

301-A

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

**Reserved on: July 06, 2018
CRA-D-198-DB of 2013 (O&M)
Date of decision: July 27, 2018**

State of Punjab

.....Appellant

Versus

Harwinder Kumar and others

....Respondents

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE B.S. WALIA**

Present: Mr. H.S. Grewal, Addl. AG Punjab.

Mr. H.S. Jugait, Advocate for respondents No.1, 3, 4 & 5.

A.B. CHAUDHARI, J

Being aggrieved by the judgment dated 09.12.2009 passed by the learned Additional Sessions Judge, Barnala, in Sessions (IPC) Case No.11 of 03.01.2005, by which the learned trial Judge acquitted the respondents of the charge framed against them for offence under Sections 120-B, 366, 366-A, 376, 506 and 109 of Indian Penal Code, 1860 (for short 'IPC'), the State of Punjab has preferred the present appeal in this Court.

FACTS

The prosecutrix 'R' aged about 14 and a half years is a deaf and dumb girl and a student of fourth standard studying in deaf and dumb School, Barnala. Her mother is Paramjit Kaur and her father Parshotam Singh is working as Electrician in Punjab Mandi Board, Barnala. Their neighbours, Shiv Ram is working as a Gardner in the Rest House of

Market Committee, Barnala, and residing along with his two sons Harwinder Kumar and Narinder Kumar, wife Sita Devi and daughter Meera Rani.

On 05.09.2004, Paramjit Kaur, the complainant and her husband had gone away from their house in connection with household work. She returned at about 11:00 A.M. and found that prosecutrix 'R' was not at home. She tried to locate her and went to the house of Shiv Ram, neighbourer and found one room of the house of Shiv Ram was closed. She gave a push and opened the door and found that Harwinder Kumar and Narinder Kumar, sons of Shiv Ram had thrown the prosecutrix on the bed and her *salwar* was removed. Harwinder Kumar also removed her underwear and his pant. Narinder Kumar accused had caught hold of her from her arms and was trying to commit rape upon her while the prosecutrix was resisting. On seeing Paramjit Kaur, the accused Harwinder Kumar and Narinder Kumar lifted their clothes and slipped away. Meanwhile, Shiv Ram, Sita Devi and Meera Rani arrived at the spot from the adjoining room. Paramjit Kaur made a grievance with them, but they said that there was nothing new that and it was continuing for the last about 7 to 8 months. Paramjit Kaur then put on the clothes of the prosecutrix and brought her back to the house. On asking, the prosecutrix 'R' revealed to her mother by signals that Harwinder Kumar and Narinder Kumar have been forcibly committing sexual intercourse with her for the last 7 to 8 months by threatening her and as such, she has become pregnant. Shocked with above, Paramjit Kaur took the prosecutrix to Civil

Hospital, Barnala and got her medically examined and it was informed that the prosecutrix was pregnant. The case was thus, registered on the basis of statement made by Paramjit Kaur. All the accused persons were arrested on 06.09.2004. Narinder Kumar, however, absconded and his trial was separated. On completion of investigation, the challan was presented against the accused persons. The charge was framed against them, which, they denied. The prosecution examined 11 witnesses in addition to the documentary evidence produced. Thereafter, the learned trial Court recorded the statements of the accused persons under Section 313 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.'). Harwinder Kumar, in his statement under Section 313 Cr. P.C. submitted that it was Narinder Kumar who was responsible for all that had happened. The prosecutrix stood into the witness-box as PW8. She being deaf and dumb, her statement was recorded on interpretation by Santosh Chadha (PW9), Principal of Deaf and Dumb School, Barnala and the accused persons were also provided assistance of Deepati Sharma, Teacher in that School, in accordance with the written consent given by the accused persons for doing so, for cross-examination. All the material witnesses were examined. The trial Court thereafter, acquitted all the accused persons including the main accused Harwinder Kumar. Since Narinder Kumar had absconded, his trial was held at a later point of time and he was convicted by the Sessions Court for the heinous offence, against which he had filed criminal appeal in this Court, which is being decided simultaneously.

ARGUMENTS

In support of the appeal filed by the State, learned State counsel vehemently argued that in the impugned judgment, the manner in which the evidence has been discussed and discarded clearly shows total insensitivity on the part of the learned Additional Sessions Judge, Barnala in dealing with the matter in a cavalier manner. According to him, reasons given by the learned judge in his judgment, if carefully seen and compared with the evidence, will show that he himself has imagined several things for criticizing the witnesses and for not accepting their testimonies in the absence of any material being brought out in the cross-examination of these witnesses. Inviting our attention to the impugned judgment, learned State counsel submitted that the evidence of all the material witnesses has not at all been shaken on material points, but that has been conveniently ignored by the learned trial Court, which can be seen from the careful consideration of the entire evidence of the prosecution witnesses. He then contended that the trial Court did not have any humane approach for minor girl, the prosecutrix 'R', who was deaf and dumb studying in the fourth standard. The reasons given by the trial Judge for recording the order of acquittal, if seen, would show that there is a total perversity on the part of the learned trial Court in dealing with the sworn testimonies of the witnesses and that too of independent witnesses also. According to him, the trial Court has made a total ignorance and dereliction of duty while considering the evidence regarding age of the minor prosecutrix. In the absence of any cross-examination, though, the doctor stated that as per radiological test, her age could be between 15 to 17 years, he has recorded

a finding that he would add 3 more years making the age of the girl as 20 years, which is absolutely perverse. According to him, the learned trial Court could not have rejected the document of school admission register showing the age of the prosecutrix as 14 and a half years apart from the sworn testimonies of the mother and father of the prosecutrix showing her age to be 14 and a half years, which has not at all been challenged in the cross-examination.

According to the learned State counsel, it is shocking that the learned trial Court acquitted Harwinder Kumar by accepting the theory of consent when the same is of no relevance. He, therefore, prayed for reversal of the order of acquittal atleast in the case of Harwinder Kumar.

Learned State counsel, however, clearly stated that in so far as other relatives of Harwinder Kumar or the other accused are concerned, there is no satisfactory evidence to convict them and therefore, the appeal against Harwinder Kumar only should be allowed.

Per contra, learned counsel for the respondents opposed the appeal and submitted that the view taken by the trial Court cannot be said to be perverse as in the initial statement itself, there is mention about a person by name Budh Ram as the person indulging in sexual intercourse with the prosecutrix 'R' and therefore, it can be said with certainty that Budh Ram and not the accused persons including Harwinder Kumar had committed the offence. The trial Court has rightly given the benefit of doubt to the accused persons and in particular Harwinder Kumar.

According to him, the prosecution did not positively prove that the

prosecutrix 'R' was minor. The prosecution was required to bring the birth certificate of the prosecutrix, which her father claimed to have handed over to the police, but then that was not produced and the trial Court rightly drew inference against the prosecution. According to him, that was the best evidence which the prosecution could have produced, but it failed to do so. He, then submitted that the scope in appeal against acquittal is limited that this Court should not interfere with the acquittal order made by the trial Court. He, therefore, prayed for dismissal of the appeal filed by the State against acquittal of accused-Harwinder Kumar.

CONSIDERATION

At the outset, we find no merit in the appeal filed by the State against accused/respondents No.2 to 5, namely Shiv Ram, Sita Devi @ Sheela Devi, Meera Rani and Geeta Devi, as there is no satisfactory evidence on record and as rightly contended by the learned State Counsel that they could not have been convicted and therefore, they have been rightly acquitted. Upon perusal of the entire evidence and record, we are inclined to agree with the submission made by the counsel for the State that there is no case made out for interfering with the acquittal of respondents No.2 to 5. We, therefore, dismiss the appeal against acquittal against respondents No.2 to 5, namely Shiv Ram, Sita Devi @ Sheela Devi, Meera Rani and Geeta Devi.

Accused/respondent No.1-Harwinder Kumar son of Shiv Ram has also been acquitted by the trial Court.

We are aghast and feel extremely sorry that the learned

Additional Sessions Judge, Barnala has treated the prosecutrix and the prosecution case in a most insensitive and irresponsible manner. It does not behove of a judicial officer of the rank of Additional Sessions Judge to be insensitive towards a deaf and dumb minor girl aged about 14 and a half years and the neighbours taking advantage of her unfortunate of being deaf and dumb and also committing rape on her repeatedly for about 7-8 months, finally, resulting into her pregnancy and delivery of a child which is born and is in her custody. We really wonder as to how the learned trial Judge could in a most cavalier and casual manner ignore the fact that the girl not only became pregnant, but ultimately delivered a child which is in her custody. We have carefully and repeatedly seen the evidence of all the witnesses so that our criticism of the judgment should not result into any injustice to the learned Judge. We have kept in mind various judgments of the Apex Court in that context. But then we are compelled to repeat that the learned Judge has rendered the findings dehors the evidence and contrary to the settled principles in the matter of appreciation of evidence contemplated by Section 3 of the Evidence Act, 1872. We would now discuss each and every aspect of the case hereinafter.

It is not in dispute that the prosecutrix 'R' is deaf and dumb girl and studying in fourth standard in a deaf and dumb school at Barnala and further that the accused persons, namely Harwinder Kumar and Narinder Kumar are her neighbours. It is also not in dispute that her father goes for work and on the date of occurrence, her mother had also gone out in connection with some household work and 'R' was alone at home. It is

also not in dispute that finally, because of the pregnancy, the girl delivered a child and the child is in her custody.

Age of the prosecutrix

PW9-Santosh Chaddha, Principal, Deaf and Dumb School, Barnala proved the age of the prosecutrix as under:-

“I am working as Principal in Deaf and Dumb School since the year 1984 and earlier I joined the school as teacher in the year 1982. Rajni Bala daughter of Parshotam Singh was a student of my school and she is deaf and dumb. I have brought the admission register and copy of entry pertaining to Rajni Bala is Ex.P1 and the same is correct as per the original. The date of birth of Rajni Bala is recorded as 10.11.1990 in the admission record.....”

It is clear from the above evidence that she had brought original admission register and proved Exhibit P1 showing the date of birth of the prosecutrix as 10.11.1990 in the admission record. The cross-examination of this witness was made and the same is in seven lines. Her evidence about proof of Exhibit P1 has not at all been challenged in the cross-examination. The trial Court has placed reliance on the cross-examination that there was no birth certificate of the prosecutrix along with admission record and the date of birth was mentioned in the school record as disclosed by her parents in the application. It is important to note that no objection for exhibiting the document Exhibit P1 was taken, and except stating that no birth certificate was along with the admission record, there is no cross-examination at all. In other words, her evidence that the date of birth of the prosecutrix was recorded as 10.11.1990 in the

admission record (Exhibit P1) has not been challenged. The father of the prosecutrix had stated that he had handed-over the birth certificate to the police officer. The prosecution proved the evidence in the form of Exhibit P1. If the said documentary evidence is reliable, there was no reason for the trial Court to state that in the absence of birth certificate, he would not rely on the admission register (Exhibit P1). There is no requirement in law that in the absence of birth certificate, no other evidence can be looked into. Assuming that the date of birth of prosecutrix was recorded as disclosed by her parents in the application, the same could not be a ground to reject the document Exhibit P1. At this stage, let us see the evidence by her father and mother.

PW1-Paramjit Kaur stated thus, in her evidence on the aspect of age of the prosecutrix:-

“.....I have three daughters and two sons. Rajni Bala one of my daughters is deaf and dumb and she was aged about 14 and half years at the time of occurrence. She was studying in Deaf and Dumb school Barnala in 4th standard.....”

Her sworn testimony about the age of the girl as 14 and a half years has not at all been put to challenge in the cross-examination, which we find upon careful perusal of the entire evidence. Therefore, there is no reason to reject her testimony that the age of the prosecutrix was 14 and a half years. Then PW2-Parshotam Singh, father of the prosecutrix stated thus, about the age of the prosecutrix:-

“.....I have three daughters and two sons. Rajni Bala my daughter is deaf and dumb from her birth and was aged about

14 and half years at the time of occurrence. She was student of 4th standard in deaf and dumb School Barnala.....”

We have checked from the cross-examination if there is challenge to the said statement of both mother and father. But we do not find any. In the cross-examination of both the witnesses, there was no suggestion that the age of the prosecutrix was 19 or 20 years. The evidence of doctor shows, upon conduct of radiological test, that her age could be between 15 and 17 years. But then in the wake of documentary evidence Exhibit P1 and sworn testimonies of mother and father of the prosecutrix as stated above, the radiological evidence need not be preferred. The defence did not bring out on record any evidence to show to the contrary, when the prosecution has placed evidence about the age of the prosecutrix. The prosecutrix also deposed in the cross-examination as under:-

“.....My date of birth is 10.11.1990.....”

It is important to note that the above date of birth of the prosecutrix ‘R’ has been brought out in the cross-examination and therefore, we have no hesitation in holding that there is a candid admission that her date of birth was 10.11.1990. It is strange that the said evidence in the form of admission of the accused though has been noted down in Para-19 of the judgment of the trial Court, has been brushed aside. The trial Court has given following reasons in Paras-21 and 22 of the impugned judgment for holding that her birth certificate should have been produced:-

“21. The entry in the school record indicate the age of the prosecutrix to be less than 16 years. However, the ossification test indicates that the age of the prosecutrix can be more than 16 years. The copy of the entry in the school record has been proved by Santosh Chadha PW9. It is emerging in her cross-examination that there was no birth certificate of the prosecutrix along with the admission record and the date of birth was mentioned in the school record as disclosed by her parents in the application. It is significant to note that neither the application nor its copy, which was allegedly submitted by the parents of the prosecutrix at the time of admission in the deaf and dumb school, has been proved and produced on record. There is nothing to suggest that any affidavit with regard to the date of birth or the birth certificate of the prosecutrix was submitted at the time of admission in the school. At this stage, it shall be appropriate to refer a decision reported as 2008 (3) R.C.R. (Criminal) 531 (P&H), **Sunil Kumar @ Bholu Versus State of Haryana**, wherein it has been observed that it shall not be appropriate to rely upon the entry in the admission form with regard to the date of birth, as the same not recorded on the basis of certificate or an affidavit. In the said decision, it was also observed that the form was not filled by the parents, but by a stranger. In the case in hand, the entry in the school record has not been recorded on the basis of any birth certificate and furthermore, the application submitted by the parents of the prosecutrix at the time of her admission in the school has also not been proved on record. In these circumstances, it shall not be appropriate to rely upon the entry in the school record and conclude that the date of birth of the prosecutrix was 14.11.1990. In the aforesaid decision, the authenticity of the certificate was doubted on the score that the same was not

made on the basis of birth certificate or affidavit and furthermore, the ossification test indicated the age to be between 16-17 years and it was observed that the age could even be 19 years. Even in the case in hand, neither the birth certificate nor any affidavit or application submitted at the time of admission in the school has been proved on record and the ossification test indicates that the age could be 15-17 years and giving a margin on the higher side, the age of the prosecutrix could also be 19 years.

22. The matter does not rest here. It has been deposed by Parshotam Singh PW2, the father of the prosecutrix that he had handed over the birth certificate of his daughter to the police. Significantly, no such birth certificate has been produced or proved on record. Rather, the material on record indicates that the birth of the prosecutrix has not been registered. ASI Baljit Singh PW10 had submitted a request Ex.PP to the Local Registrar, Births and Deaths, Barnala, seeking the information with regard to the date of birth of the prosecutrix. The particulars of the prosecutrix were also furnished in the request, but the Local Registrar, Births and Deaths has reported that no such entry regarding birth of the prosecutrix has been reflected in the record.”

Upon careful reading of Para-22 above, it is manifest that evidence that her father had given birth certificate to police is in the nature of a stray or casual admission. That is clear from the second part of Para-22 that Local Registrar reported that there was no entry in the record. The trial Court should not have made a mountain out of mole. It is then a well settled legal position that whatever evidence oral or documentary is produced by the prosecution has to be assessed and the same can be either

accepted or rejected. There is no point in saying and rather it is idle to say that the prosecution did not produce birth certificate and as to why her entry of birth was not recorded in the local register. The fact remains that her entry of birth was made in the admission register of the School and that was proved without any challenge in the cross-examination.

The Supreme Court in the following cases held that medical evidence as to the age of the person, though, useful guiding factor, is not conclusive and has to be considered along with other cogent evidence and medical opinion could be sought only, if matriculation certificate or equivalent certificate or date of birth certificate from the School first attended is not available:-

Babloo Parsi versus State of Jharkhand and another,
(2008) 13 SCC 133 and

Shah Nawaz versus State of Uttar Pradesh and
another, (2011) 13 SCC 751.

To repeat, in the first place, the document Exhibit P1 was duly proved by bringing the original admission register in the first School where the prosecutrix was admitted and that has been well corroborated by unchallenged oral evidence of mother and father of the prosecutrix. We are at a complete loss to understand as to why the unchallenged and most natural evidence of the parents has been casually brushed aside.

We therefore, hold that the date of birth of prosecutrix was 10.11.1990 which was duly proved by the prosecution as discussed above and the finding recorded by the trial Court to the contrary is perverse and will have to be overturned.

As to the theory of consent relied on by the trial Court:

Since we have held that the prosecutrix was 14 and a half years old and was being subjected to rape seven months since before the date of occurrence, namely 05.09.2004 by the accused persons, the question of consent has no place in law. Apart from that what we find is as per the evidence of the prosecutrix herself and her mother who was an eye-witness to the actual incident of both accused Harwinder Kumar and Narinder Kumar committing rape upon prosecutrix in their house that she even tried to resist but she could not succeed and had to succumb. If the evidence of PW1-Paramjit Kaur, the mother of the prosecutrix is considered, her evidence on material particulars regarding the actual commission of offence on the relevant date, i.e. 05.09.2004 has practically gone unchallenged. She stated in her evidence that when she pushed the door, she found both the accused having caught the prosecutrix 'R' from her arms and both of them turn by turn committed sexual intercourse and as stated earlier, there is full corroboration by medical evidence on record by Doctor Neera. As such the prosecutrix had pregnancy of 22 to 24 weeks. Looking to the tender age of girl and the fact that two accused, Harwinder Kumar and Narinder Kumar being well built persons had caught hold of her hands, this Court finds that the reasons given by the trial Court are bound to shock one's conscience. We quote relevant portion from Para 26 of the impugned judgment, which reads thus:-

“.....The evidence of resistance from an unwilling female to yield to the sexual intercourse can result in tearing of

clothes, infliction of injuries on her person or on the person of the assailant. In the case in hand, there is no such injury on the person of the prosecutrix or the assailant. At the same time, it has to be borne in mind that there could be a possibility that the prosecutrix might have submitted on account of any threat or fear on the part of the assailant and it may not have resulted in any injury on her person or that of the assailant. Consequently, the other circumstances are also to be looked into to adjudicate as to whether the prosecutrix was a consenting party or not.”

These reasons about tearing of clothes, infliction of injuries etc. are only a figment of imagination. There is no cross-examination for making these unwarranted remarks. This could not be a matter of whims & fancies.

It is then significant to note that, though, admittedly, the prosecutrix is deaf and dumb and a girl of 14 and a half years, the trial Court blamed her as to why she did not disclose about her pregnancy to her parents or teachers or any other authority and that therefore, there was unexplained delay in lodging the FIR. We quote Paras-27 and 28 of the impugned judgment, which read thus:-

“27. Before delving further, it may be recapitulated that the prosecutrix was pregnant at the time of incident on 05.09.2004 and she was running 6th month of pregnancy. There are allegations to the effect that the accused had been sexually harassing the prosecutrix for the period preceding 7-8 months prior to 05.09.2004. However, the prosecutrix remained silent and never reported the matter either to her parents or teachers or any other authority till 05.09.2004,

when her mother saw the incident and the prosecutrix was got medico legally examined.

28. There is substantial delay in reporting the matter to the police. The delay in lodging the FIR is a circumstance, which renders the version of the prosecution suspicious, as the possibility of introduction of improved, coloured, concocted or exaggerated version cannot be ruled out. At the same time, it has to be borne in mind that in the event, there is satisfactory explanation to justify the delay in lodging of the FIR; it will not be efface the criminal liability against the accused.”

It is again again a figment of imagination on the part of the trial Court. Perusal of the facts show that prosecution case itself is that mother of the prosecutrix came to know for the first time on 05.09.2004 when she caught accused persons in their house and realised that her daughter had a pregnancy. No question was asked to the mother or the girl on this aspect as to why she could not see the bulging belly and on the contrary, in the absence of any cross-examination or the questions asked to the mother, the trial Court in Para-32 of the impugned judgment recorded the following reasons, which are preposterous. We quote the following portion from Para-32 of the impugned judgment, which reads thus:-

“.....In these circumstances, it cannot be disputed that the pregnancy of the prosecutrix could be noticed from her physical appearance. Even on the assumption that the prosecutrix had not confided with anyone with regard to the sexual intercourse committed by Harwinder Kumar at earlier occasion, it sounds improbable that the pregnancy of the

prosecutrix could have escaped the notice of her mother or teachers. The prosecutrix had been regularly attending the school up to 04.09.2004 i.e. a day prior to the occurrence and this aspect has also appeared in the deposition of Paramjit Kaur PW1, Santosh Chadha PW9 and the prosecutrix. In these circumstances, it sounds hard to believe that the fact of pregnancy of the prosecutrix could have escaped the notice of her mother, the other family members or the teachers in the school.”

The trial Court could not have itself imagined in the absence of cross-examination that the pregnancy ought to be visible to a naked eye that too of Paramjit Kaur. There could be reasons and reasons.

To sum up, we hold that the reasons given by the trial Court to disbelieve the entire prosecution story are as perverse as they could be. They are in violation of principals of appreciation of evidence contemplated by Section 3 of the Evidence Act. We, therefore, reverse the finding of facts recorded by the trial Court for acquittal on the ground that there was consent of a deaf and dumb girl for sexual intercourse, which ultimately and admittedly resulted into delivery of a child out of the pregnancy. The prosecutrix for all these reasons will have to be compensated also as per Section 357-A(5) of Cr. P.C.

In the result, we make the following order:-

ORDER

- (i) **CRA-D-198-DB of 2013** stands dismissed qua respondents No.2 to 5, namely, Shiv Ram, Sita Devi @ Sheela Devi, Meera Rani and Geeta Devi;
- (ii) **CRA-D-198-DB of 2013** stands allowed qua respondent No.1-

Harwinder Kumar holding him guilty. He is convicted for commission of offence punishable under Sections 366, 366-A and 376(2)(g) of IPC;

- (iii) Post the proceedings for hearing, on the question of awarding sentence to respondent No.1-Harwinder Kumar, on 03.08.2018;
- (iv) Accused-Harwinder Kumar, in custody, be produced before this Court on 03.08.2018 for hearing on quantum of sentence. This Court shall hear the accused and pronounce the sentence and order payment of compensation;
- (v) The prosecutrix 'R' and her child shall be given compensation by the State in accordance with the scheme of Section 357-A (5) Cr. P.C. within three months from today and compliance be reported;

A copy of this judgment be sent to the Registrar General of this Court for appropriate action.

(A.B. CHAUDHARI)
JUDGE

(B.S. WALIA)
JUDGE

July 27, 2018

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No