

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

**CRM No.5912 of 2015 in/and
CRA-D-1319-DB of 2014
Date of decision: 25.2.2015**

Krishan Kumar

..... Applicant/Appellant

VERSUS

State of Haryana and another

..... Respondents

**CORAM: HON'BLE MR. JUSTICE S.S. SARON
 HON'BLE MR. JUSTICE GURMIT RAM**

**Present: Mr. Gaurav Gupta, Advocate
 for the applicant-appellant.**

S.S. SARON, J.

CRM No.5912 of 2015

The criminal miscellaneous application has been filed for recalling the order dated 15.1.2015 vide which CRA-D-1319-DB of 2014 filed by the appellant Krishan Kumar had been dismissed for want of prosecution.

The appellant Krishan Kumar filed the appeal against the judgment and order dated 6.6.2014 passed by the learned Additional Sessions Judge, Narnaul whereby respondent No.2 Karambir Singh

(accused) was acquitted of the offences punishable under Sections 363 and 366 Indian Penal Code ('IPC' - for short) and Section 4 of the Protection of Children from Sexual Offence Act, 2012 ('POCSO Act' – for short) read with Section 376 IPC.

The appellant is the father of the prosecutrix and being aggrieved against the order acquitting respondent No.2 had filed the appeal. The appeal was listed for the first time before this Court on 15.9.2014. No one appeared for the appellant on the said date and notice was issued to the appellant for 15.1.2015. According to the office report, notice was served upon the appellant, however, despite that none appeared for him on the said date i.e. 15.1.2015. In the circumstances, it was held that no one had appeared for the appellant on the last date of hearing i.e. 15.9.2014 and none had appeared on the said date i.e. 15.1.2015. Accordingly, the appeal was dismissed for want of prosecution.

The present CRM has now been filed for recalling the order dated 15.1.2015. It is submitted that the earlier learned counsel who was engaged by the appellant was appointed as Additional Advocate General, Haryana and on 15.1.2015, he was not in a position to argue the case. He had requested one of his colleague to get an adjournment. However, his colleague did not appear and the appeal was dismissed for want of prosecution. The earlier counsel informed the appellant through a letter asking him to change his counsel for conducting the appeal. The appellant after receiving the letter on 6.2.2015 engaged the learned counsel who has now filed the application seeking recalling of the order dismissing the appeal for want of prosecution.

Learned counsel for the applicant-appellant has not been able to show as to who was the colleague of the earlier learned counsel who was asked to get an adjournment or as to how and when was the letter received by the appellant from his earlier counsel. Be that as it may in order to avoid that any prejudice is caused to the appellant, it would be just and expedient to hear the learned counsel now appearing for the appellant on the main appeal itself.

Accordingly, the order dated 15.1.2015, dismissing the appeal for want of prosecution is recalled and the appeal is restored to its original number.

CRA-D-1319-DB of 2014

On request of learned counsel for the applicant/appellant, the appeal is taken up for hearing.

Heard learned counsel for the appellant.

The appellant has preferred this appeal against the judgment and order dated 6.6.2014 passed by the learned Additional Sessions Judge, Narnaul whereby respondent No.2 Karambir Singh has been acquitted of the offences punishable under Sections 363 and 366 IPC and Section 4 of the POCSO Act read with Section 376 IPC.

According to the learned counsel for the appellant, the impugned order acquitting respondent No.2 is contrary to facts and law. It is submitted that the prosecution evidence which is trustworthy and reliable, was liable to be accepted. Respondent No.2 had taken the prosecutrix by misrepresentation and under a false pretext. She was not in a position to raise resistance. The learned trial Court erred in considering

the prosecutrix to be a consenting party. The date of birth of the prosecutrix is 9.12.1996 and the learned trial Court has wrongly held her to be more than 18 years of age. The prosecutrix was in the 9th class, therefore, in fact she was less than 18 years of age on the date she was enticed by respondent No.2 i.e. on 1.12.2013.

We have given our thoughtful consideration to the contentions raised by the learned counsel.

The prosecution case is that the appellant who is the complainant in the case and father of the prosecutrix met ASI Sukhbir Singh and HC Sunil Kumar at bus stand of village Sohla on 1.12.2013. He submitted an application (Ex.PW5/A) stating that his daughter (prosecutrix) aged about 15 years had gone for tethering cattle at about 8/8:30 p.m. on 30.11.2013 but she had not returned. The prosecutrix was studying in 9th class. Karambir (respondent No.2 - accused) had given a mobile phone to her. The number of the mobile phone is mentioned. It was alleged that Karambir (respondent No.2) used to talk to the prosecutrix on the said phone from his phone. The phone was taken from the prosecutrix by her brother Jai Bhagwan on 29.11.2013 and at that time the prosecutrix had informed that the said phone was given to her by Karambir (respondent No.2). According to the complainant (appellant), his daughter (prosecutrix) had been enticed away by Karambir (respondent No.2). On the said application (Ex.PW5/A), an endorsement was made by ASI Sukhbir Singh and it was sent to Police Station Satnali through HC Sunil Kumar for registration of a case (FIR). On the basis of the application (Ex.PW5/A), FIR for the offences punishable under Sections 363, 366-A IPC and Section 4 of POCSO Act, 2012 was

registered. During investigation, the prosecutrix was recovered from Karambir (respondent No.2) on 10.12.2013. The statement of the prosecutrix was recorded, on the basis of which the offence under Section 376 IPC was added.

The prosecutrix was got medically examined from the General Hospital, Mohindergarh. According to Dr.Neesha Yadav (PW10) possibility of sexual assault on the prosecutrix could not be ruled out. The statement of the prosecutrix in terms of Section 164 of the Code of Criminal Procedure (Cr.P.C. - for short) was also recorded. According to the prosecutrix she was going to get her buffalo and in the meanwhile accused (respondent No.2) came from behind and gagged her mouth. He took her in the jungle of village Madhogarh and from there she was taken to Satnali. From Satnali, they went to Mohindergarh in a pick-up vehicle. From Mohindergarh, they went to Rewari by train and then they went to Bikaner. Thereafter, they went Jaipur and from there they went to Delhi by train. From Delhi, they went to Gandhidham. Then Karambir (respondent No.2) made a telephone call to some person of Satnali. Thereafter, respondent No.2 started talking about marriage. Then they came to Mohindergarh. Accused (respondent No.2) was also medically examined by Dr. Rahul Mighani (PW12), who stated that there is nothing to suggest that the accused (respondent No.2) was incapable for having sexual intercourse.

On filing of the police report (challan), the case was committed by the Area Magistrate to the Court of Sessions as the offences punishable for the offences under Sections 376 and 366-A IPC were triable by the learned Sessions Court. Charges against the accused

(respondent No.2) were framed for the offences punishable under Sections 363, 366 IPC and Section 4 of POCSO Act, 2012 read with Section 376 IPC. The prosecution examined as many as 12 witnesses in the case. The statement of the accused (respondent No.2) was recorded in terms of Section 313 Cr.P.C.. The prosecution evidence was put to him. In his defence he stated that he had been falsely implicated in the case. He did not lead any evidence in his defence. The learned trial Court after considering the evidence and material on record has acquitted the accused (respondent No.2).

The learned trial Court considered the fact that the prosecutrix had gone out of her house on 30.11.2013 at about 8/8:30 p.m. by taking her buffalo. In the meantime, accused (respondent No.2) came there and gagged her mouth. She was taken to the jungle of village Madhogarh and then they walked to Satnali. From Satnali respondent No.2 took her to Mohindergarh in a pick-up vehicle. From Mohindergarh respondent No.2 took the prosecutrix to Rewari by train. From Rewari respondent No.2 took the prosecutrix to Bikaner by train. From Bikaner respondent No.2 took the prosecutrix to Jaipur by another train. From Jaipur respondent No.2 took the prosecutrix to Delhi by train. From Delhi they went to Gandhidham (Gujrat) by train. From Gandhidham respondent No.2 contacted some person of village Satnali on telephone and asked him to arrange their marriage. From Gandhidham respondent No.2 took the prosecutrix to Delhi and then they went to Mohindergarh on 10.12.2013. The above sequence of events shows that the prosecutrix had remained with respondent No.2 from 30.11.2013 to 10.12.2013.

According to the prosecutrix the respondent No.2 committed sexual

intercourse with her against her wishes at all the above places and in trains.

The learned trial Court held that it was quite improbable that these acts could have been done for so many days without the consent of the prosecutrix as many other passengers must have been travelling in those trains and she had opportunity to inform the other passengers that she was being taken forcibly by respondent No.2. The prosecutrix admitted that respondent No.2 had given her a mobile phone about 2-3 days earlier to 30.11.2013. Lady Constable Shinu was examined as PW2 and she stated that respondent No.2 and the prosecutrix were apprehended by the police party on 10.12.2013 from a bus that was coming from Narnaul to Mohindergarh. She stated that when the police party saw the prosecutrix with respondent No.2, she tried to flee. According to the learned trial Court these facts show that the prosecutrix went with respondent No.2 with consent and the alleged sexual intercourse by the accused with the prosecutrix was with her consent.

As regards age, it was held that the age of the prosecutrix to be less than 18 years could not be established. According to the learned counsel for the appellant, the date of birth of the prosecutrix is 9.12.1996. Therefore, she was admittedly more than 16 years of age on the date of occurrence. However, there is nothing to show or establish that the date of birth of the prosecutrix is 9.12.1996. A reference has been made to the school certificate Ex.PW5/C. However, the said certificate has not been proved. The learned trial Court observed that the the said certificate was issued by Head Master Government High School, Dadhot. According to the said certificate, the prosecutrix was studying in Government High

School, Dadhot in the 9th class. She was admitted in the said school on 22.4.2013. The prosecution did not examine any official of Government High School Dadhot for proving that the said certificate was issued by that school. The record of first school attended by the prosecutrix for proving her age was not shown. It was observed that even the mother of the prosecutrix was not examined by the prosecution to prove the age of the prosecutrix. PW5 Krishan (appellant) is the father of the prosecutrix and he has also did not state that the prosecutrix was below 18 years of age on the date of alleged occurrence. It was observed that there was no other evidence except the school certificate Ex.PW5/C for determining the age of the prosecutrix and the said certificate was held to be not admissible in evidence in accordance with the mode of proving document.

It may be noticed that although the said certificate is marked as an exhibit. However, mere marking of a document as an exhibit does not dispense with the mode of proving the document. In **Sait Tarajee Khimchand and others Versus Yelamarti Satyam @ Sattaya, AIR 1971 SC 1865**, it was held that mere marking of a document as an exhibit does not dispense with its proof. This was reiterated in **Narbada Devi Gupta Versus Birendra Kumar Jaiswal (2003) 8 SCC 745**. Therefore, the school certificate Ex.PW5/C was rightly held by the learned trial Court to be not admissible in evidence because no official of the school had been examined. Even otherwise, it was held that mere entry in the school record was not sufficient to prove the exact age of the prosecutrix. Reliance was placed on **Brij Mohan Singh Versus Priya Brat Narain Sinha, AIR 1965 SC 282** wherein the value of an entry of date of birth in

a school register was considered. It was held that in actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life, he would have an advantage when seeking public service for which a minimum age of eligibility is often prescribed. A Court of fact, it was held, cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on basis of the entry, when it was alleged that the entry was made upon false information supplied with a motive. Reliance was also placed by the learned trial Court on **Bhup singh Versus State of Haryana 2005 (3) RCR(Criminal) 63(P&H)** in which it was held that school certificate which is not proved by examining the person who issued the certificate could not be read in evidence. It was also held by the learned trial Court that no radiologist or Dental Surgeon was examined to prove the age of the prosecutrix.

The reasons recorded by the learned trial Court are just and proper and merely because a different view may be possible would not be a ground to interfere with the reasons given by the learned trial Court.

In the circumstances, we find no merit in the appeal and the same is accordingly dismissed.

(S.S. SARON)
JUDGE

(GURMIT RAM)
JUDGE

25.2.2015
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