without hesitation.

10. True, the child was hesitant to respond to some questions put at the time of recording her statement. Obviously, the child was reluctant to answer embarrassing questions which were derogatory in nature. The court can understand shyness of tender aged girl to answer dirty or vulgar Crl.A.841/2016 Page 7 of 10 questions. She has given answers to other questions. Nevertheless, she had categorically pointed out as to what the appellant had done with her by referring it to the doll in her hand. She had conveyed as to what was done by the appellant with her. Nothing more can be expected from a child aged around five years considering her limited understanding. Her testimony cannot be discarded merely because X in specific/express words did not tell that nails were scratched on her vagina by the appellant after putting off her underwear.

11. PW-3 (Neelam) who lived in the neighbourhood of the victims parents saw her near Gol Chakkar of Pratap Bagh when she was coming to her house after bringing her own daughter from the school situated at Gur Mandi after 12.30 p.m. She saw X daughter of her neighbour Laxmi weeping. She informed that at that time X was wearing only shirt and underwear. She was not wearing her skirt and carrying her school bag. When she enquired as to what had happened, the child was unable to respond. She brought the child to her mother Laxmi. Then she came to know that X was missing since morning. She was not cross-examined; her testimony remained unchallenged. PW-3s deposition has revealed as to under what horrible conditions, X was found alone without a skirt at a place away from her residence.

12. PW-8 (Rajiv Verma) is an independent witness who had no familiarity either with the appellant or the victims family to make a false statement. He deposed that he was residing along with his family at A-16, Rana Pratap Bagh, Near Mother Dairy Gol Chakkar. He had installed two CCTV cameras outside his house in the gali. On 21.7.2014, the police informed him about the kidnapping of a child aged around five years Crl.A.841/2016 Page 8 of 10 studying in a primary school situated in the next gali. The police asked for CCTV footage. He showed the CCTV footage to the police where a minor girl wearing school uniform was being taken by a boy wearing pink colour shirt and blue jeans. He provided the copy of CCTV footage to the police. He further deposed that on the day his CCTV cameras were working in proper order under his control and no tampering was made to the CCTV footage provided to the police. Recording in the CCTV was in usual course and the system on which the footage got stored was working in fine order; there was no deficiency of any kind therein. He proved the photographs (Ex.PW8/A1 to Ex.PW8/A4). In the cross-examination, he fairly admitted that certificate under Section 65B of Evidence Act was not asked for from him. He volunteered to add that he was ready to give the certificate that day too. The appellant did not insist for production of certificate under Section 65B of Evidence Act. The testimony of the witness is crucial where the appellant was found taking the child with him. No suggestion was put to PW-8 in the cross-examination that the photos (in Ex.PW8/A1 to Ex.PW8/A4) were not that of the appellant with X.

13. From the statements of the prosecution witnesses referred above, it stands proved that the appellant had kidnapped the child out of lawful custody of her parents without their consent. It was for the appellant to offer explanation as to what had prompted him to take the child with whom he had no prior acquaintance to a secluded place. No such explanation has come on record. In the disclosure statement (Ex.PW4/C) the appellant has disclosed about his criminal antecedents. Though he was a married man, but his wife had left the matrimonial home due to his incarceration in some criminal case. Merely because no nail marks were found on the private parts of the child, it cannot be inferred that no such incident had taken place. X was taken for medical examination but to protect her honour, seemingly, the victims mother did not permit her internal medical examination. The crucial evidence regarding nail marks on the private parts could not be gathered. It, however, does not dilute the oral testimony of the victim whereby by referring to the private parts of the doll in her hand she conveyed the information as to what had happened with her. There was no occasion for the appellant to take the child on the allurements of handing over a ten rupee note to her brother.

14. The impugned judgment based upon proper appreciation of the evidence deserves no intervention. The conviction is affirmed.

15. The crime committed is very serious. The victim a child aged around five years was sexually assaulted and defiled. When she was noticed by Neelam (PW-3), X was not wearing her skirt. The court can well understand the trauma of the kid whereby she suffered sexual assault at such a small age. The appellant aged around 23 years was well aware of as to what he was doing. The Trial Court has already taken a lenient view and no modification of the sentence order is called for; there being a minimum sentence under Section 10 POCSO Act.

16. 17. forthwith. The appeal lacks in merits and is dismissed. Trial Court record along with the copy of the order be sent back JUNE06 2017/sa (S.P.GARG) JUDGE CrI.A.841/2016 Page 10 of 10