

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-1879-SB of 2016
Date of Decision : February 24, 2018

Shakti Kumar alias Baghi alias Rohit alias AmanPetitioner

Versus

State of Punjab Respondent

CORAM : HON'BLE MRS. JUSTICE LISA GILL

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Present: Mr. Arshdeep Bhullar, Advocate
 for the appellant.

 Ms. Rajni Gupta, Sr. DAG, Punjab.

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LISA GILL, J. (Oral)

Present appeal has been filed against the order dated 31.08.2015 passed by the learned Additional Sessions Judge/Exclusive Court, Amritsar, whereby the appellant has been convicted for the offence punishable under Sections 363/366 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') and sentenced as under:-

<i>Under Section</i>	<i>Sentence</i>
363 IPC	Rigorous imprisonment for three years and fine ₹ 5,000/-, in default of payment of fine, he shall further undergo rigorous imprisonment for three months.
366 IPC	Rigorous imprisonment for three years and fine ₹ 5,000/-, in default of payment of fine, he shall further undergo rigorous imprisonment for three months.

<i>Under Section</i>	<i>Sentence</i>
6 of the POCSO Act	Rigorous imprisonment for ten years and fine ₹ 20,000/-, in default of payment of fine, he shall further undergo rigorous imprisonment for six months.

All the sentences were ordered to run concurrently.

Brief facts of the case are that FIR No. 259 dated 25.12.2014 was initially registered under Sections 363/366-A at Police Station 'E' Division, Amritsar City (Ex.PW13/B) on the statement (Ex.P3) of the complainant i.e.the mother of the victim. The complainant stated that she had two daughters, the eldest daughter (victim) aged about 14 years, younger daughter aged 12 years and a 03 years old son. The complainant's eldest daughter it is stated was studying in 10th class. She had gone to the Bazaar/Market at Old Lakkar Mandi on 24.12.2014 at about 6:00 P.M. to fetch household articles but she did not return. The complainant and her family searched for her but failed to trace her. The victim was stated to be carrying a mobile phone No. 8437412821. The complainant stated that her daughter used to talk to a boy namely Aman and she believed that her minor daughter had been enticed by Aman on the pretext of marriage. Legal action was prayed for.

Formal FIR, Ex.PW13/B was registered on the basis of the said statement. PW13 ASI Lakhbir Singh stated that spot inspection was conducted and rough site plan (Ex.PW13/C) was prepared and thereafter the investigation of the case was handed over to SI Kanwaljit Kaur and ASI Narain Singh. PW17 SI Kawaljit Kaur submitted that after recovery of the victim rough site plan of the place of occurrence (Ex.PW17/B) was

prepared. The victim allegedly returned home on 26.12.2014 at about 7:00 P.M. She was produced before the police officials on 27.12.2014. Her statement (Ex.P1) was recorded. The victim's statement under Section 164 Cr.P.C. (Ex.P2) was recorded on 29.12.2014. The victim stated that her date of birth was 21.01.2000 and she was studying in Class X in the Marwari Vidyalaya School, Old Cloth Market. About a month prior to the occurrence, a boy (appellant) had called her on her mobile phone revealing his name as Aman. After a few days the same boy called her again stating that his name is Rohit and he belonged to Gurdaspur, presently residing on rent near Lohgarh. He kept calling the victim and asked her to come and meet him. The victim stated that she received a call from Rohit on 24.12.2014 at about 5/6:00 P.M. He called her to Sultanwind Gate. She initially refused but he started threatening her and out of fear she firstly went with him to Gurdwara Shaheedan Sahib and thereafter he took her to Lohgarh where he was residing on rent. At Lohgarh a friend of the accused namely Rohit met them and he addressed the appellant as Shakti Kumar. The appellant forcibly confined her in a room for two nights and committed rape upon her once or twice. The victim managed to escape from his confinement on 26.12.2014. The victim gave a consistent version in both her statements under Section 161 Cr.P.C. as well as Section 164 Cr.P.C. Offences punishable under Section 376 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') were added on 27.12.2014.

Medical examination of the victim was conducted by PW4 Dr.

Kiranjit Kaur, Medical Officer, Civil Hospital, Amritsar. Ossification test of the victim was recommended and conducted by PW9 Dr. Ketul Pathak, Junior Resident, Government Medical College, Amritsar, who opined the radiological age of the victim to be between 17-19 years. The Birth Certificate (Ex.P6) of the victim was handed over to PW5 ASI Narain Singh by the complainant. An application (Ex.PW5/E) was moved to the Head Mistress of the School where the victim was studying regarding verification of the school certificate which was taken in possession vide Ex.P7. It was verified by the Head Mistress of the School that date of birth of the victim as per the school record was 21.01.2000.

The appellant was arrested on 30.12.2014. On completion of investigation, final report under Section 173 Cr.P.C. was presented. The appellant pleaded not guilty and claimed trial.

The prosecution examined 18 witnesses to prove its case. The appellant in his statement under Section 313 Cr.P.C. denied all the incriminating evidence put to him and pleaded innocence and false implication. He specifically stated that the prosecutrix left her house out of her own sweet will and came to his house voluntarily as she was having a love affair with him. It is denied that he committed any rape as alleged. No evidence was however led in defence.

The learned trial Court on considering the evidence on record and the facts and circumstances of the case, concluded that the prosecution had proved its case beyond reasonable doubt against the appellant thereby convicting him for the offence punishable under Sections 363, 366 IPC and

Section 6 of the POCSO Act and sentencing the appellant as detailed above.

Learned counsel for the appellant argues that the learned trial Court has grossly erred in convicting the appellant on the basis of the evidence on record. It is submitted that the date of birth of the victim is not proved to be 21.01.2000. While referring to the evidence of Dr. Ketul Pathak PW9 as well as the report Ex.PW9/B it is submitted that the victim was over 18 years of age. The School Leaving Certificate or the Birth Certificate are not proved in accordance with law therefore no reliance should be placed on them. It is argued that PW12 Kiran Jolly, Incharge Birth and Death, Municipal Corporation, Amritsar, did not verify the contents of the register which was brought by her. Neither is there any record of the hospital on the basis of which entry was made in the register. The said witness PW12, it is contended clearly stated she could not say anything regarding the correctness of the entry without consulting the record received from Singhania Nursing Home. Moreover, PW10 Parvesh Kumari Sharma, Head Mistress, Shri Marwari Vidyalaya, Amritsar, stated in her cross-examination that she was not aware whether any record regarding birth of the prosecutrix was produced at the time of her admission. It is, thus, submitted that age of the prosecutrix does not stand proved from the evidence on record.

In this situation, it is vehemently argued that no offence of kidnapping of the victim by the appellant is made out as it is clear that the victim left her home out of her own accord. It is further argued that statement of the victim was not recorded on 26.12.2014 itself when she is

alleged to have returned home. She was produced before the police authorities on 27.12.2014 and her statement under Section 164 Cr.P.C. was recorded much later on 29.12.2014. The call detail records relied upon by the prosecution have not been proved in accordance with law. Reference is also made to Ex.D1 an affidavit purportedly suffered by the complainant to the effect that the FIR in question was registered due to certain misunderstandings and the complainant would have no objection in case the appellant is acquitted of all the charges against him. In this situation, it is vehemently argued by learned counsel for the appellant that conviction of the appellant is not sustainable. The victim admittedly knew the accused prior in time, used to talk to him on the mobile which she admittedly had, went to meet him out of her own accord, thus, it cannot be said that she was allured or kidnapped and thereafter subjected to rape. It is further submitted that no credence can be given to the testimony of the victim in this case as she has even gone to the extent of saying before the learned trial Court that she did not know the appellant earlier. It is, thus, prayed that this appeal be allowed.

Learned counsel for the State while refuting the arguments on behalf of the appellant submits that there is clear and cogent evidence on record which clearly points to the guilt of the appellant. The appellant has been rightly convicted by the learned trial Court vide the well reasoned and logical judgment and order dated 31.08.2015 which should be upheld.

I have heard learned counsel for the parties and have gone through the record with their assistance.

It is not in dispute that FIR (Ex.P13/B) was registered on the statement (Ex.P3) of the complainant-mother of the victim. The complainant specifically stated that her eldest daughter (victim) aged 14 years, went missing on 24.12.2014. They could not find her and report was lodged on 25.12.2014 wherein a suspicion is raised that the complainant's daughter was allured by the appellant on the false pretext of marriage. The victim returned on 26.12.2014 at 7:00 P.M. She was produced before the police authorities on the very next day on 27.12.2014. The argument that the victim was in fact presented before the police on 28.12.2014 is not correct as the evidence on record shows that her medical examination was also conducted on 27.12.2014 itself. Medico-legal report dated 27.12.2014 is on record as Ex.PW4/A. The medico-legal report reads as under:-

“O/1E 1-There is no evidence of any fresh external injury on her body. Her secondary sex characters are well developed.

P/V= Her hymen is torn (freshly), abrasions present on the posterior part of vagina and introitus. Two swabs Ist from lower vagina and introitus and IInd from upper vagina taken and send to chemical examiner for the confirmation of spermatozoa.

Opinion:- There is nothing suggestive that she could not be subjected to sexual intercourse. Final report will be given after the report of chemical examiner.”

PW1 the victim in this case specifically stated that her date of birth is 21.01.2000. She was studying in Class 10+1 at the time of her

examination before the learned trial Court. She stated that her father was doing the work of packing of material while her mother was working as a helper at Baba Khark Singh I.T.I. Amritsar. The victim was possessed of a mobile phone. She stated that the appellant used to call her. He had been threatening to kill her younger brother and sister in case she did not come to meet him. She received a call from the appellant on 24.12.2014 at about 5:30/5:45 P.M. He called her to Sultanwind Gate to meet him. The appellant met her at the spot. He threatened her with dire consequences if she did not accompany him. The appellant took her to Lohgarh where he took a room on rent and the appellant kept her there for two days. Allegation of rape being committed upon her twice during the two days is raised. On the third day the door was somehow left open and the victim managed to escape. The victim denied that she stayed with the accused out of her own free will or consent. The complainant PW2 consistently stood by her version. PW3 father of the victim specifically stated that he produced the 10th class certificate of her daughter issued by her school. The same was taken in possession by the Investigating Officer vide Memo Ex.P7.

In the present case, the first and foremost question for consideration is regarding the age of the prosecutrix. Date of birth of the prosecutrix is stated to be 21.01.2000. Her 10th class certificate was produced. PW10 Parvesh Kumari Sharma, Head Mistress of Shri Marwari Vidyalaya, Amritsar proved the original record of admission and withdrawal of the complainant. As per the said record, date of birth of the victim was mentioned as 21.01.2000. Certificate (Ex.PW10/B) was verified to be issued

by her. The prosecution also relied upon the birth certificate of the prosecutrix (Ex.PW12/A). The said certificate has been duly proved by PW12 Kiran Jolly, Incharge Birth and Death, Municipal Corporation, Amritsar. Argument of learned counsel for the appellant that there is nothing on record to show the basis on which the said entry was made either in the school register or in the records of the Municipal Corporation is of no avail. The school records were admittedly not prepared after the incident in question. The prosecutrix was admitted to the said school on 01.04.2010. She was studying in the said school since then. In respect to the argument raised on behalf of the appellant that the record of the Municipal Corporation should not be relied upon as the record of the hospital which had sent the intimation regarding the birth of the child was not available is not tenable, hence rejected. It is not the case of the appellant that the record of the Corporation or the school in question produced in Court is forged or fabricated. The genuineness of the certificates is not in question. Therefore, the argument raised on behalf of the appellant that the register brought in Court does not stand proved is not acceptable. Date of birth of the prosecutrix in the school records as well as in the record of the Municipal Corporation is in consonance with each other. Therefore, reliance on the ossification test is not called for in the given circumstances. No benefit can accrue to the appellant on account of the said ossification test. Therefore, it is duly proved that the victim in this case was less than 15 years at the time of the incident.

Therefore, the question of consent or otherwise is irrelevant and

of no avail to the appellant. As per the medical evidence duly proved by Dr.Kiranjit Kaur PW4, Medical Officer, Civil Hospital, Amritsar, it is specifically opined that there is nothing suggestive that the victim could not be subjected to sexual intercourse. It is pertinent to note that PW4 Dr. Kiranjit Kaur was not cross-examined despite opportunity.

Similarly, absence of spermatozoa on the vaginal swab lifted from the victim (Ex.PX) by itself cannot absolve the appellant. It is proved on record that the appellant was in touch with the victim who was not even 15 year old. The call detail records were produced as Ex.PW15/B by PW15 HC Sarwan Singh, Cyber Cell, office of Commissioner of Police, Amritsar. The appellant allured and enticed the victim who was a minor and subjected her to sexual intercourse.

Another argument strenuously urged by learned counsel for the appellant that the complainant i.e. mother of the victim executed an affidavit (Ex.D1) stating therein that the FIR in question was registered due to a misunderstanding is indeed fallacious and noticed only to be rejected. A bare perusal of the alleged affidavit (Ex.D1) reveals that it is a mere piece of paper upon which the purported 'affidavit' has been typed. There is no date on this document and neither has it been attested by any competent authority. The placing of the signatures of the complainant corroborates the explanation put forth by the complainant in her statement that she had signed at point A and B of the said document at the instance of the President of their locality and she had never gone through the contents of the said affidavit. The complainant specifically denied tht she executed any affidavit

to the effect that the appellant was named as an accused due to a misconception or that she had entered in a compromise with the appellant (which in any case is impermissible). There is nothing on record to dent the credibility of the victim or the complainant. Both of them steadfastly stood by the prosecution version and withstood the searching cross-examination. It is a settled position that even the sole testimony of a victim found to be truthful and trustworthy can be relied on to convict an accused.

Keeping in view the facts and circumstances of the case the prosecution has indeed proved its case beyond reasonable doubt against the appellant. Learned counsel for the appellant is unable to point out any illegality or infirmity in the impugned judgment of conviction.

At this stage, learned counsel for the appellant prays that the appellant was a young man of 22 years. He is not involved in any other criminal offence either prior or subsequent to the present case. He is the sole bread earner of his family and has aged parents who are dependent upon him. It is, thus, prayed that the sentence imposed upon the appellant be reduced to that already undergone.

It is pertinent to note that the appellant has been convicted for the offence punishable under Section 6 of the POCSO Act which reads as under:-

“6. Punishment for aggravated penetrative sexual assault :

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to

imprisonment for life and shall also be liable to fine.

A minimum sentence of 10 years is stipulated under the said Act. Therefore, the sentence in question cannot be reduced to that already undergone by the appellant. Thus the impugned judgment dated 31.08.2015 passed by the learned Additional Sessions Judge/Exclusive Court, Amritsar, convicting the appellant for the offences punishable under Sections 363/366 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 and order of sentence dated 31.08.2015 are upheld.

Accordingly, the present appeal is dismissed.

24.02.2018
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(LISA GILL)
JUDGE

Note: Whether speaking/reasoned

Yes / No

Whether Reportable:

Yes / No