

In the High Court of Punjab and Haryana at Chandigarh

CRA-D-947-2022 (O&M)

Reserved on: 30.1.2024

Date of Decision: 19.2.2024

Faizal Khan

.....Appellant

Versus

State of Punjab

.....Respondent

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE LALIT BATRA**

Argued by: Mr. Pawan K. Sharma, Advocate
for the appellant.

Mr. Jaswinder Singh Arora, DAG, Punjab.

SURESHWAR THAKUR, J.

1. The instant appeal is directed against the impugned verdict, as made on 22.7.2022, upon Sessions Case No. 73/11.9.2020, by the learned Judge, Special Court, SAS Nagar (Mohali), wherethrough in respect of charges drawn against the accused qua offences punishable under Sections 323, 376(3) of the IPC, and, under Section 6 of the Protection of Children From Sexual Offences Act, 2012 (in short 'the POCSO Act'), thus the learned trial Judge concerned, proceeded to record a finding of conviction against accused-appellant. Moreover, through a separate sentencing order of even date, the learned trial Judge concerned, sentenced the convict to undergo rigorous imprisonment for a period of 20 years for the commission of an offence punishable under Section 6 of the POCSO Act, besides also imposed, upon the convict sentence of fine, as comprised in a sum of Rs. 20,000/-, and, in default of payment of fine amount, he sentenced the convict

to undergo rigorous imprisonment for a period of one month. Moreover, the learned convicting Court also sentenced the convict to undergo rigorous imprisonment for a period of one year, for the commission of an offence punishable under Section 323 of the IPC.

2. Both the above imposed sentences of imprisonment, were ordered to run concurrently but the period of detention undergone by the convict, during the investigations, and, trial of the case, was, in terms of Section 428 of the Cr.P.C., rather ordered to be set off from the above imposed sentence(s) of imprisonment.

3. It was also ordered, that a sum of Rs. 4.00 lacs, be paid as compensation to the victim, as sufficient amount payable under Victim Compensation Fund or other scheme or fund established by it, thus for the purposes of compensating and rehabilitation of victim under Section 357-A of the Cr.P.C., or any other laws for the time being in force, or where such fund or scheme does not exist, rather by the State Government. The said amount was ordered to be deposited in the Fixed Deposit, and, the same was ordered to be paid to the victim after hers attaining the age of majority.

4. The accused-convict becomes aggrieved from the above drawn verdict of conviction, besides also, becomes aggrieved from the consequent thereto sentence(s) of imprisonment, and, of fine as became imposed, upon him, by the learned convicting Court concerned, and, hence has chosen to institute thereagainst the instant criminal appeal, before this Court.

Factual Background

5. The genesis of the prosecution case becomes embodied in the appeal FIR, to which Ex. PW-6/2 is assigned. The narrations carried in Ex PW-6/2 are, that on 22.07.2020 SI Baljit Kaur along with police official was

present near light point, New bus Stand, Mohali where Naim Khan has got

recorded his statement to the effect, that he is a plumber by profession and they are two brothers and four sisters. The complainant is the eldest one who is married and all other siblings are unmarried. On 20.7.2020 he had gone to his work, one of his sister informed him telephonically that their youngest sister (name withheld to protect her identity and hereinafter referred to as prosecutrix), aged about 15 years, studying in 6th class in Government Primary School, Phase 6, Mohali, received injuries. When he came back, he found that his sister/prosecutrix was not in her senses, and, blood was oozing from her forehead. He took his sister to Civil Hospital, Phase 6, Mohali, and, she was discharged on the same day. On the said day, his sister/prosecutrix was under the influence of medicine and was having pain in her head therefore, she did not disclose anything. However, later on, his sister/prosecutrix told him that on 12.06.2020 at about 8:00 PM accused Faizal Khan, had made forcible sexual relations with her. Thereafter, on 20.7.2020 when she was strolling in the Mango park, the accused came there, made forcible sexual intercourse with her, gave her beatings and also threatened to eliminate her. On the basis of the statement of complainant, the present case was registered against the accused.

Investigation proceedings

6. During investigation, the site plan was prepared. Medical examination of the prosecutrix was also conducted from Civil Hospital Phase 6, Mohali. On the identification of the prosecutrix, the accused was arrested and his arrest memo, identification memo and personal search memos were prepared. On 23.07.2020 medical examination of accused was got conducted from Civil Hospital, Phase 6, Mohali. Statement of prosecutrix under Section 164 Cr.P.C was also got conducted before the

Cr.P.C were recorded. After conclusion of investigations, the investigating officer concerned, proceeded to institute a report under Section 173 of the Cr.P.C., before the learned Court concerned.

Trial Proceedings

7. The learned trial Judge concerned, after receiving the case for trial, made an objective analysis of the incriminatory material, adduced before her. Resultantly, she proceeded to draw charges against the accused, for offences punishable under Sections 323, 376(3) of the IPC, and, under Section 6 of the POCSO Act. The afore drawn charges were put to the accused, to which he pleaded not guilty, and, claimed trial.

8. In proof of its case, the prosecution examined 10 witnesses, and, thereafter the learned Public Prosecutor concerned, closed the prosecution evidence. After the closure of prosecution evidence, the learned trial Judge concerned, drew proceedings, under Section 313 of the Cr.P.C., but thereins, the accused pleaded innocence, and, claimed false implication. He, however, chose to adduce defence evidence, but did not lead any witness into the witness box.

9. As above stated, the learned trial Judge concerned, proceeded to convict the accused for the charges (supra), as became drawn against him, and, also as above stated, proceeded to, in the hereinabove manner, impose the sentence(s) of imprisonment, as well as of fine, upon the convict.

Submissions of the learned counsel for the appellant

10. The learned counsel for the aggrieved convict-appellant has argued before this Court, that both the impugned verdict of conviction, and, consequent thereto order of sentence, thus require an interference. He supports the above submission on the ground, that it is based on a gross misappreciation, and, non-appreciation of evidence germane to the charge.

Submissions of the learned State counsel

11. On the other hand, the learned State counsel has argued before this Court, that the verdict of conviction, and, consequent thereto sentence(s) (supra), as become imposed upon the convict, are well merited, and, do not require any interference, being made by this Court in the exercise of its appellate jurisdiction. Therefore, he has argued that the instant appeal, as preferred by the convict, be dismissed.

Analysis of the submissions (supra)

12. The victim, as unfolded by Ex. PW-3/A, proven by PW-3, exhibit whereof encloses her date of birth, was born on 23.5.2005. Since PW-3 tendered the document (supra) during the course of his examination-in-chief, and, as such during the course thereof, the exhibit (supra) became made thereons. Therefore, the above revelation made therein appertaining to the date of birth of the prosecutrix, does naturally acquire probative sanctity, as no cross-examination became conducted, upon the said witness, by the learned defence counsel, so as to bely the disclosures (supra), as made therein.

13. Even otherwise since no other further evidence also became adduced by the defence, so as to bely the correctness of the disclosures (supra), as made in the exhibit (supra) thereby, grave evidentiary sanctity is to be assigned to exhibit (supra). Resultantly, since at the time of commission of the crime event, thus the prosecutrix was a minor, therefore, she became completely incapacitated to make any lawful consent to the accused to subject her to coitus, or any exculpatory plea erected upon any consent being purveyed by the victim to the accused but becomes completely inconsequential.

14. Moreover, when the statement, as made by the victim/prosecutrix, before the learned trial Judge concerned, is confidence inspiring, and/or is not tainted with any vices of hers grossly improving or embellishing, upon her previously made statement in writing, thereby utmost credence is to be assigned to the statement of the prosecutrix.

15. The victim stepped into the witness box as PW-2. In her examination-in-chief, she rendered a version, which is in alignment with her previously made statement to the police officer concerned. Moreover, during the course of her cross-examination, a sealed parcel enclosing therein, a statement made by her under Section 164 of the Cr.P.C., before the jurisdictional Magistrate concerned, became retrieved therefrom, and, was shown to the victim, who, however admitted that her signatures exist at Point-A of Ex.P2/2. Moreover, she proceeded to also identify the accused in Court, and, implicated him to be the person, who had made a penetrative sexual assault, upon her. She also testified, that the accused had caused injuries to her, and, had also threatened her.

16. However, on the Court query, whether she is aware of the accused, she made a disaffirmative response thereto, besides she also testified that on the relevant date, the accused did not commit the charged offence, rather she testified, that the accused only threatened her, and, inflicted injuries on her face, and, forehead. On the basis of the above statement (supra), the learned counsel for the appellant has argued, that thereby the identification of the accused, by the victim, as occurs in identification memo Ex. PW-2/1 becomes belied. Furthermore, he also contends, that since the statement (supra) makes exculpatory echoings thereby the learned counsel for the petitioner argues, that the challenged

verdict before this Court, is required to be quashed, and, set aside.

17. However, for the reasons to be assigned hereinafter, this Court does not accept the above submissions, and, is rather constrained to reject them.

18. The prime reason for making the above inference, is that, subsequent to the making of the said statement, the prosecutrix has also made echoings, that she had narrated the entire incident to her elder sister Jyoti, and, that she also made a narrative vis-a-vis the crime event to her brother Naim Khan, who subsequently made a complaint to the police. If so, on a reading of the above portion, it is but clear that the purported exculpatory echoings (supra), as made by the victim rather do become completely blunted, as therebys she has lend proof to the version, as occurs in the FIR.

19. Be that as it may, the further reason for not assigning any credence to the said purported exculpatory echoings, as spoken by the prosecutrix becomes marshalled from the factum, that upon the victim becoming cross-examined by the learned Public Prosecutor after his being granted leave by the learned trial Judge concerned, to make re-examination, upon her, rather the prosecutrix in affirmative answering to the question, that the accused was known to her prior to 18.7.2020, given his residing in the upper storey of the same building, wherein, the residence of the victim also occurs. Moreover, with her also making an affirmative response to the further question, as became put to her by the learned Public Prosecutor, that on the asking of the accused, she had visited Amb Wala Park on 20.7.2020. Therefore, and, when ultimately she conceded to the query, as became put to her by the learned Public Prosecutor, that the accused had committed rape, upon her on 18.7.2020, and, on 20.7.2020. Resultantly therebys, the effect, if

do become completely underwhelmed. Significantly also when she conceded to a query put to her by the learned Public Prosecutor, that since she appeared for the first time in the Court, therefore, she became perplexed, and, as such could not make apt answers to the relevant Court queries.

20. An added vigour to the above inferences becomes also mobilized from the trite factum, that during the course of her examination-in-chief, the victim became confronted with her statement made under Section 164 of the Cr.P.C., before the learned Magistrate concerned, and, therein she rather admitted that her valid signatures exist at Point A of Ex. P2/2. Thereafter, she also identified the accused present in Court. Consequently, when the learned defence counsel did not make any cross-examination, upon the victim, thus devolving upon the factum, that her statement under Section 164 Cr.P.C., to which Ex. PW-2/2 became assigned, and, whereons at Point-A, her admitted signatures exist, rather was made under duress or compulsion, nor also when she became confronted qua hers identifying the accused in Ex. PW-2/1, as became prepared by the investigating officer concerned, besides when obviously no cross-examination became made, upon her so as to bely the authenticity of the drawings of Ex. PW-2/1. Consequently, thereby too, rather predominantly with hers making affirmative responses (supra) to the suggestions (supra) meted to her by the learned Public Prosecutor, upon his making cross-examination upon her but with leave of the Court. Therefore, it appears, that the victim/prosecutrix, has rendered a confidence inspiring, and, truthful account, vis-a-vis the crime event.

21. Be that as it may, PW-6 the investigating officer concerned, who during the course of her examination-in-chief, proved the identification

the victim, who had assigned incrimination to the accused, besides was at the stage of drawing the identification memo, thus standing near wastage dump.

22. The above echoings made by the investigating officer concerned, during her examination-in-chief remained unbelied through any efficacious cross-examination being made, upon her by the learned defence counsel. The simplicitor suggestion, as became meted to the investigating officer concerned, by the learned defence counsel in his attempting to dis-impute credence to the identification memo, was that she had not seen any identification card of the accused before his arrest. The above sketchy cross-examination, does not falsify the identification memo, as the same was proven by victim during the course of her examination-in-chief, besides also when thereins she identified the accused, who was then present in Court. In summa, it has to be concluded with aplomb that the prosecution has discharged to the hilt, the burden of proving the charges drawn against the accused, inasmuch as, the said burden became discharged through the truthful, and, confidence inspiring account rendered vis-a-vis the crime event by the prosecutrix.

Medical evidence

23. PW-5 Dr. Harleen Kaur proved the MLR Ex. PW-5/A, wherein, echoings occur thus suggestive, that there is a possibility of a sexual assault being made, upon the victim. Therefore, and, when PW-7 Dr. Parminderjit Singh, who proved Ex. PW-7/1 with disclosure therein, that three blunt injuries were occurring on the body of the victim therebys, the attribution of incrimination by the victim to the accused qua his inflicting injuries, upon her, thus does naturally become cogently proven. Ex. PW-5/B

DNA expert. The said results become extracted hereinafter.

“1. Presencxe of semen/spermatozoa could not be confirmed on Exhibit-01 (vaginal swabs) and Exhibit-03 (pubic hair strands of Safun Katoon).

2. A female DNA profile was obtained from vaginal swabs (Exhibit-01) which is consistent with the DNA profile of Safun Katoon (Exhibit-02: Reference blood sample of Safun Katoon).

3. No male DNA profile could be recovered from the Exhibits-01 (vaginal swabs of Safun Katoon). Hence, DNA profile of Faisal Khan (Exhibit-04) was not generated.”

24. Though, a reading of the above extracted result discloses, that the DNA expert concerned, could not from the relevant material, as became sent to him, draw any incriminatory compatible matchings rather inter se the DNA profiling of the victim, and, the DNA profiling of the accused. Though on the anvil of the report of the DNA expert, as embodied in Ex. PW-5/B, the learned counsel for the appellant has argued before this Court, that thereby the testification of the prosecutrix rather loses its credence. However, the above argument loses its sheen, as the above alluded clinching incriminatory evidence adduced by the prosecution, especially the confidence inspiring testification of the prosecutrix, thus overcomes the purported lack of incriminatory echoings in the result (supra) made of the relevant examinations, rather by the DNA expert.

25. Importantly also, when in the event of penetrative sexual assault becoming committed, upon a minor victim, thus does not require ejaculation of semen into the vagina of the minor victim. Resultantly, thereby the absence of any inculpatory semen in the vaginal swab of the minor victim also does not over-rule the evidentiary efficacy of the testification of the prosecutrix.

made under Section 164 Cr.P.C., before the learned Magistrate concerned, the effect of qua its foot thus a certification being not made, by the learned Magistrate concerned, rather requires an analysis being made of the provisions carried in Section 164(1), (2) and (3) Cr.P.C., provisions whereof are reproduced hereinafter.

“164. Recording of confessions and statements.

1. Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

[Provided that any confession or statement made under this sub-Section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]
[Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 13, for the Proviso. Prior to its substitution, the proviso read as under:-

[Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force].

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.”

27. The reason for there being no need for a certification being made at the foot of the statement made by the victim in terms of Section 164 Cr.P.C., before the jurisdictional Magistrate, is embedded in the factum, that the said necessity arises, as spoken by sub-Section (2) of Section 164 Cr.P.C. only upon the learned Magistrate proceeding to record the confession of the accused. Therefore, when the victim is not the accused,

thereby the lack of such a certification occurring at the foot of Ex. PW-2/2, does not deprive, the said exhibit vis-a-vis its probative sanctity.

Final order

28. The result of the above discussion, is that, this Court does not find any merit in the appeal, and, is constrained to dismiss it. Consequently, the appeal is dismissed. The impugned verdict of conviction, as becomes imposed upon the convict-appellant, by the learned convicting Court, is maintained, and, affirmed, besides also the consequent thereto sentence(s), as became imposed upon the convict-appellant, by the learned convicting Court, is also maintained, and, affirmed. If the convict-appellant is on bail, thereupon, the sentence(s) as imposed upon the convict-appellant, be ensured to be forthwith executed by the learned trial Judge concerned, through his drawing committal warrants. The case property be dealt with, in accordance with law, but after the expiry of the period of limitation for the filing of an appeal.

29. Records be sent down forthwith.

30. The miscellaneous application(s), if any, is/are, also disposed of.

(SURESHWAR THAKUR)
JUDGE

(LALIT BATRA)
JUDGE

February 19th, 2024
Gurpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No