

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

CRA-S-4238 -SB-2015 (O&M)
Date of Decision: 05.12.2016

Shakti

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

Present: Mr. K.S. Sidhu, Advocate
for the appellant(s).

Mr. Apoorv Garg, DAG, Haryana,
counsel for the respondent-State.

ANITA CHAUDHRY, J.

The appellant had been sentenced to 7 years' rigorous imprisonment along with fine of Rs.5,000/-. In default of payment of fine, he was sentenced to further undergo rigorous imprisonment for a period of 3 months. Aggrieved by the order he has filed this appeal.

Adverting to the facts first. The complainant along with her children were residing in Tamil Colony. Her husband had died 12 years ago. On 30.06.2014 she went to Maheshpur to buy vegetables at 8:30 PM. She returned after half an hour and found her daughter aged 15, missing. She searched at her own level and came to know that Shakti, a vagabond of her colony had taken her to his Jhuggi (hut). The complainant along with her married daughter went to the hut and found

him lying naked with the victim. She raised alarm on which the accused who was heavily drunk started running. The complainant chased him. In the meantime, the victim also ran away. The victim was found sitting in a vacant plot in Sector-21, Panchkula at 7:00 AM, the next morning. The victim revealed that when the accused tried to take off her clothes forcibly, she tried to raise alarm but was gagged and raped by the accused. On this statement, the FIR under the POCSO Act was registered. The accused was arrested the next day and was medically examined. Statement of victim under Section 164 Cr.P.C. was recorded by the Magistrate. The vaginal swabs had been sent to the FSL. DNA test on the accused was carried out.

After completion of investigation, challan was submitted. Charge was framed, to which the accused pleaded not guilty. The prosecution examined 15 witnesses besides tendering documents, the FSL report and the DNA test.

The accused simply denied the prosecution case and did not lead any evidence in defence.

The trial Court on the basis of the evidence produced, held the girl to be below 18 years. The trial Court had also noted that the victim had admitted that the age determination test was carried out on her. It had noted that the radiological examination clearly showed that the lower end of the radius ulna was unfused and held that the girl was a child as defined under Section 2(1)(d) of the POCSO Act.

The trial Court noted that the prosecutrix at the trial had not supported the prosecution version but found that the medical evidence was clearly against the accused and the DNA test completely nailed him and convicted the appellant.

I have heard the counsel of both the sides.

The counsel for the appellant with all vehemence at his command urged that the appellant could not have been convicted as the victim had not supported the prosecution version and she had stated that she had not made any statement before the police and had explained that the statement made before the Magistrate was under threat and pressure of the neighbours. It was urged that the FIR has also been lodged after a delay and the benefit should have gone to the appellant.

The submission on the other hand was that when the mother found her daughter missing, she started looking for her and she came to know that the accused had taken her and therefore, she went to his hut and found the accused naked and his daughter by his side and he was caught in the act and he was heavily drunk and though the victim has turned hostile but she had admitted that she had gone to play with the sister of the accused. It was urged that she had also admitted that she was found by her mother the next morning. It was urged that the hymen was found torn and the mother is a witness to the incident and the DNA report is against the accused and the girl was a minor and below the age of 18 and there is a presumption under Section 29 of the POCSO Act and the appellant has failed to discharge it.

Coming to the age of the victim first, the prosecutrix had given her age as 15 years and that is the age which is recorded in the MLR. The mother had explained that the birth certificate was damaged in the fire. The Medical Officer had recommended a radiological test, which was carried out and the Medical Board had given its opinion that the victim's age was between 16 – 18 years. The trial Court has dealt with the issue exhaustively in para no.10 to 14 giving the reasons for arriving at that conclusion. I find no infirmity in the same. No evidence has led by the accused to show that the girl was over 18 years of age.

Section 29 of the POCO Act reads as under:-

“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.”

It is to be seen whether the accused had been able to rebut the presumption. The incident had occurred on 30.06.2014. The mother returned at 9:00 PM and did not find her daughter at home. She learnt that Shakti had taken her to his hut, when she entered his hut, she found him lying naked with the victim by his side. The complainant had seen her daughter along with the accused. The accused fled and so did her daughter out of fear. She was found the next morning. The medical of the girl was carried out. There was clear report that the hymen was torn.

The history given to the Medical Officer was that the victim was taken by her friend and her brother raped her. The accused was arrested the next day. There was smell of alcohol even at that time. The Medical Officer had noted that he was still under the effect of alcohol. He was admitted with minor injuries, which he had stated he had received after falling from the motorcycle.

The victim made a statement against the accused before the Magistrate but subsequently at the trial she admitted part of it. She admitted that she was playing with her friend but denied that her friend's brother took her in the hut and raped her. She admitted that she ran from the house in the night due to fear. The explanation given by her was that she had a fight with her brother and therefore, she ran from the house. She had explained that the statement given before the Magistrate was under threat and pressure from the neighbours. She admitted that her medical examination was carried out at the hospital. On being cross-examined by the accused, she denied that she was over 18 years of age.

Laxmi PW-9 supported the prosecution version and stated that she found the accused and her daughter nude and in a compromising condition and after seeing her, the accused ran away.

Isham Singh, Reader – PW10 had identified the signatures of the Magistrate who had recorded the statement under Section 164 Cr.P.C.

The issue that arises is as to whether the appellant was entitled to acquittal solely on the ground that the victim had not supported the prosecution case at the trial. Besides the statement of the victim, the prosecution had examined the mother who had reached the spot and had seen both the accused and her daughter in a compromising position. She has given a detailed narration as to the manner in which she reached the hut of the accused. The victim fearing backlash from her family fled and did not return that night. The FSL report showed presence of semen. Besides that the DNA report is against the accused. The victim in her first statement before the Medical Officer had stated that she had been raped by the brother of her friend. She had also made a statement before the Magistrate that it was the appellant who had raped her but at the trial for some reason she chose to support him. The girl was a minor. The plea of consent was not available to the accused. I find that there was ample evidence which proved the complicity of the appellant. I find no reason to differ with the finding recorded by the Courts below. There is no merit in the appeal.

The appeal is dismissed.

(ANITA CHAUDHRY)
JUDGE

05.12.2016
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No