

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**CRA-S-359-SB of 2016**

DATE OF DECISION: MARCH 10, 2017

RAM KUMAR

...APPELLANT

VERSUS

STATE OF HARYANA

...RESPONDENT

**CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.**

PRESENT: MR. MOHAN LAL SINGLA, ADVOCATE FOR THE APPELLANT.  
MR. ASHOK MUTHREJA, DAG, HARYANA.

**M. JEYAPPAUL, J.**

1. Accused Ram Kumar has challenged the conviction and sentence passed by the trial Court under Section 377 read with Section 511 and Section 506 IPC and Section 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

2. It is the case of the prosecution that on 12.12.2004, PW2 complainant Sukhwinder Singh @ Sukha was in search of his son aged 13 years who had not returned from the school on that day. The complainant was an autorickshaw puller. On search of the clothes of the victim kept in the house, a slip with two mobile numbers was found. PW3 Jitender Singh, uncle of complainant Sukhwinder Singh, made a call from his phone bearing Mobile No.7404278182 to 9813321086 which was one of the numbers found in the slip. The receiver of the call informed PW3 that the victim was with him and he had now left for his house. The complainant and his uncle kept on searching for the victim. In the meantime, the receiver of the abovesaid call made telephonic call two or three times to PW3 Jitender

Singh and assured him that the victim would reach his house. At about 6.00 p.m. on the said day, the victim was found coming from the side of Calcutta Nursery. On enquiry made by the complainant, his son, who was the victim, informed him that accused Ram Kumar used to take him to his room and had carnal intercourse with him many times. On that day also, he was called by the said accused to his room. The victim instead of going to his school proceeded to the room of the accused, who committed carnal intercourse with him. Accused Ram Kumar also used to threaten the victim with dire consequences in case he chose to disclose the incident to anyone.

3. The complainant who is the father of the victim was examined as PW2 while his uncle Jitender Singh was examined as PW3. The star witness who was the victim was examined as PW1. He has deposed that about two months prior to the occurrence, accused Ram Kumar was present outside his school. The accused asked him to befriend him. The victim informed that he would ask his father about the said proposal. Same was his reply when the accused again insisted him for making friendship. The accused offered him an eatable, namely, chowmein. After 2-3 days of that incident, accused was again present outside his school and pulled the victim and took him to his house. The accused bolted the door from inside and asked the victim to take his penis into his mouth and gave two slaps to him. He also asked him to open his pants. The victim pleaded that he had to go to his house. Accused tied him with a chair with the help of a rope. He forcibly opened the pants of the victim and his pants as well. The accused made him to lie down and attempted to commit carnal intercourse. He tried

to put his penis into his anus. Thereafter the accused took him on his cycle for dropping him at his house, but on the way PW1 met the victim. But the victim did not disclose the incident to his father at that time. He disclosed the incident to his father after one day of the occurrence. The victim also deposed that a slip mentioning the mobile numbers of the accused was handed over to him.

4. PW6 Constable Rahul from Cyber Cell, Yamuna Nagar, was examined. He spoke about the procurement of call details of mobile phones No.9813321086 and 7404278182 for the period from 10.12.2014 to 12.12.2014 from Tata Docomo and Vodaphone companies, respectively. The call detail report in respect of mobile phone No.9813321086 was exhibited as Ex.PO and that of mobile phone No.7404278182 was exhibited as PQ. The I.D. proof in respect of mobile phone No.9813321086 was exhibited as Ex.PR and of mobile Phone No.7404278182 as Ex.PS.

5. PW10 Dr. Rishu Goel, Medical Officer, medico-legally examined the victim on 12.12.2004 and issued MLR Ex.PE. He also subjected accused Ram Kumar to medico-legal examination and issued MLR PW10/B and opined that there was nothing to suggest that the accused was incapable of performing sexual intercourse.

6. In the statement under Section 313 Cr.P.C., the accused set up a plea that the victim was found fighting with another boy in the park near his house. When he intervened, the victim hurled abuses at him, due to which the accused gave a slap to the victim and reported the same to his father, whereupon the victim's father came to his house and scuffled with him. He

pleaded innocence.

7. Learned counsel appearing for the appellant vehemently submitted that the trial Court completely ignored the defence set up by the accused in his statement under Section 313 Cr.P.C. that the victim had a fight with another boy in the park located near his house. As the victim raised his objection to the intervention made by the accused, he slapped him. The victim's father who rushed to his house and had a scuffle with him foisted a case against him. Such a defence set up by the accused was not seriously considered by the trial Court. It is his further submission that originally, the case of the prosecution was that accused had carnal intercourse with the victim. But only an attempt to commit carnal intercourse was spoken to by the victim before the Court. In other words, a serious charge levelled against the accused was contradicted by the star witness in this case. It was further argued that the first information report did not speak about the penetration of the penis into the mouth of the victim. Only as an afterthought, the victim had come out with a statement before the Judicial Magistrate that the penis of the accused was penetrated into his mouth. The offence under Section 3 and 4 of the POCSO Act was not made out. It is his last submission that in case the Court comes to the conclusion that the accused has committed the offence charged against him, his sentence may be reduced substantially.

8. Learned counsel for the State rebutted the above arguments submitted by the learned counsel appearing for the accused. It is his submission that the trial Court has rightly evaluated the evidence and

recorded the finding. The sentence imposed on the accused was also not disproportionate to the gravity of the offence attributed to the accused.

9. PW1 was the victim aged 13 years. He was a school going boy. PW2 Sukhwinder Singh who is the father of the victim is an autoriskshaw puller. PW1 has categorically deposed that accused Ram Kumar was present outside his school and pleaded for making friendship with him. PW1 had innocently responded that he would ask his father about such a plea of the accused. When he again repeated about his intention to ask his father to make friendship with the accused, the accused offered him an eatable, namely, chowmein. Thereafter, the accused had waited for 2-3 days. He again emerged outside the school and pulled the victim and took him to his house. After taking the victim to the house, the accused bolted his house and put his penis into his mouth. He had also slapped the victim twice. The victim had pleaded that he had to proceed to his house, but the accused had tied him to a chair with the help of a rope. He had forcibly stripped the pants of the victim and his one as well, and having made the victim to lay on the floor attempted to committed carnal intercourse with him. Thereafter, the accused took him on his bicycle for dropping him at his house.

10. The above testimony of the victim is found to be credible and trustworthy. It does not appear to be a concocted version emanated due to some enmity between father of the victim and the accused. In my considered view, 13 years old school boy would not have risked to bear the scar for his entire life acceding to the request of his father to come out with a false version of carnal intercourse just to wreak vengeance by his father

against the accused. Further, I find that the defence plea set up by the accused in his statement under Section 313 Cr.P.C. has no legs to stand upon. In other words, the boy with whom the victim picked up a fight was not examined by the defence to buttress the plea set up by the accused. Secondly, PW2 would not have imagined to fabricate a case with such false implication against the accused by involving his innocent 13 years old son just to demoralize the accused. In my considered view, the accused has come out with a cock and bull story that the father of the victim who had a quarrel with him, booked a false case and projected his son as a victim. The defence plea has been rightly rejected by the trial Court.

11. The victim's father's uncle was in fact in search of the victim. PW2 and PW3 have spoken about the anxiety the family had on account of the missing of victim right from 3.00 p.m. to 6.00 p.m. on the day of occurrence. The mother of the boy had made a search of the clothes of the victim. She tumbled upon a slip which contained mobile No.9813321086. PW3 Jitender Singh, the uncle of the complainant, had made a call to the above mobile number with his mobile number bearing No.7404278182. The call details produced by PW6 Constable Rahul from Cyber Cell, Yamuna Nagar, demonstrate that the calls had emanated from the mobile phone of PW3 Jitender Singh to the mobile phone of the accused. The accused had also returned a call to the mobile phone of PW3. The above call details buttress the case of the prosecution that the family having got the mobile phone number from the slip found in the clothes of the victim contacted the said mobile phone number and received a positive response.

There was no plausible explanation from the accused as regards the above call details which supports the evidence of PW2 and PW3.

12. PW1 who was the victim was not the author of the first information report. It was only his father PW2 who had lodged a complaint based on the information furnished by PW1. Therefore, PW1 was not answerable to the details given by his father in the first information report. Any inconsistency found in the first information report would not create a doubt in the version of PW1. PW1 had categorically stated before the learned Judicial Magistrate as well as before the Court that the accused had not only made an attempt to commit carnal intercourse, but put his penis into his mouth.

13. In my considered view, there is no material contradiction in the statement of the victim who was examined as PW1. Further, the victim has categorically deposed that the accused had come out with a threat to kill him if he chose to reveal the affair to anyone. The fact that the victim had revealed the entire incident to his father the next day goes to establish that the victim was in the grip of fear.

14. Learned counsel appearing for the appellant cited a decision of the Bombay High Court in **John @ Vivek Ramesh Jadhav vs. The State of Maharashtra, 2015 ALL MR(Cri) 4053**. In a case under the POCSO Act, the trial Court disbelieved the allegation made against the accused that he asked the victim to take his penis in her mouth. Therefore, the Hon'ble Bombay High Court made an observation that if the trial Court had disbelieved that part of the story, then there was nothing to accept the other

story that accused touched the breast of the child. On a careful reading of the above decision, it is found that a strained relationship between the parties had been admitted during the course of cross-examination of PW1. Under such circumstances, the testimony of the child witness was found not reliable by the Bombay High Court.

15. In the instant case, the plea set up by the accused in his statement under Section 313 Cr.P.C. was not established. There is no legal evidence to come to a conclusion that the family of the victim had strained relationship with the accused. In this case, it is found that the accused was a stranger to the family of the victim. Therefore, in my considered view, the above decision would not apply to the present case.

16. Learned counsel appearing for the appellant referred to yet another decision in **Subhankar Sarkar vs. State of West Bengal, 2015(4) (Crimes) 265**. That was a case where PW1, PW2 and PW3 who were the neighbours of the complainant, turned hostile to the case of the prosecution and deposed that they did not have any direct knowledge of the occurrence. The medical examination of the victim disclosed that her hymen was intact. As a result of which penetrative sexual assault was not proved in that case. But, in the instant case, the victim's testimony passed the test of credibility. There was no reason to cast a doubt on his testimony or reject the same. Therefore, the observations made in the above decision will not have any bearing on this case.

17. Coming to the quantum of sentence imposed by the trial Court, I find that the attempt made by the accused to have carnal intercourse with

the victim has left a permanent scar in the psyche of the victim. The trauma the victim had undergone on account of the unnatural beastly behaviour of the accused cannot be lost sight of by the Court while quantifying the sentence. The animal behaviour of the accused will have to be matched with a suitable punishment. Further, under Sections 3 and 4 of the POCSO Act, the minimum punishment prescribed is 7 years of imprisonment. Therefore, in my considered view, the trial Court has rightly awarded sentence for the offence under Section 377 read with Section 511 and Section 506 IPC and Sections 3 and 4 of POCSO Act.

18. In the result, confirming the judgement of conviction and sentence passed by the trial Court, the appeal stands dismissed.

March 10, 2017  
Gulati

**(M. JEYAPPAUL)**  
**JUDGE**

Whether Speaking/Reasoned : Yes

Whether Reportable : Yes