

2023:PHHC:059483-DB

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-AD-306-2022
Date of Decision : **April 25, 2023**

YYY THROUGH HER FATHER

.....Appellant

VERSUS

STATE OF HARYANA AND ANOTHER

.....Respondents

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE KULDEEP TIWARI**

Present : Mr. Sanjeev Kumar, Advocate
for the appellant.
Mr. Raman Sharma, Addl. AG, Haryana.
Mr. Devender Arya, Advocate
for respondent No.2.

KULDEEP TIWARI. J.

The instant appeal is directed against the order of acquittal dated 2.8.2022 passed by the learned Additional Sessions Judge, Fast Track, Special Court (under POCSO Act), Narnaul, whereby, the respondent has been acquitted of the charges framed against him for offences punishable under Sections 465, 506 (ii) of IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the '**POCSO Act**'), in case FIR No. 520 dated 14.10.2019, registered with Police Station Mahendergarh.

The prosecutrix, who is stated to be a minor, has, through her father, challenged the verdict of acquittal (supra), on the ground, that the learned trial Court has not assigned adequate weightage to her statement, as, made under Section 164 Cr.P.C. It has been further averred that the learned trial Court has not considered the vital aspect i.e. of the statutory presumption(s), as prescribed under Sections 29 and 30 of the POCSO

Act, rather becoming engendered against the accused. Therefore, the onus became laid upon the respondent-accused to prove his innocence beyond reasonable doubt. Thus, when the respondent-accused has not led any cogent evidence to rebut the apposite statutory presumption, therefore, it is argued that the learned trial Court ought to have convicted the respondent-accused whereas, it has erroneously and illegally made a verdict of acquittal upon the accused qua the charges (supra) framed against him.

It was also argued that the age of the victim at the time of the alleged offence was just 12 years and she then was a student of 7th class, therefore, possibly she could not be construed to falsely involve the accused. Contrary to this, it is argued that there is every possibility of the prosecutrix being pressurized, given hers belonging to a poor family, to may be, make testifications, if any, favourable to the accused.

Before we examine the submissions made by the learned counsel for the appellant and the legality of order of acquittal (supra), it is apt to first deal with the factual matrix of the present matter.

FACTUAL MATRIX

The prosecution was set into motion upon a complaint Ex.P1 made by the prosecutrix (identity of prosecutrix is withheld in terms of explanation attached to Section 33(7) of the POSCO Act) recorded on 14.10.2019 to the effect that on 9.10.2019 she was present in the school and was playing as it was games period and in the meantime when she reached at the gate of the room of her class then the accused came there

and directed her to come inside the room, on which, she went inside the room where the accused offered her sweets and thereafter gagged her mouth and then forcibly removed her *salwar* and also put off his pent and then committed rape with her and further threatened to kill her if she disclosed the matter to anyone. The accused allowed her to go back only two minutes before **closing of the school time**. Thereafter she stopped going to school and when she was not feeling well for 3-4 days, then, on enquiry, she disclosed the entire incident to her mother and thereafter her family informed the police. On the basis of the above statement, FIR under Sections 464, 465, 506 IPC and Section 6 of POCSO Act was registered. Thereafter the investigation was carried out by ASI Lal Singh (PW12). During investigation, Sonu Nimal (present respondent-accused) was arrested. During interrogation, he made disclosure statement (Ex.P14) which was signed by the accused and attested by Constable Umed Pal and in pursuance of the disclosure statement, the accused led the police party to the place of occurrence and got demarcated the place vide demarcation memo Ex.P15 which was signed by the respondent-accused and attested by Constable Umed Pal. On the same day, the accused was got medico-legally examined from General Hospital, Mahendergarh and after examination, the doctor handed over a sealed parcels to the Investigating Officer which were taken into possession vide memo Ex.P16. Thereafter the case property was deposited with the RFSL, Sunaria for its forensic examination. An application Ex. P6 was also moved on 14.10.2019 for medico legal examination of the

prosecutrix whereupon the prosecutrix was examined by Dr. Poonam, LMO posted at General Hospital, Narnaul.

The Statement of the prosecutrix was also got recorded under Section 164 Cr.P.C. before the Magistrate. Thereafter, the final report under Section 173 Cr.P.C. through SHO was filed before the learned trial Court.

PROCEEDING BEFORE THE TRIAL COURT

The learned trial Court found a prima facie case against the respondent-accused and framed charges under Sections 465, 506(ii) IPC and under Section 6 of POSCO Act vide order 23.7.2022.

In order to substantiate its case, the prosecution examined as many as 21 witnesses.

The learned trial Court after examining the entire evidence documentary as well as oral as became led by the prosecution and as well as by the defence, acquitted the respondent-accused of the charges framed against him vide impugned verdict of acquittal.

ANALYSIS

With the able assistance of the counsel for the appellant and the learned State counsel besides counsel for respondent No.2, we have threadbare examined the entire record and also have perused the verdict of acquittal.

The issues which are required to be considered and culled out for the adjudication are as under:-

1. *The age of the prosecutrix ?*
2. *Whether the respondent-accused committed sexual*

assault upon the prosecutrix ?

The age of the prosecutrix ?

In order to prove the age of the prosecutrix, the prosecution examined Rajveer, Head Teacher, Govt. Primary School, Khatiwas as PW6. He tendered into evidence, the date of birth certificate of the prosecutrix, to which Ex.P18 is assigned. He also tendered into evidence, the photocopy of admission and withdrawal register, to which Ex.P19 is assigned. A perusal of Ex.P18 makes it crystal clear, that the date of birth of the prosecutrix, is recorded therein as 15.6.2007. PW6 was subjected to a grilling cross-examination by the counsel for the defence, but no relevant elicitation could be made from him, but suggestive, that the contents of the above exhibit are ridden with any taint of any falsity. Moreover, since the respondent also could not adduce any evidence to rebut the truth echoing in the birth certificate Ex. P18, birth certificate whereof became issued by the competent authority concerned, thus, conclusivity is to be assigned to the reflection therein, that the prosecutrix was born on 15.6.2007. Resultantly, when on the date of occurrence, she was 12 years old, thus, she was incompetent in any law to mete any lawful consent to the accused to subject her to sexual intercourse, if any.

Whether the respondent-accused committed sexual assault upon the prosecutrix ?

The prosecution examined Dr. Poonam, LMO, PHC, Bamanwas Tehsil Nangal Chaudhary, who stepped into the witness box as PW3. She placed on record her duly sworn affidavit as Ex.P8. As per her affidavit, she conducted medico-legal examination of the prosecutrix

and found that no injury, either on external, or internal, existed on the examined portion of the person of the prosecutrix. Moreover, the doctor did not give any definite opinion about the prosecutrix being subjected to sexual intercourse, rather, she awaited an opinion from the FSL concerned. The relevant extract of the opinion as made by the above PW reads as under:-

“On dated 14/10/2019, 1 medico legally examined Ekta D/o Giriraj. Age-12 years 4 months, weight-35.6kg. height-4'10' Female, R/o-Vill.-Khatiwas, Teh. & Distt.-Mahendergarh, brought to GH Narnaul by A.S.I. Suresh & Accompanied by her mother Durgesh on 14-10-2019 at 4:05Pm. As per Alleged history given by Ekta. She was Playing at ground with her friends on 09-10-2019 in 7 period. Her teacher named Sonu called her and took her in classroom & gave sweets to eat. She ate the sweets, after that he forcibly removed her salwar & make sexual relation with her and gave warning if she tells to anybody he will kill her.

She is conscious, oriented to time, place and person.

No fresh complains. Clothes are changed and incident clothes are not available. Gait-Normal On examination- No injury seen.

Penetration was attempted in Vagina, she don't know about ejaculation.

LMP-Not started yet till 14-10-2019. Since the assault there was bleeding.

UPT-Negative.

Investigation advised-HIV, VDRL, HBsAg.

In my Opinion possibility of sexual assault cannot be ruled out on clinical examination. Sample taken and

handed over to police.”

Although in her opinion, she stated that the possibility of sexual assault taking place cannot be ruled out, resultantly, the report of the FSL, assumes importance, as therefrom alone, any conclusive inference could be drawn as to whether the prosecutrix was subjected to any sexual intercourse. However, the report of the FSL, which is enclosed in Ex. P40, does not make any candid speakings, that on examination of the materials/exhibits which were sent for examination, any relevant inculpatory opinion could be formed, suggestive that the accused had subjected the prosecutrix to sexual intercourse. Therefore, since the best scientific evidence is comprised in Ex. P40, therefore, the indefinite or inconclusive opinion of the doctor, but making speakings, that the possibility of the prosecutrix being subjected to sexual intercourse cannot be ruled out, thus, does not assume any importance, as it is merely a surmised opinion.

Analysis of the testimony of the prosecutrix

The prosecutrix was examined as PW1. However, when she stepped into the witness box, she completely resiled from her earlier made statement. Moreover, she completely exculpated the accused-respondent. Her examination-in-chief reads as under:-

“State that on dated 9.10.2019, I was studying in Government Senior Secondary School, Khatiwas. On those days, I was ill and was not good in my studies. My parents rebuked me on that account. On dated 9.10.2019, I did not complete my home work. My class teacher also

rebuked me and asked me to call my parents. In 7th period when I was playing in playground of the school, at that time some teachers were taking their lunch. Due to mistake, my leg stuck with their food tiffin and I fell down. The teacher rebuked me and asked me that they will call my parents. I got perplexed and did not disclose these facts to my parents and also did not attend the school for four days. After that my mother asked me why I was not attending the school. I narrated the whole incident to my mother. On dated 14.10.2019, I alongwith my mother and some villagers went to school to make complaint about the behaviour of teachers. When my mother and the co-villagers who accompanied us to the school made complaint about the teachers, at that time, some teachers misbehaved with my mother as well as other villagers and did not pay any heed towards my mother's complaint. The villagers who were present asked my mother, you need to move complaint before the police. Thereafter, the villagers had taken us to the police station where they had some conversation with the police officials while we were sitting aside. After some time, the police had obtained my signatures on some blank papers. I know the accused present in the Court. He is our school teacher. He was not present when my foot struck with the meals of the teacher. The accused never rebuked me and did not commit any penetrative sexual assault upon me.”

Since the prosecutrix did not support the case of the prosecution, thus, the learned Public Prosecutor's request, as made to the learned trial judge to declare her hostile, with liberty to cross-examine her, was granted to him.

In her cross-examination, yet she did not make any

speaking, so as to belie the above made speaking by her, in her examination-in-chief. Importantly, she stated that her signatures on her previous statement, as made by her before the police, were in fact taken on blank papers. The above speaking are not efficaciously rebutted by the prosecutrix, therefore, when she has also stated that her statement under Section 164 Cr.P.C. was made, on hers being tutored by the police official, and also by the villagers, resultantly, she obviously has not rendered either a truthful or an inspiring version in respect of the genesis of the prosecution case. In sequel, the verdict of acquittal, as made upon the accused, is but anvilled upon apt appraisal of the evidence, as became adduced before him.

***Analysis of the testimony of mother of the
prosecutrix.***

The mother of the prosecutrix stepped into witness box as PW2. In her examination-in-chief, she has made the hereinafter extracted deposition:-

“Stated that in the year 2018-19, I was working as Sweeper in Government Senior Secondary School, Khatiwas on contract basis. Some staff of the school were not happy with my job and they conspired together and as they were members of the committee who appoint the persons on contract basis in the school, removed me from the job. My victim daughter was also studying in the same school and when she did not attend her school from 10.10.2019 then on 14.10.2019, on my enquiry she disclosed that her class teachers rebuked her on account of not completing the home work and when she was playing in the school, her leg stuck

with the food tiffin of some teachers and she fell down. They rebuked her on this account also and said that she had to call her parents. Due to which, she became perplexed and did not attend the school. Thereafter, I alongwith my victim daughter and some villagers went to school to make complaint about the behaviour of teachers. When I and the co-villagers who accompanied us to the school made complaint about the teachers, at that time, some teachers misbehaved with me as well as other villagers and did not pay any heed towards my complaint. The villagers who were present asked me that I need to move complaint before the police. Thereafter the villagers had taken me and my victim daughter to the police station where they had some conversation with the police officials while we were sitting aside. After sometime, the police had obtained the signatures of my victim daughter on some blank papers. I know the accused present in the Court who was teacher in that school. The accused never rebuked my victim daughter and did not commit any penetrative sexual assault upon my victim daughter.”

A perusal of the above statement depicts, that the accused had never abused the prosecutrix, nor had he committed any sexual assault on her. Though, on the asking of the learned Public Prosecutor, she was declared hostile and was also permitted to be cross-examined by the learned Public Prosecutor concerned, however, in her cross-examination, she did not make any voicings, which could but suggest that a statement, as embodied in her examination-in-chief, is either prevaricated or is false. Therefore, when she alike her daughter, the prosecutrix, has completely reneged from her previous statement

recorded in writing, the charge drawn against the accused, cannot be said to be established.

***Effect of the statutory presumptions as engrafted
in Sections 29 and 30 of the POSCO Act.***

Be that as it may, the learned counsel appearing for the appellant has vigorously argued before this Court that since the prosecutrix in her statement made under Section 164 Cr.P.C. has made an inculcation against the accused, as such, the statutory presumption engrafted in Sections 29 and 30 of the POSCO Act, provisions whereof are extracted hereinafter, did become aroused against the respondent-accused:-

“Section- 29: Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Section-30 : Presumption of culpable mental state.

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such

mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability”

Therefore, he argues that there is a presumption against the accused qua his committing the charged offence and as such the onus to rebut the said presumption shifted upon the accused, whereas he has failed to adduce cogent rebuttal evidence to dislodge the said statutory presumption. Therefore, he argued that the verdict of acquittal as made by the learned trial judge, requires interference. However, for the reasons to be assigned hereinafter, the above argument is planked upon the statement made by the prosecutrix under Section 164 Cr.P.C. before the learned Magistrate concerned. However, only when the said statement is put to the test of cross-examination, thereupon alone, completest evidentiary sanctity can be assigned thereto. However, when the prosecutrix stepped into witness box, she in her testification comprised in her cross-examination denied that she had voluntarily made the said statement before the Magistrate concerned, rather, made a deposition that she was pressurized to make the said statement. Since, thereafter the learned Public Prosecutor did not ensure that the said statement is false nor, with the leave of the court, he caused summoning of the learned Magistrate concerned before whom the statement was recorded, so as to impeach the credibility of the prosecutrix so as to

ensure that the statutory certification, if any, as made on the said statement was made only after the Magistrate concerned ascertaining the imperative factum from the prosecutrix about hers making the said statement voluntarily. Therefore, in the absence of the above evidence existing on record and in the absence of the above recourse being made by the learned Public Prosecutor concerned, the statement of the prosecutrix that her statement recorded under Section 164 Cr.P.C. by the learned Magistrate concerned was made under pressure being exerted upon her does assume an air of truth. Therefore, mere making of the statement under Section 164 Cr.P.C., especially when its effect has been completely whittled down, cannot well rest any argument that the statutory presumption (supra) as engrafted in the above statutory provision is attractable against the accused nor it can be said that the onus for rebutting the said presumption shifted on to the accused.

Even otherwise, only when the requisite foundational steps for ensuring that the statutory presumption is amenable to become aroused is firmly established by the prosecution, thereupon alone the onus to adduce evidence to rebut the said presumption shifts onto the accused. However, since the bedrock of the foundational prosecution case is rested upon a previously made statement in writing becomes completely shattered, thus, there was no necessity of the drawing the said statutory presumption against the accused nor also any occasion arose for evidence to rebut the statutory presumption shifting on to the accused. Therefore, this Court is of the firm view that the verdict of acquittal by

the trial Judge does not require interference as it is based upon a mature and balance appreciation of the evidence as became adduced before it. In sequel, the present appeal against the order of acquittal, being bereft of merits, is hereby dismissed and the order passed by the learned Additional Sessions Judge, Fast Track Special Court, under POSCO Act, Narnaul is hereby upheld.

The case property, if any, be dealt with in accordance with law. The record be forthwith sent down.

(SURESHWAR THAKUR)
JUDGE
April 25, 2023
ajay-1/dalbir

(KULDEEP TIWARI)
JUDGE

Whether speaking/reasoned. : Yes/No
Whether Reportable. : Yes/No