

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 522 of 2019

Reserved on: 28.12.2022

Decided on: 10.01.2023

Pawan Rathore alias Pankaj alias Panku

....Appellant

Versus

State of Himachal Pradesh

...Respondent

Coram

Hon'ble Ms. Justice Sabina, Judge

Hon'ble Mr. Justice Sushil Kukreja, Judge

¹*Whether approved for reporting?*

For the Appellant: Mr. Yashveer Singh Rathore,
Advocate.

For the Respondent: Mr. Bharat Bhushan, Additional
Advocate General.

Sushil Kukreja, Judge

The instant appeal filed under Section 374 (2) of Code of Criminal Procedure, lays challenge to the judgment of conviction/order of sentence dated 25.10.2017, passed by the learned Special Judge, Kullu, District Kullu, H.P., in Sessions Trial

No.52 of 2015, whereby the appellant/accused (hereinafter referred to as 'the accused') was convicted under Sections 363, 376(2)(n) of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 5(l) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for one year alongwith fine of Rs.5,000/- for offence punishable under Section 363, IPC and in default of payment of fine, to further undergo simple imprisonment for three months. The accused was also sentenced to undergo rigorous imprisonment for a term of 10 years and a fine of Rs.10,000/- for the offence punishable under Section 6 of the Act and in default of payment of fine, to further undergo simple imprisonment for one year.

2. The case of the prosecution, in brief, is that on 05.05.2015, the victim (name withheld) alongwith her mother and relatives lodged a complaint at Police Station Banjar, wherein it was alleged that she was a resident of Suraj Colony, Banjar and used to remain in her house to pursue her study as she had to appear in the matriculation examination as a private candidate. On 01.05.2015 at around 6:00 p.m., when she was in the ground near

to her house, her neighbour Goldy made a phone call on her mobile and after picking up the call, she came to know that accused Pankaj was calling her, who called her to Mela Ground Banjar. Since the accused was known to her for the last 8-9 months, she met him in the Mela Ground and he persuaded her to solemnize marriage and he also said that they will solemnize the marriage in the morning as it was getting dark. Thereafter, the accused took her near the college in his car and they spent the whole night in the said car, where the accused committed sexual intercourse with her without her consent. In the morning, the accused took her towards Sojha in the same car and booked one room in Raja Guest House, where they took bath and after taking the meals, they slept there and at around 3:00 p.m., they woke up and remained in the guest house for the whole night and there also the accused again committed sexual intercourse with her forcibly.

3. On 03.05.2015 at around 9:00 a.m., the accused took the victim in the car to village Chhet in the hut (Kutiya) of Ganga Girdhar Maharaj and they remained there till 10:30 a.m. and then he took her to Banjar and near village Darudhar, he stopped the

car and told her to go to her house and also said that they would solemnize marriage after 2-3 days. The accused also gave his mobile number to the victim. The victim asked the accused as to how she would go to her house now, but the accused suggested her to stay in the house of her friend and also warned her not to disclose the incident to anyone, otherwise he would not solemnize the marriage with her. He also threatened her by saying that if she disclosed the incident to anyone, he would beat her father. Thereafter, the victim went to Village Bala and stayed in the house of her friend and she made a phone call to the accused on his mobile and asked him about the marriage, but he said that he would think over the marriage later. The victim disclosed this fact to her friend Kalpana and her younger sister Kirna and thereafter she also disclosed the same to Meena Rawat, who met her on 04.05.2015 at about 10:00 a.m. near Banjar. From Village Bala, the victim came to her aunt's house at Kullu and disclosed the entire incident to her aunt and then her aunt called the mother of the victim to Kullu and disclosed the entire incident to her. Thereafter, the victim remained in the house of her uncle (taya) and disclosed the entire incident to him and then the accused and

his elder brothers Kuldeep and Durga Dass were called to Kullu by the uncle (*taya*) of the victim and they had a long conversation with each other regarding the incident. However, after sometime the uncle of the victim took her to the office of Superintendent of Police, Kullu, who advised them to go to Police Station, Banjar.

4. On the basis of the statement of the victim, an FIR was registered against the accused under Sections 363, 366 & 376, IPC and Section 4 of the Act. The date of birth certificate of the victim was obtained from her school, according to which, she was 15 years, 7 months and 26 days of age on the date of the lodging of the FIR and thereafter the victim was taken to Regional Hospital, Kullu for her medical examination and for determination of her age. During investigation, the police took into possession the Alto Car bearing registration No.HP-33(T)-9616 alongwith its documents. The accused was arrested on 07.05.2015 and he was taken to hospital for his medical examination. During further investigation, the victim identified the places, where she remained in company of the accused and the police prepared the site plan and also photographed those places. The police also took into

possession the bed-sheet from Raja Guest House. The statement of victim was recorded under Section 164 of the Code of Criminal Procedure in the Court of learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu. The blood samples of the victim and the accused were sent to RFSL, Junga, for DNA profiling.

5. On the completion of the investigation and receipt of the RFSL report, the Investigating Officer prepared the charge-sheet and presented the same in the Court.

6. Charge was framed by the learned trial Court against the accused under Sections 363, 366 & 376(2)(n) of IPC and Section 5(l) read with Section 6 of the Act, vide order dated 18.01.2016, wherein, he did not plead guilty of the charge framed against him and claimed to be tried.

7. In order to prove its case, the prosecution has examined as many as 21 witnesses. The statement of accused was recorded under Section 313 Cr.P.C., wherein, he denied all set of incriminating evidence led by the prosecution against him, besides pleaded to be innocent and being falsely implicated. In his defence, the accused examined one witness.

8. On the basis of evidence led on record by the prosecution, the learned trial Court held the accused guilty of his having committed offences punishable under Sections 363, 376 (2)(n) of IPC and Section 5(l) read with Section 6 of the Act and sentenced him as per description given hereinabove.

9. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence, passed by the learned trial Court, the accused approached this Court, praying therein for his acquittal after setting aside the aforesaid judgment of conviction and order of sentence.

10. The learned counsel for the appellant contended that the impugned judgment is based on conjectures and surmises and the appellant had been falsely implicated in the case in order to pressurize him to solemnize marriage with the victim as she was in one sided love with him. He further contended that the learned trial Court has failed to appreciate the fact that the victim was not minor at the time of the incident and, therefore, the impugned judgment of conviction is liable to be quashed and set aside.

11. On the other hand, the learned Additional Advocate General supported the judgment of the learned trial Court and contended that since the charge against the accused has been duly proved by the prosecution beyond all reasonable doubt, the learned trial Court has rightly convicted him on the basis of proper appreciation of evidence.

12. We have heard the learned counsel for the appellant as well as the learned Additional Advocate General and also gone through the records carefully.

13. So far as the age of the victim is concerned, while appearing in the witness box as PW-2, mother of the victim disclosed that the victim was 17 years of age. PW-14 Dr. M.L. Bandhu deposed that on 06.05.2015, he examined the victim for age estimation. He examined X-ray films Ext. PW14/A-1 to A-4, issued MLC Ext.PW14/B and opined the estimated age of the victim as 15 to 17 years. Similarly, PW17 Dr. Yogita Thakur deposed that on 07.05.2015 at 10.30 a.m., she examined the victim for her dental age. All teeth were present, permanent teeth were present from central incisor till second molar excluding all four wisdom teeth, but upper deciduous canines were present.

She opined the dental age of the victim was approximately between 14 to 15 years and she issued MLC Ext.PW17/A. PW-3 Dev Raj, the then Clerk of the Nagar Panchayat, deposed that as per record, the date of birth of the victim was 05.09.1999 and the Secretary issued birth certificate Ext.PW3/B on the basis of the record maintained by the Nagar Panchayat and entry in this regard was made at serial No.31 of the birth record register. Similarly, PW-7 Mukesh Kumar, the then TGT, Medical Government Senior Secondary School (name withheld), produced the record of date of birth of the victim and deposed that as per record, the date of birth of the victim was 05.09.1999 and the Principal of the School issued certificate Ext. PW7/B in this regard. Thus, the perusal of date of birth certificates Ext. PW3/B and Ext. PW7/B shows that the date of birth of the child victim was 05.09.1999. Though, the accused in his defence examined DW-1 Jiwan Lal, Supervisor, Nagar Panchayat, who brought the record pertaining to birth entry of the victim. However in the entry Ext.DW1/A at Sr. No.31, the date of birth of the victim has been recorded as 05.09.1999. This witness also admitted in his cross-examination that the birth certificate

Ext.PW3/B was issued by Secretary, Nagar Panchayat on the basis of Ext. DW1/A. Thus, the prosecution has proved beyond reasonable doubt that the date of birth of the victim was 05.09.1999. As the date of occurrence was 01.05.2015, therefore, at the time of the incident, the age of the child victim was below 16 years. Section 2(d) of the Act defines the child as any person below the age of 18 years. Since the age of the victim was below 16 years, she comes under the definition of child within the meaning of Section 2(d) of the Act.

14. The child victim, while appearing in the witness-box as PW-1, deposed that on 01.05.2015, when she was at her house at Banjar, she received a telephonic call from Goldi Bhaiya at about 6.00 p.m. and thereafter, she talked with Panku known as Pawan Rathore on the cell phone of Goldi, who called her to the School Ground, Banjar. She went there at about 6.30 p.m. and accused Pawan Rathore came there in a vehicle and she met him there. They went on talking till late evening and they were sitting in the vehicle of accused. The accused took the vehicle just a little distance away near a big stone and committed penetrative sexual assault on her in the said vehicle. He committed penetrative

sexual assault on her 3-4 times in the said vehicle and they remained in the said vehicle throughout the night. In the morning, the accused took her in the said vehicle to Sojha and they stayed in a Guest House, known as Raja Guest House on that day and the accused again committed penetrative sexual assault on her during night in the said Guest House. On 03.05.2015, in the morning, they came back in the said vehicle to Banjar and on the way at place Chhet, they stayed in the Kutir of Baba Ji for fifteen minutes and then came to Darudhar. She was made to alight from the vehicle there and the accused told her that he would marry her after sometime and thereafter she went to the house of her friend at place Balla. Her friend was cutting grass and she narrated the incident to her. Name of her friend was Kalpana and her sister Kirna came there. The victim also narrated the incident to her and thereafter, she made a phone call from cell number of Kalpana to the accused. Cell number of accused was 94598-83490 and the accused told her not to call him since he was busy. On the next day, she went to the house of her aunt (Bua) on 04.05.2015 and she also disclosed incident to her Bua, who made a telephonic call to her mother and thereafter her mother came to the house of

her Bua at Kullu and then she (victim) narrated the incident to her mother in the house of her Bua and thereafter, her mother called her uncle (Tau), who also came to the house of her Bua. On the next day, they went to the office of S.P. Kullu on 05.05.2015 and then they went to Police Station, Banjar and lodged FIR Ex.PW1/A. Thereafter, she was sent for medical examination to Regional Hospital, Kullu and her mother was with her at the time of examination and then she went with the police and showed spots near school ground, Sojha and Raja Guest House. She also identified one bed-sheet in Raja Guest House, which was taken into possession, vide memo Ex.PW1/B. The seat covers of the vehicle were also taken into possession by police. At the time of her medical examination, her clothes were taken into possession. She also showed the police the place near College at Banjar, where vehicle was taken by accused and also the Kutir of Baba ji. Her statement was also recorded by the Magistrate at Kullu.

15. PW-2 is the mother of the victim and deposed that she had three children and the eldest one was the victim, who was aged about seventeen years. On 01.05.2015, the victim went missing and on 04.05.2015 they were informed by Smt. Rama

Dogra that the victim was with her in her house at Kullu. They were searching for the victim from 01.05.2015 to 04.05.2015, but she was not found and on 05.05.2015, they came to Kullu. The victim disclosed to her about the incident that the accused had committed repeated sexual assault on her. The victim also disclosed to her that the accused firstly took her in the vehicle to a place near school ground, where she was sexually assaulted and thereafter she was taken to Sojha guest house, where the accused again sexually assaulted her and on the next day, the accused dropped her at Balla temple and said that he would marry her. This witness also deposed that they reported the matter to the police on 05.05.2015 and the victim was medically examined at Kullu and she was with her. The victim was also taken before a Magistrate at Kullu, who recorded the statement of the victim and thereafter, the victim was taken to police station, where she identified the vehicle. Then they went to Sojha guest house, where one bed-sheet Ex.P2 was taken into possession, vide memo Ex. PW1/B. They also went to Baba's Kutir at Chhet.

16. PW-4 is the aunt of the victim, who deposed that the victim came to her house at Kullu on 04.05.2015 at about 4-5 p.m

and disclosed that Pankaj Kumar kidnapped her and thereafter she was sexually assaulted by him in the vehicle, for the second time at Mela ground Banjar and for third time at place Sojha. The victim also disclosed that the incident had taken place on 01.05.2015, 02.05.2015 and 03.05.2015. This witness also deposed that thereafter her brother and the mother of the victim came to her house and they inquired from the victim about the incident.

17. PW-13 Dr. Tannu Sharma stated that on 06.05.2015 at about 1.40 p.m., she examined the victim, who was brought by police with the alleged history of being sexually assaulted twice by an acquaintance after making false marriage promise. The victim gave history that the person forcefully assaulted her on 1st & 2nd May, 2015 and on examination, her general condition was fair and she was well oriented, conscious and cooperative. Her pulse was 90 per minute and BP was 120/70 MM of Hg. Her systemic examination was within normal limits and her gait was normal. The victim attained menarche at the age of fourteen years and her LMP was 26.4.2015. The victim had changed the clothes and taken bath after the incident. Her breasts were well developed.

Pubic hair and axillary hair were present. No marks of injury were seen. On her local examination, the pubic hair were present and labia majora was covering labia minora. Old healed tags of hymenal tissue were seen and no fresh injury was seen. In her opinion, the person examined was exposed to coitus, however, final opinion was reserved till the report from RFSL. She preserved and sealed the clothes which the victim was wearing at the time of incident and handed over to the police. She also preserved blood sample of victim on dried gauze piece in sealed bag, sample of pubic hairs in sealed bag, vaginal slides were made and sealed in sealed bag. On 23.07.2015, as per RFSL report Ext. PX, she gave the opinion to the effect that human blood was detected on dupatta of the victim, blood was detected on her salwar and underwear, human blood was detected on blood sample and, as such, her opinion remained the same. She had issued MLC EX.PW13/C and her final opinion is Ex.PW13/D.

18. PW-15 is the uncle (Tau) of the victim, who fully corroborated the statement of the mother of the victim (PW-2) and deposed that the victim was his niece and on 02.05.2015, he received a call from his wife that the victim was missing from

01.05.2015 and then he came to Kullu on 03.5.2015. They searched the victim, but could not trace her. On 04.05.2015, he received call from his sister, who told him that the victim was in her house at Akhara Bazar, Kullu and thereafter, he went to the house of her sister and took the victim to his house and on inquiry from the victim, firstly, she kept mum and started weeping, but thereafter she disclosed that on 01.05.2015, one Pankaj kidnapped her with promise to marry her. She also disclosed that she was taken to Rest House to Jot and on 03.05.2015, she was dropped at Banjar and she was sexually assaulted by Pankaj. Thereafter, he made a call to Pankaj and asked him to bring his parents to his house and on 05.05.2015, Pankaj, his elder brother Kuldip and one relative Durga Dutt came to his house at Kullu. Thereafter, he told the relatives of the accused to take the victim to their home and get her married with the accused. They took some time to consider the proposal, but after that they refused to take the victim and Pankaj refused to marry her and thereafter, he went to S.P. Kullu, who advised him to go to police station, Banjar for registration of case and then the FIR was registered.

19. Learned counsel for the appellant contended that the statement of the victim does not inspire confidence in view of her cross-examination as she was in one sided love with the accused. We have gone through the cross-examination of the victim, who appeared in the witness box as PW-1, where she admitted that she did not resist sexual assault made by the accused on her, she did not make any complaint to anyone while she was being taken in the vehicle from the school ground to Sojha, nor did she raise any alarm. She also did not complain to any other person that the accused on the previous night committed sexual assault on her. She also stated in her cross-examination that she loved accused. No doubt, from the perusal of the cross-examination of the victim, it appears that it was a case of consensual sex. However, since the victim was a child under the definition of the Act, therefore, she cannot give consent and even if she had given consent, the consent is immaterial and is not valid in the eyes of law. The child has no legal right to give any consent, as such, the consent cannot be a legal one. The fact remains that the victim was a minor at the relevant point of time and therefore, she being a minor, the question of she having had consensual sex with the

accused cannot be a defence in a prosecution under the POCSO Act. PW-13 Dr. Tanu Sharma, who had examined the victim, specifically stated that in her opinion the victim was exposed to coitus and after report of RSFL, her opinion remained the same.

20. At this stage, it would be relevant to note that as per Section 29 of the Act, where the person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, the Court shall presume that such person had committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved. The presumption of culpable mental state of the accused is also envisaged in Section 30 of the said Act. In the instant case, the prosecution has proved that the accused had committed penetrative sexual assault on the victim repeatedly at various places. Therefore, the burden was on the accused to prove his innocence. However, except for the denial simplicitor in the statement under Section 313, Cr.P.C., the accused had failed to rebut the said statutory presumption contained in the Act either during his statement recorded under Section 313 of Cr.P.C. or by leading any evidence in his defence.

21. Consequently, in view of the detailed discussion made hereinabove, there is no illegality, perversity and infirmity in the impugned judgment of conviction and the order of sentence passed by the learned trial Court, which otherwise have been passed on proper appreciation of evidence as well as the law, as such, the same are upheld. Accordingly, the present appeal is dismissed.

Pending miscellaneous application(s), if any, also stand disposed of.

(Sabina)
Judge

January 10, 2023
(VH)

(Sushil Kukreja)
Judge