

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

Crl. Appeal No.S-1118-SB of 2016(O&M)

Date of Decision: 16.12.2017

Mohammad Chand

.. Appellant

Vs.

State of Haryana

.. Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Mr. Jagdish Rai, Advocate -
Amicus Curiae for the appellant.**

Mr. R.K. Singla, AAG Haryana.

ANITA CHAUDHRY, J.

This appeal has been preferred against the judgment of conviction dated 04.12.2015 and order of sentence dated 07.12.2015 vide which the appellant has been held guilty under Sections 363, 366-A, 376(2) of Indian Penal Code (for short, IPC) and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for brevity, POCSO Act). He was sentenced for a period of 5 years and 10 years rigorous imprisonment respectively under Sections 366-A and 376(2) IPC. Fine of Rs.2000/- and Rs.20,000/- was also imposed under the aforesaid heads. In default whereof further imprisonment for 3 months and 2 years respectively was awarded. Both the sentences were ordered to run concurrently. The matter was also recommended to the District Legal Services Authority, Sonipat for awarding the compensation under Section 357 Cr.P.C. to both the victims.

The prosecution case finds its origin in complaint Ex.PW1/A dated 27.10.2014 made by father of prosecutrix No.1 who informed the

police that his daughter aged about 16 years and another girl aged about 14/15 years (prosecutrix No.2) niece of his colleague were missing since 25.10.2014. The complainant suspected that Chand and Afzal, both brothers resident of Bihar and working as labourer had enticed the girls.

On the basis of their complaint, FIR No. 451 dated 27.10.2014 (Ex.PW4/A) was registered under Sections 363, 366-A IPC and investigation was carried out.

On 30.10.2014 both the girls were recovered from Safidon, District Jind from the huts situated on a construction site of a school and memo Ex.PW10/B was prepared. Mohammad Chand and Mohammad Afzal were arrested. Disclosure statement of Mohammad Chand (Ex.PW14/B) was recorded and he disclosed that he had kidnapped prosecutrix No.1 and had raped her. He further disclosed that prosecutrix No.2 was kidnapped by his brother Mohammad Afzal.

Similarly, Mohammad Afzal suffered a disclosure statement (Ex.PW14/C).

Both the accused identified the place vide memo Ex.PW14/Dd and Ex.PW14/E respectively where they had confined and raped the victims. Both the accused were medically examined. Site plan (Ex.PW16/A) of the place of recovery was prepared.

The prosecutrix were also examined by the Medical Officer and POCSO Act was added

On police request (Ex.PW11/A), the statements Ex.PW9/A and Ex.PW16/A respectively of both the prosecutrix were recorded under Section 164 Cr.P.C. by the Judicial Magistrate on 31.10.2014, wherein they retracted and stated that they had gone on their own.

On completion of investigation, challan was filed against the accused for trial. The case was committed. It is apt to mention here that vide order dated 30.04.2015 accused Mohammad Afzal was declared juvenile and his trial was separated and forwarded to the Juvenile Justice Board for trial.

On 06.05.2015 accused Mohammad Chand was charge-sheeted under Sections 363, 366-A, 376(2)(i)(n) of IPC and under Sections 5(1)/6 of the POCSO Act.

At the trial, the prosecution examined 16 witnesses.

PW1 was the complainant and father of prosecutrix No.1. He deposed that a complaint Ex.PW1/A was given to the police as his daughter and niece of his neighbourer was missing. He also deposed that School Leaving Certificate (Ex.P1) of his daughter was given by him to the police.

PW2 and PW3 were the maternal uncle and mother respectively of victim No.2. They deposed that both the prosecutrix were taken away by accused Mohammad Chand and Mohammad Afzal.

PW4 SI Rajbir Singh had lodged the FIR of the case.

PW5 Const. Raghunath had delivered the special reports of the case to the Senior Officers and Illaqa Magistrate.

PW6 Inderpal Draftsman had prepared the scaled site plans Ex.PW6/A and Ex.PW6/B.

PW7 ASI Naresh Kumar and PW8 EHC Ashok Kumar had tendered their affidavits Ex.PW7/A and Ex.PW8/A respectively.

Prosecutrix No.1 and 2 had stepped in the witness box as PW9 and PW10 respectively. Both of them had deposed that accused Mohammad Chand and his brother Mohammad Afzal had enticed and had taken them to

Safidon, where they were beaten and raped by the accused. They stated that false statements under Section 164 Cr.P.C. were made by them before the Magistrate under the fear and threats extended by parents of both the accused and the police respectively.

PW11 Inspector Nar Singh had prepared the report under Section 173 Cr.P.C. of the case.

PW12 Ms. Ankita Sharma, Judicial Magistrate had recorded the statements of both the prosecutrix under Section 164 Cr.P.C.

PW13 Dr. Yogesh had medicolegally examined the accused Mohammad Chand.

PW14 ASI Kuldeep had forwarded the complaint made by the complainant to the police for registration of the case. He initially investigated the case and deposed about recovery of both the prosecutrix and arrest of the accused and the disclosure statements suffered by them. He got the prosecutrix and accused examined from the Medical Officer.

PW15 Dr. Himanshi had examined both the prosecutrix. There was no external mark of injury on the private parts of the prosecutrix. The hymen was torn and in her opinion the possibility of sexual intercourse with both the prosecutrix could not be ruled out.

PW16 SI Kavita took over the investigation of the case on 30.10.2014. She deposed about the recovery of prosecutrix, arrest of both accused and the disclosure statements given by them and medicolegal examination of both the victims and the accused. She stated that the prosecutrix were produced before the Magistrate and their statements under Sections 164 Cr.P.C. was recorded.

In his statement under Section 313 Cr.P.C., the accused abjured

the trial and pleaded false implication.

In defence, documents, Ex.D1 to Ex.D5 were tendered by the accused.

The trial Court held the appellant guilty and sentenced him to the imprisonment noticed above. Dis-satisfied with the same, the instant appeal.

I have heard learned counsel for the parties and have gone through the record carefully.

Learned Amicus Curiae appearing for the appellant had submitted that the victims were consenting party and the trial Court has erred in placing implicit reliance upon the School Leaving Certificate (Ex.P1) of prosecutrix No.1 wherein her date of birth was mentioned as 12.10.1998. Elaborating his submissions, he had submitted that when the statement of prosecutrix was recorded under Section 164 Cr.P.C. by the Magistrate she had given her age as 18 years, but in the witness-box she changed her stand and had stated that she was 16 years old. According to him, certificate Ex.P1 was procured and no sanctity or authenticity can be attached to certificate Ex.P1 in absence of any evidence of the person who had issued the same. According to him, there is nothing on record to show that from where the details were taken as no admission form or record was produced by the prosecution and stray entry in the school leaving certificate cannot establish beyond doubt that prosecutrix No.1 was born on the date given in the certificate Ex.P1. He had further submitted that PW 15 Dr. Himanshi had referred prosecutrix No.1 for dental and radiological opinion, but medical opinion was not taken and this led to taking an adverse inference against the prosecution that real age of prosecutrix No.1 was

withheld and she was major. He has referred to **Bhajan Singh & Ors. Vs. State of Punjab, 2015(9) RCR(Crl.) 711, Alamelu & Anr. Vs. State Rep. by Inspector of Police, 2011 AIR(SC) 715, Krishan Kumar Malik Vs. State of Haryana, 2011(7) SCC 130, Sunil Vs. State of Haryana, 2010(1) SCC 742 and Niranjana Vs. State of Haryana 2016(2) RCR(Crl.) 378.**

Learned Amicus Curie had also pointed out that prosecutrix No.1 had remained in the company of the appellant for about five days and as per the case of the prosecution she was beaten and raped by the accused, but the medical evidence on record belies the case of prosecution as no mark of external injury was found on her person at the time of examination and it has not been shown that at any point of time she had raised hue and cry, which clearly reflected that she was a consenting party. He had also referred to the contradictions and discrepancies in the ocular account of the witnesses.

Learned State counsel had supported the judgment of conviction.

The question of paramount importance is the age of the prosecutrix. Contradictory stand had been taken by the prosecutrix regarding her age. On 31.10.2014 when she was produced before the Magistrate, she gave her age as 18 years in her statement under Section 164 Cr.P.C. and had stated that she had gone on her own but when she appeared in the witness box she retracted from her earlier statement and claimed herself to be 16 years old. It had come on record that during investigation of the case, the father of the prosecutrix had handed a School Leaving Certificate (Ex.P1) wherein her date of birth was mentioned as 12.10.1998.

The whole foundation of the prosecution case rests on this document. There

is a contradictory ocular version of the prosecutrix about her age. The entry in the school leaving certificate (Ex.P1), without proving its source, was not sufficient to conclude that the prosecutrix was minor on the date of occurrence. No attempt had been made by the prosecution to get the person examined who had issued the same. It is not clear who had issued the certificate Ex.P1. It is not proved as to who had supplied the information and the date of incorporation. No admission form or school record pertaining to the prosecutrix was produced. It had come in the statement of father of the prosecutrix that she was got admitted by her great grandfather, who had died. In that situation, it was imperative upon the prosecution to produce the relevant school record of the prosecutrix to prove her exact age.

In Law of Evidence by Sir John Woodroffe and Symed Amir Ali, 17th Edition Vol.2 at page 2099 it is stated as follows:

"An entry relating to date of birth made in the school register is relevant and admissible under s.35 of the Evidence act, but entry regarding the age of a person in a school register is not of much evidentiary value to prove the age of a person in the absence of material on which the age of was recorded. An entry in a school register is not of much evidentiary value, when there is no evidence to show on what materials the entry in the register about the age of the scholar was made.

The date of birth mentioned in the scholar's register of a school has no probative value unless either the parents are examined or the person on whose information the entry may have been made is examined. Much reliance cannot be placed on entries in the school admission registers which are not proved to have been made on the basis of the statement made by a person eg, the father of the boy, who knew the date of his birth. Since the name of the school from which the transfer

certificate is obtained itself is absent from the certificate no reliance can be placed on the said certificate for determining the age of the accused."

In the decision reported in [Sunil v. State of Haryana](#) 2010(1) SCC (Cri.) 910 it was held as follows:

"25. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced."

In Court Vs. By Adv. Sri Blaze K. Jose, Crl. Appeal No. 438 of 2006, Kerala High Court had an occasion to evaluate the evidentiary value attached to a school certificate. Taking into account catena of judgments, it was summed up as follows:-

29. If the extract of the school admission register is produced and it is proved in accordance with law by examining the person who issued the same and also by producing the register and also by examining the person who gave the date of birth when the ward was admitted, then it becomes an item of evidence which can be accepted as a conclusive evidence

regarding the date of birth of the person concerned. More authentic is the entry in the register kept by the local authorities with regard to the date of birth and death of any person concerned.

30. Normally, the law accepts the entries in school records are proof of age, but the extract of the school admission register of the school where the ward was first admitted should be produced and proved. It is very seldom that the court accepts the extract of the school admission register where the ward had studied subsequently and the entries in that register is based on the entries in the transfer certificate issued from the school. In such circumstances, as could be seen from the decisions cited above, on facts it can be seen that there were other items of evidence to prove the date of birth of the victim. That would either be the oral evidence furnished by the person who gave information about the date of birth or the parents of the victim or through medical evidence in support of the age of the victim concerned.”

In the case of **Birad Mal Singhvi Vs. Anand Purohit, 1988**

(supp) SCC 604, Hon'ble Apex Court has held that the date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The Court further held that the truth or otherwise of the factum of date of birth as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those person who could vouchsafe for the truth of the facts in issue. It was held that in the circumstances the dates of birth as mentioned in the documents have no probative value in the absence of the admissible evidence and the same could not be accepted.

The same proposition of law was reiterated by the Supreme

Court in **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal, 2003(4)**

RCR(Civil) 683, wherein it was held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents and its execution has to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue.

There was no reliable evidence to vouch for the truth of certificate Ex.P1. The person who had issued the same and the source from where the date was taken, was not examined or proved. There was no admissible evidence to corroborate the entry of date of birth mentioned in the Certificate Ex.P1. The investigation of the case had been done in a casual manner. No attempt was made to ascertain whether her birth had been incorporated in the government record or not. Her father was a Government employee and it cannot be believed that he had not got the factum of her birth in the government record. The lethargic attitude of the investigating agency is apparent from the fact that despite being referred by PW15 to the dental and radiological opinion regarding the age of the prosecutrix, she was not taken thereto for examination. This has to said as nothing was shown by the prosecution that she had been taken to the doctors for opinion of her age. It can be said that the prosecutrix was major and an attempt had been made by the prosecution to withhold her correct age.

Coming to the deposition of victims, they had stepped into the witness box as PWs 9 and 10. After analyzing their testimony, the trial Court came to the conclusion that both of them had not said about gang rape and prosecutrix No.1 had deposed about the rape by appellant Mohammad Chand and it was held not to be a case of gang rape.

There is sole testimony of prosecutrix No.1, so far as allegations of kidnapping and rape by the appellant are concerned. No doubt, the conviction can be based on the solitary statement of the prosecutrix, but at the same time, it cannot be mechanically applied to every case of sexual assault. The testimony of prosecutrix does not inspire confidence. Her unnatural conduct leaves no doubt that she was a consenting party. In the first version given to the Magistrate in statement under Section 164 Cr.P.C., she had stated that she had gone of her own, but later she retracted therefrom while appearing in the witness box and alleged kidnapping and rape by the accused for the obvious reason that she had succumbed to the pressure of her parents. She had voluntarily made the statement under Section 164 Cr.P.C. and there is no reason to believe that she had made the statement under the pressure of the parents of the accused when she was produced before the Magistrate. Not only this, the victims had admittedly been taken to Safidon in three wheeler, but she had not raised alarm. The stand of the prosecutrix that she had told the three wheeler driver about her kidnapping but no help was extended, does not convince me. The victims had changed three vehicles to reach Safidon. She had the opportunity to raise alarm and seek help. The place from where she had remained with the accused was a construction site where other huts were constructed. She had admitted in her cross-examination that accused used to leave her in the earthen hut for hours together. She remained there for more than four days and it is highly improbable that the stay was without her consent.

The things do not rest here. The medical evidence also goes contrary to her version. She had deposed that she was beaten by the accused

and raped. PW15 D. Himanshi had medically examined the prosecutrix and she found no injury on her person external or internal. Had she been beaten by the accused and was raped, there would have been bruises on her body. The veracity of the deposition made by the prosecutrix are doubtful.

Another circumstance which goes to the root of the case is the delay. The victims went missing on 25.10.2014, but the matter was reported on 27.10.2014. The father of the prosecutrix was a helper in the Police Department, but he had offered no explanation as to why the matter was reported so late to the police.

In the case of **Munna Vs. State of Madhya Pradesh, 2014(10) SCC 254**, in a similar situation, the Hon'ble Apex Court held as under:-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecution in view of the statutory presumption under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

Hon'ble Supreme Court in **Raju and others Vs. State of Madhya Pradesh, (2008) 15 SCC 133** has held that the accused must be protected against the possibility of false implication. It has been further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness whose presence

at the spot is probable but it can never be presumed that her statement should without exception be taken as the gospel truth.

In **Tameezuddin alias Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566** it has been held that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

In **Narender Kumar Vs. State (NCT of Delhi), (2012) 7 SCC 171**, Hon'ble Apex Court has held that if the statement of prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon. It has further been held that onus of proof is on the prosecution to establish each ingredient of offence beyond reasonable doubt on basis of cogent evidence and material on record. The sole testimony of prosecutrix can be relied for the purpose of conviction without any corroboration if the same inspires confidence, but if court finds it difficult to accept version of prosecutrix on its face value, it may look for corroboration by other evidence, direct or circumstantial.

For the reasons recorded above, it is found that the evidence led by the prosecution suffers from serious infirmities and inconsistencies. The circumstances referred to above lend support to the plea of accused that the prosecutrix had left home on her own and she was neither confined, abducted or raped. In a criminal case, the prosecution has to prove its case beyond reasonable doubt. In the instant case, the prosecution has failed to prove the case against the accused beyond shadow of reasonable doubt and the trial Court had erred in convicting and sentencing the appellant on the

basis of untrustworthy and unreliable evidence. Accordingly, the appeal is allowed. Judgment of conviction and sentence is set aside.

Accused is acquitted.

December 16, 2017
Jiten

(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No