

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-D-2-2020 (O&M)
Reserved on: 12.07.2023
Date of decision : 19.07.2023

KEWAL KRISHAN -APPELLANT

VERSUS

STATE OF HARYANA -RESPONDENT

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

Present : Mr. A.S. Lamba, Advocate
for the appellant.

Mr. Ankur Mittal, Addl. A.G., Haryana with
Mr. Pardeep Prakash Chahar, Sr. DAG, Haryana.

SURESHWAR THAKUR, J.

1. The instant appeal is directed against the impugned verdict of conviction drawn on 30.10.2019, upon, Sessions Case No.155 of 2018, by the learned Additional Session Judge-cum-Judge, Special Court For Heinous Crime Against Women, Hisar, whereby, the learned trial Judge, held the appellant/accused, thus guilty for commission of offences punishable under Sections 376(2)(n) and 376(3)of the IPC, and, under Section 6 of the POCSO Act, 2012.
2. Through a separate sentencing order drawn on 04.11.2019, the learned trial Judge proceeded to impose upon the convict/appellant, sentences of imprisonment, and, of fine, but in the hereinafter extracted manner:-

Offence under Sections	Imprisonment awarded	Fine imposed	In default of payment of fine
376(2)(n) IPC	Rigorous imprisonment for Ten years.	Rs.25,000/-	Three months
376(3) IPC	Rigorous imprisonment for	Rs.50,000/-	Six months

	Twenty years.		
6 POCSO Act	Rigorous imprisonment for Ten years.	Rs.25,000/-	Three months

3. All the above substantive sentences of imprisonment, as became imposed upon the convict/appellant, were ordered to run concurrently. However, from the fine amount, as became imposed upon the convict/appellant and became comprised in a sum of Rs.1,00,000/-, a sum of Rs.50,000/- was directed to, on its realization, thus become disbursed as compensation to the victim, while the remaining sum of Rs.50,000/- was directed to become disbursed to the State Exchequer.

4. Moreover, the period spent in custody by the convict/appellant, during investigation or trial of the case, thus was ordered to be set off from the above imposed term(s) of the substantive sentence(s) of imprisonment, upon, the convict/appellant. In addition, in terms of Rule 7 of Protection of Children from Sexual Offences Rules, 2012, a compensation of Rs.5,00,000/- was directed to be disbursed by the State Government to the victim.

5. The convict/appellant, becomes aggrieved from the above made verdict of conviction, and, also becomes aggrieved from the above made substantive sentences of imprisonment, and of fine, thus is led to make a challenge thereto, through his instituting the instant appeal before this Court.

Factual background

6. The genesis of the prosecution case becomes embodied in the appeal FIR, to which Ex.P9 has been assigned. The narrations carried in Ex.P9 are, that on 29.10.2018, complainant Saroj went to police station and got recorded her statement to the effect that on 28.10.2018, prosecutrix, i.e. her niece, telephonically called her and told her that she would not go to tuition

and when she asked her the reason for not going to tuition, she told that Kewal Dada had been doing wrong act with her and she felt pain. When she asked the prosecutrix as to what was the wrong done, she told her that Kewal Dada had removed her pant in the shop and put his penis into her. The complainant came to Hisar on 29.10.2018 and made further inquiry from the prosecutrix, whereupon, prosecutrix told her that on Sunday, when she went for tuition, Kewal Dada committed wrong act upon her, therefore, she did not go to tuition yesterday. Prosecutrix further disclosed to her that on last Sunday, i.e. on 21.10.2018, Dada committed wrong act with her. Thereafter, the complainant disclosed about all this to her brother Sharwan Kumar because her sister-in-law (Bhabhi) is mentally retarded and she has three children, i.e. prosecutrix is the eldest child, Priyanka is youngest to her and youngest son is Aman. Prosecutrix and her sister are also mentally retarded, while the son is quite well. Upon this statement of the complainant, the instant appeal FIR was registered.

Investigation Proceedings

7. After registration of case, statement of the prosecutrix was recorded in presence of legal aid counsel. Thereafter, statement of prosecutrix was also got recorded under Section 164 Cr.P.C. Investigation was carried out. During investigation, medical examination of the prosecutrix was got conducted. Place of occurrence was inspected and one bed sheet was recovered vide separate recovery memo. Accused was arrested and interrogated. During investigation, accused suffered his disclosure statement. In pursuance of his disclosure statement, accused got demarcated the place of occurrence. On 30.10.2018, accused was medico-legally examined at

Government Hospital, Hisar. Statements of witnesses under section 161 Cr.P.C were recorded. On completion of investigation, final report under Section 173 of the Cr.P.C. was prepared against the accused Kewal Krishan and was presented before the learned Magistrate concerned, for trial.

Committal Proceedings

8. As the offences punishable under Sections 376(3), 376(2)(l)(n) of the IPC and Sections 6 & 10 of the POCSO Act are exclusively triable by the Court of Session, therefore the case was committed to the Court of learned Session Judge, Hisar, vide order dated 30.10.2018, as made by the Court of Ms.Tarannum Khan, learned Judicial Magistrate Ist Class, Hisar.

Trial Proceedings

9. On finding a prima facie case, the learned trial Judge concerned, chargesheeted the accused/appellant, for offences punishable under Section 376(2)(n), 376(2)(l), 376(3) of the IPC, and, under Section 6 of the POCSO Act.

10. The prosecution in support of its case examined as many as 20 witnesses and placed reliance on documents exhibited as Ex. P1 to Ex. P33. Subsequently, the learned public prosecutor closed the prosecution evidence, and thereafter the learned trial Judge drew proceedings under Section 313 Cr.P.C, wherein, the accused/appellant pleaded innocence and claimed false implication. The accused/appellant chose to adduce defence evidence and availed the said opportunity, through his examining Lady/Assistant Sub Inspector Sudesh as DW1, and, thereafter closed the defence evidence.

Submissions of the learned counsel for the convict/appellant

11. The learned counsel appearing for the convict/appellant has vigorously argued that the impugned verdict of conviction, and, the consequent thereto order of sentence, are but legally infirm. He raised the above argument on the ground, that since there are material contradictions inter se the statement (Ex.P14), as, made by the prosecutrix before police, and, the statement (Ex.P15), as, made by the prosecutrix before the learned Magistrate concerned, inasmuch as, in the earlier statement (Ex.P14), the prosecutrix merely attributing to the convict/appellant, an incriminatory role of his fondling her breast and also kissing her, whereas, in the subsequent thereto statement (Ex.P15), hers improving the previous statement (supra), thus through hers disclosing therein, that the convict/appellant had inserted his penis into her vagina and had also kissed her, thereby the above improvement, as made by the prosecutrix, was but gross and blatant. Resultantly, he argues that neither a creditworthy nor a confidence inspiring testimony thus became rendered by the prosecutrix.

Submissions of the learned State counsel

12. The learned State counsel has argued that the impugned verdict of conviction, and, the consequent thereto order of sentence, as became rendered upon the convict, by the learned convicting court concerned, is based upon a sound and mature appreciation of the evidence on record, and, that it does not require any interference.

Reasons for rejecting the submissions of the learned counsel for the convict/appellant, and, for accepting the submissions of the learned State counsel

Age of prosecutrix

13. Ex.P4 is the birth certificate of the prosecutrix. The said birth certificate has emanated from the office of the Registrar of Births and Deaths, Hisar, wherein, the prosecutrix is revealed to be a minor at the stage of commission of the charged offences. Therefore, but obviously, she was legally incapacitated to mete any lawful consent to the convict/appellant, in his purportedly subjecting her to the charged offences.

14. Even otherwise, since Ex.P4 has emanated from the custody of the Registrar of Births and Deaths, who otherwise, under law, makes entries in respect of birth and deaths. Therefore, with the emanation of Ex.P4 from the custody of a lawful authority, besides when the legality of the entries, as made therein, rather remains un rebutted, through adduction of cogent evidence, thereby the recitals as made therein, thus declaring the prosecutrix to be a minor, at the stage of commission of the charged offences, but obviously constrain this Court to assign an aura of conclusivity thereto.

Proof of MLR (Ex.P5) of the prosecutrix by PW5 Dr. Neeru Gupta

15. PW5 Dr. Neeru Gupta, on her stepping into the witness box, thus tendered into evidence her affidavit Ex.PW5/A, whereby she proved the MLR (Ex.P5), as became drawn by her qua the prosecutrix.

16. A reading of the MLR (supra) reveals, that thereby the prosecutrix had unfolded the factum of her being subjected to a sexual assault on 21.10.2018. Moreover, the MLR (supra) details the factum of an external injury running from head to toe, becoming found on the body of the prosecutrix, besides it is also unfolded therein, that the hymen of the prosecutrix was torn, but had healed.

Analysis of the testification of the prosecutrix, who stepped into the witness box as PW8

17. The prosecutrix stepped into the witness box as PW8 and the learned trial Judge concerned, for testing both her competence to testify as a witness, as also for gauging her intelligibility to do so, thus put certain queries to her, and, since she meted intelligible answers thereto, thereby he concluded that she was competent to testify as a prosecution witness. Resultantly, he permitted the prosecutrix to make her testification in her examination-in-chief. In her examination-in-chief, the prosecutrix completely corroborated her statement (Ex.P15), as became made by her before the learned Magistrate concerned, with attributions therein that the convict/appellant had inserted his penis into her vagina. She also proved the factum of hers being subjected to medical examination by PW5 Dr. Neeru Gupta, who as stated above, had proven the MLR (Ex.P5), as became drawn by her in respect of the prosecutrix.

18. The above made testification by the prosecutrix, in her examination-in-chief, though was attempted to be carrying no evidentiary worth, thus through the learned defence counsel subjecting her to cross-examination. However strangely, during the course of the prosecutrix being subjected to cross-examination, rather than the learned defence counsel choosing to bely the prosecution version, that the prosecutrix was taking tuitions from the convict/appellant, thus chose to mete suggestions to her that the convict/appellant also tutored the prosecutrix, and, to the said suggestions, the prosecutrix obviously meted an affirmative answer. Resultantly, the effect of the above, is but naturally, the defence conceding to the prosecutrix taking

tutions from the convict/appellant, thus at his shop. Moreover, thereby the prosecution but obviously conceded to the commission of the incriminatory offence(s) by the convict/appellant.

19. Though, the learned defence counsel also meted suggestions, to the prosecutrix devolving upon the factum of hers not raising any hue and cry, but since as above stated, the said suggestions are an attempt to leverage an untenable defence rather appertaining to the prosecutrix meteing a lawful consent to the convict/appellant to subject her to sexual overtures. However, even if affirmative answers thereto(s) became meted by the prosecutrix. Nonetheless, when as stated (supra), the prosecutrix was evidently a minor at the relevant stage, thereby when she was concomitantly incapacitated to mete any lawful consent to the convict/appellant, thus to subject her to sexual overtures, if any. Therefore, both the meteing of the said suggestion to the prosecutrix by the learned defence counsel and also the makings of affirmative answers thereto by the prosecutrix, but revealing that she omitted to raise hue and cry, when the convict/appellant made sexual advances upon her, but naturally do not carry any exculpatory effect. Contrarily, the meteing of the said suggestions, as stated (supra), rather tantamount to the defence thus conceding to the convict/appellant perpetrating the penal offences upon the prosecutrix.

20. Furthermore, suggestions also became meted to the prosecutrix by the learned defence counsel, thus relating to a disclosure of the said incident becoming telephonically made by her, on the same day to her Bua, hence from her father's mobile, and, also her Bua on the very same day, thus responding to the said telephonic call, which resulted in both visiting the

police station on the very same day. The meteing of the said suggestions to the prosecutrix, and, the latter also answering them affirmatively, thus but also are an admission of the convict/appellant, that the penal occurrence did take place, besides also corroborate the testification of the prosecutrix, about an intimation being telephonically made by the prosecutrix to her Bua, on the very day, when the penal occurrence took place, and, also that both of them on the very day, thus visited the police station rather for making reportings of the incident. Therefore, but obviously the genesis of the prosecution case, as encapsulated in the appeal FIR (Ex.P9), concomitantly thereby becomes fully established.

21. Even the Bua of the prosecutrix, who stepped into the witness box as PW9, has fully corroborated the contents of the FIR, thereby has also meted corroboration to the confidence inspiring testification, as made by the prosecutrix, before the learned trial Judge concerned.

Corroboration to the testification of the prosecutrix, through the statement of the learned Illaqa Magistrate, who stepped into the witness box as PW14

22. During the course of the investigations being made into the FIR, the prosecutrix had made a statement under Section 164 Cr.P.C. before the learned Magistrate concerned. To the said statement, Ex.P15 is assigned. Ex.P15 became proven by the learned Magistrate concerned, who stepped into the witness box as PW14. During the course of her examination-in-chief, she has proven the prosecutrix making her signatures as Point A therein, and, hers making her signatures at Point B therein. She has also proven hers, making a certificate Ex.P15/A, on Ex.P15, with but echoings therein qua the prosecutrix making a volitional statement before her, and, that hence a certification being

made by her at Point B of Ex.P15. The said deposition of PW14, does also coax this Court, to conclude that thereby absolute corroboration is rendered to the confidence inspiring and truthful version rendered by the prosecutrix, in respect of the penal occurrence, thereby the charge drawn against the convict/appellant, can but be concluded to be unflinchingly proven.

Medical evidence of PW5

23. As stated above, Dr. Neeru Gupta, who stepped into the witness box as PW5, during her examination-in-chief, has rendered efficacious proof in respect of hers authoring the medico-legal report, as appertains to the prosecutrix, and, to which Ex.P5 is assigned. A reading of Ex.P5 reveals, that the prosecutrix had narrated to her the factum of hers being subjected to a sexual assault and whereafter she made a medical examination upon her, thus resulting in hers reciting in Ex.P5, that there were certain external injuries running from head to toe on the body of the prosecutrix, and, besides resulting in hers therein making echoings that the hymen of the prosecutrix was torn, but had healed. The effect of the evident recitals (supra), becoming carried in Ex.P5, is but naturally, that the prosecutrix became subjected to penetrative sexual assault at the instance of the convict/appellant.

24. Though the learned counsel for the convict/appellant has vigorously argued before this Court, that there are material contradictions inter se Ex.P14, which is but an unsigned statement of the prosecutrix, as became recorded under Section 161 Cr.P.C. by the police officer concerned, thus with the statement (Ex.P15), as made by the prosecutrix under Section 164 Cr.P.C. before the learned Magistrate concerned, inasmuch as, in Ex.P14 the prosecutrix not attributing any incriminating role, to the convict/appellant, of

his subjecting her to penetrative assault, whereas, in Ex.P15, hers making the above attribution against the convict/appellant. Therefore, he argues that the above inter se contradictions are but blatant, rife and open and thereby, the version testified by the prosecutrix before the learned trial Judge concerned is not confidence inspiring, nor any evidentiary tenacity is to be assigned thereto.

25. However, the above made argument pales into insignificance, in the light of: (a) Ex.P15 becoming testified in court by the prosecutrix; (b) the learned Magistrate concerned, wherebeforewhom the said statement (Ex.P15) was made, also proving all the recitals, as contained therein, and, importantly hers stating, that the said statement was made voluntarily, and, that in respect of voluntariness of the making of the said statement, hers making the statutory certification at Point B therein; (c) a wholesome analysis of testification of the prosecutrix but revealing that the defence, for reason (supra), conceding to the incriminatory participation of the convict/appellant in the relevant penal occurrence; (d) lastly, the statement (Ex.P14) under Section 161 Cr.P.C., is an unsigned statement of the prosecutrix, as made before the investigating officer concerned, whereas, the statement Ex.P15, as became made by her before the learned Magistrate concerned, is proven to be signed by her, as also by the learned Magistrate concerned, thereby a higher aura of solemnity is to be assigned to the said signed statement of the prosecutrix, than to her unsigned statement Ex.P14. Consequently, any purported contradiction inter se Ex.P14 and Ex.P15 becomes completely underwhelmed, nor any leverage therefroms can be derived by the convict/appellant.

26. For all the reasons (supra), this Court does not find any merit in the instant appeal and is constrained to dismiss it. Consequently, the instant

appeal is dismissed and the impugned verdict of conviction and the consequent therewith sentences (supra), as become imposed upon the convict/appellant, by the learned trial Judge concerned, are affirmed and maintained.

27. All pending application(s) stand disposed of accordingly.

28. If the convict/appellant is on bail, thereupon he is ordered to be forthwith taken into custody

29. Case property, if any, be dealt with in accordance with law after expiry of the period of limitation for filing an appeal. The record be forthwith sent down.

(SURESHWAR THAKUR)
JUDGE

(KULDEEP TIWARI)
JUDGE

19.07.2023
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Whether speaking/reasoned ? Yes/No
Whether reportable ? Yes/No