

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-3310-SB of 2013(O&M)
Date of Decision: March 27 , 2018

Dharamvir Appellant

Versus

State of Punjab Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Aman Sharma, Advocate
for the appellant.

Ms. Rajni Gupta, Sr. DAG, Punjab.

LISA GILL, J (Oral).

Appellant has been convicted for the offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') by the learned Additional Sessions Judge-cum-Special Judge under POCSO Act, Rupnagar, vide impugned judgment dated 09.07.2013 and by a separate order of even dated i.e. 09.07.2013 he has been sentenced as under:-

Offence u/s	Sentence
6 POCSO Act	Rigorous imprisonment for 10 years; besides pay a fine of ₹5,000/- and in default thereof to further undergo SI for six months.
10 POCSO Act	Rigorous imprisonment for 5 years; besides pay a fine of ₹2500/- and in default thereof to further undergo SI for three months.

Aggrieved therefrom, the present appeal has been filed by the
appellant.

Brief facts necessary for the adjudication of this matter are that FIR No. 17 dated 03.02.2013 (Ex.PW5/B), was registered on the statement of the complainant-PW-1 (mother of the prosecutrix). As per the complainant's statement Ex.PW1/A, it is revealed that her first husband died about four years ago. She had two daughters from her first marriage. The complainant solemnized second marriage with the appellant about three years prior to the occurrence and was presently residing with the appellant alongwith her two daughters aged 8 years and 7 years. It is stated that the complainant's husband had been harassing her daughters physically for the last one year and in her absence he even tried to commit rape upon them. It is further stated that her daughters revealed that the appellant used to threaten them at that time. He was committing indecent acts with the children. It was thus prayed that action be taken against the present appellant.

Statement of the victims under Section 164 Cr.P.C. could not be recorded on 05.02.2013, as it was opined by the learned Judicial Magistrate Ist Class, Anandpur Sahib that they are not competent to suffer a statement due to their tender age. PW-5-ASI Raghbir Singh, the Investigating Officer, revealed that after recording of the statement of the complainant, rough site plan Ex.PW5/C was prepared after proceeding to the spot. Appellant was arrested. Statements of the witnesses were recorded. Medical examination of the victims was conducted on 04.02.2013 by Dr.Jatinder Kaur, Medical Officer, BBMB, Hospital, Nangal. No injury – external or internal was detected on the person of any of the two victims. However, it was opined that possibility of molestation and sexual assault cannot be ruled out. Final report under Section 173 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') was presented against the present appellant after completion of investigation.

The case was committed to the Court of Sessions, Rupnagar, on 13.02.2013. Charge under Sections 376, 511, 354 IPC was framed against the appellant on 20.02.2013, who pleaded not guilty and claimed trial.

Amended charge was framed on 08.07.2013 under Section 6 of the POCSO Act read with Section 376 IPC and Section 10 of the POCSO Act read with Section 354 IPC against the appellant, who pleaded not guilty and claimed trial.

The prosecution examined as many as six witnesses to prove its case.

The accused-appellant in his statement under Section 313 Cr.P.C., denied all the incriminating evidence put to him while claiming innocence and false implication. The appellant specifically stated that he was innocent. A false case had been planted upon him at the instance of the complainant, his wife, because she wanted to live with one Sunny and wanted to marry him. It is stated that the appellant opposed the same and due to this reason, he was falsely implicated in the present matter. No evidence was led in defence.

Learned trial Court on considering the facts and circumstances of the case as well as the evidence on record concluded that the prosecution successfully proved its case beyond reasonable doubt against the appellant. Consequently, the appellant was convicted for the offence punishable under Sections 6 and 10 of the POCSO Act and sentenced as detailed above.

Aggrieved therefrom, the present appeal has been filed.

Learned counsel for the appellant argues that false implication of the appellant is apparent on the face of it. It is submitted that the complainant in her cross-examination has admitted that she got married to one Sunny during the subsistence of her marriage with the appellant. She even lived with him for

about one month. While referring to the statements of both the victims recorded on 15.04.2013, it is vehemently urged that both of them were tutored. It is further submitted that both the victims being child witnesses were clearly under the influence of their mother and were admittedly tutored. Therefore, their testimonies cannot be relied upon. It is argued that the said victims were found to be incompetent to suffer a statement under Section 164 Cr.P.C., on 05.02.2013, though surprisingly only after two months on 15.04.2013 itself, they are certified to be capable witnesses.

Learned counsel for the appellant submits that when the victims were brought before the learned Judicial Magistrate Ist Class, Anandpur Sahib for recording of their statements under Sections 164 Cr.P.C. on 05.02.2013 they were found incompetent to suffer statement under Section 164 Cr.P.C. due to their tender age. In respect to the victim later examined as PW-3, it is pointed out that she did not even know the name of place where she was living. She stated that she was living on a hill. She initially did not respond when asked as to which class she was studying in and after some time responded by saying that earlier they used to be in Delhi, but then there was a fight with her father. When asked as to why she had come to the Court, she responded by saying that she had come to spend her holidays. The victim (later examined as PW-2) aged 8 years on 05.02.2013 could not reveal her age neither she could give the details of her place of residence or her school and when asked as to why she had come to Court, she responded that a quarrel had taken place. Due to the said reasons their statements under Section 164 Cr.P.C. were not recorded. It is contended that merely two months after 05.02.2013, the said witnesses have surprisingly given graphic details of the alleged offence on 15.04.2013 before the learned trial Court. It is vehemently argued that both the

said witnesses have admitted to being tutored. Therefore, their testimonies have been wrongly relied upon to convict the appellant.

It is further submitted that medical evidence on record does not point out to the commission of any offence by the appellant. Learned counsel for the appellant while pointing to the custody certificate dated 03.02.2018, submits that the appellant has undergone actual sentence of 04 years, 11 months and 28 days as on 02.02.2018 and in case remissions are included he has undergone 06 years and 28 days of the sentence for no fault on his part. It is thus prayed that conviction of the appellant be set aside and he be acquitted of the charges against him.

Learned counsel for the State has refuted the arguments raised by the appellant while submitting that there is sufficient evidence on record to sustain the conviction of the appellant. It is stated that there is clear and cogent evidence on record to prove the commission of the offence punishable under Section 6 of the POCSO Act, by the appellant. Thus, it is submitted that there is no ground for setting aside the well reasoned and logical judgment of conviction and order of sentence dated 09.07.2013, which is based on a sound appreciation of the evidence on record.

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

Complainant in this case is the mother of the two victims. In her statement Ex.PW1/A, the complainant stated that her first husband died about four years ago. She had two daughters from her first marriage. The complainant solemnized second marriage with the appellant about three years prior to the occurrence and was residing with the appellant alongwith her two daughters aged 8 years and 7 years. It is stated that the complainant's husband used to

exploit and assault her daughters for the last one year and in her absence he even tried to commit rape upon them. It is further stated that her daughters revealed that the appellant used to threaten them not to disclose about his acts. He committed indecent acts with the children. In her testimony before the learned trial Court on 03.04.2014, while reiterating her version stated that the appellant used to exploit and assault her daughters and even tried to commit rape upon them. The complainant stated that the appellant committed the said offence in her presence as well though no detail in terms of a timeline are given.

In her cross-examination, it is admitted by the complainant-PW-1 that she married the appellant after her first husband passed away about four years ago. It is further admitted by her that she solemnized court marriage with one Sunny though she tried to explain that it was not with her consent. There is no explanation regarding the circumstances in which she solemnized marriage with Sunny and the reason for the same or as to what was the undue pressure exerted upon her or who exerted the same. It was further admitted that she solemnized marriage with Sunny at Nangal about one year ago. The Court marriage is stated to have been solemnized through an Advocate. The complainant duly put her thumb impression on papers pertaining to the said marriage. The complainant admittedly remained with said Sunny as his wife for about one month at village Mangat near Nangal. It is further stated by the complainant that the appellant brought a dagger to kill Sunny about a month after her marriage. However, the matter was not reported to the police. The complainant has denied the suggestion that the appellant had sold his land in Uttar Pradesh for ₹1,50,000/- and she along with Sunny embezzled that amount and thereafter, in connivance with Sunny, false allegations were raised against the appellant.

PW-2, daughter/victim aged 8 years gave details of the act committed by the appellant. PW-2 stated that her mother told her that she was to give a statement before the Court and policemen also told her what she was to depose. It is further stated by PW-2 that she never quarreled with the appellant.

PW-3, another daughter/victim, recorded to be aged 4 years narrated that the appellant did indecent acts with her as well as her sister. When they protested, he would beat them as well as their mother. PW-3, in her cross-examination stated that her mother had told her what to say and whatever was told by her mother she has stated today. Though, subsequently, she stated that none had told her what is to be deposed before the Court. It is further stated by PW-3 that the appellant used to keep her and her sister like daughters. He even used to chastise them when they were wrong.

PW-5-ASI Raghbir Singh, the Investigating Officer stated that on 03.02.2013, he along with the police party was present at Rajiv Gandhi Chowk, Nangal. Statement of the complainant (Ex.PW-1/A) was recorded and thumb marked by her in the presence of Lady Constable Kumari Neerja. Rough site plan Ex.PW5/C was prepared on visiting the spot. The accused was arrested vide memo Ex.PW5/E. It is stated by PW-5 that statements of the victims were recorded under Section 164 Cr.P.C. whereas this is clearly opposed to the record as the both the child witnesses were found incompetent to suffer a statement by the learned Judicial Magistrate Ist Class, Anandpur Sahib on 05.02.2013. PW-5 further stated that he did not have any knowledge as to whether the complainant was residing with one Sunny at Village Mojjowal. He did not join any other person from the locality in investigation. It is to be noted at this stage that no statement of the child witness/victim allegedly recorded by PW-5 formed part of the final report under Section 173 Cr.P.C. Ex.DA was

produced by the defence i.e. the statement of PW-3 recorded on 03.02.2013, wherein she has stated that she was 8 years old and was living with her mother at Chughian near Kusht Ashram, Nangal, District Ropar, along with the appellant, who was engaged in work of scrap. She further stated that her mother was working in the houses of other people and in the absence of her mother, the appellant did indecent acts with her. She told her mother about it.

A perusal of the evidence on record reveals that a palpable and substantial doubt is cast on the prosecution version. Perusal of the statement of the complainant herself as well as of the victims does not inspire sufficient confidence to convict the appellant solely on the basis of their statements. It is a matter of record that no details whatsoever have been given by the complainant in terms of even the approximate date, month or time when the alleged offence was committed by the appellant. Moreover, it is opposed to all kind of probabilities that once she came to know about the alleged attempt of the appellant to exploit or rape her daughters, she would not have protested right away. It is to be noted that PW-1 stated that the appellant attempted to commit rape upon the victims a few times in her presence. It is opposed to all normal probabilities and sensibilities that a mother would not have protested in such a situation. It is reiterated that there is no detail of time or even month or year of the alleged occurrence.

It is pertinent to note that PW-1, in her cross-examination specifically stated that during the subsistence of her marriage with the appellant she solemnized another marriage with one Sunny about one year prior to recording of her statement before the learned trial Court. It is admitted that it was a Court marriage and she appended her thumb marks on the relevant papers. Even though, PW-1 seeks to explain that her marriage with Sunny was

not with her consent. In the very next breath, she admitted that she remained with said Sunny as his wife for about one month at village Mangat near Nangal. There is no explanation or narration of any compelling circumstance in which the complainant solemnized marriage with the appellant. She further stated that the appellant was enraged because of her marriage with Sunny and after about one month of this marriage, he attempted to kill Sunny with a dagger. Peculiarly, PW-1 stated that when the appellant was arrested on 03.02.2013, the complainant was living with him.

At this juncture, it is relevant to note that a specific doubt arises as to whether the complainant and the victims were even residing with the appellant at the time of the alleged incident. It is not the case of the complainant that she was forcibly brought back from the said Sunny by the appellant and made to reside alongwith the appellant. It was incumbent upon the complainant to have explained the said circumstances. It is trite that an accused can be convicted on the sole testimony of the victim in given circumstances. However, where the attended circumstances impinge upon the credibility of the victim-complainant, the Court is entitled to look for corroboration. Statement of PW-5, ASI Raghbir Singh reveals that he has not even verified the place of residence of the complainant. He has even gone to the extent of saying that the statements of the victims were recorded under Section 164 Cr.P.C., whereas this is totally opposed to the record.

Another factor which requires consideration in this case is the reliability of the evidence of the child witness/victims. A perusal of the record indeed reveals that the learned Judicial Magistrate Ist Class, Anandpur Sahib, had opined on 05.02.2013 that the child witnesses were not competent to depose. However, barely two months thereafter, both the victims when

examined gave graphic details of the alleged incident/incidents before the learned trial Court on 15.04.2013. PW-2, the victim aged 8 years in contradiction to PW-1 stated that her mother i.e. the complainant was not married with any other person after her marriage to the appellant. She specifically deposed that her mother had told her that she was to suffer a statement before the Court and the policemen had told her what was to be deposed. In the next breath, she says that she has never quarreled with the appellant. It is sought to be explained that the appellant used to give filthy abuses and her mother does not want to live with him. PW-2 stated that the appellant used to keep them along as their earlier father Nasir used to. PW-3, the victim aged 4 years in her cross-examination clearly stated that her mother had told her what to say before the Court and whatever was told by her mother was stated by her, though in the next breath, she says that no one had told her what should be deposed before the Court. It is admitted by PW-3 that the appellant used to keep her and her sisters like his daughters. He would even chastise them when they were wrong.

Doubtlessly, the Evidence Act, 1872 does not prescribe a particular age as a determining factor to prove a witness to be a competent one. A child of a tender age can also be allowed to testify in case he is found to be capable of understanding questions and of giving rational answers thereto. Evidence of the child witness cannot be rejected per se, but it is a settled principle as a rule of prudence that such evidence should be subjected to close scrutiny. The Hon'ble Supreme Court in **State of Karnataka v. Shantappa Madivalappa Galapuji and others**, 2009(12) SCC 731 has observed as under:-

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who

notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

In the case of **Jagjit Singh @ Jagga v. State of Punjab, 2005(3) SCC 689**, the Hon'ble Supreme Court did not rely upon the testimony of a child witness, aged 7 years who was the sole eye-witness in a matter under Section 302 IPC.

In the present case keeping in view the facts and circumstances as discussed in the foregoing paras, it would be unsafe to solely rely upon the evidence of both the child witnesses/victims and the testimony of the complainant to convict the appellant. In the given set of circumstances, it is necessary to look for necessary corroboration of the prosecution version.

PW-6-Dr. Jatinder Kaur, Medical Officer, BBMB, Hospital, Nangal testified that she examined PW-2, aged 8 years and PW-3 aged 7 years. In respect to PW-2, it was opined as under:-

“She was conscious, cooperative, well oriented. She bears no marks of violence on her body and private parts. On examination, her breast are on early developing stage. No axillary hair present.

No pubic hair present.

Examination of genitalia: no public hair, hymen intact, no marks of violence present, swabs were taken from introitus and slides were made. PV examination not done. Child was frightened and started crying.

Molestation and sexual assault possibility cannot be ruled out. I have brought the original MLR register and carbon copy of MLR of Rekha is Ex.PW6/A. I identify my signatures on it.”

In respect to PW-3, it is opined as under:-

“On examination, she was conscious, cooperative, crying and scare. She has no marks of violence on her body. Secondary sexual characters were not present.

Examination of genitalia: No public hair present, hymen intact, no marks of violence present, swabs were taken from introitus and slides were made. PV examination not done.

Possibility of molestation and sexual assault cannot be ruled out. I have brought the original MLR register and carbon copy of MLR of Asha is Ex.PW6/B. I identify my signatures on it. Intact hymen does not rule out the possibility of fingering. It if is done violently then hymen can be torn off.”

Appellant in his statement under Section 313 Cr.P.C, has specifically stated that a false case has been planted upon him at the instance of the complainant because she wanted to live with one Sunny and he had opposed the same. It is due to this reason that he was falsely implicated. The complainant as noted earlier has admitted her marriage with said Sunny thereby lending credibility to the case of defence. Despite her admission of this marriage with Sunny and cohabitation with him, there is no explanation for the same. As mentioned earlier, sole reliance on the statements of the child witnesses is not justified in this case. Credibility of the complainant has been rendered suspect.

In this situation, the learned trial Court has erred in holding the appellant guilty

of the offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012.

There is no doubt that the appellant has been charged with an offence of a serious nature, which need to be dealt with a great sensitivity. However, at the same time the court cannot proceed on the basis of any kind of presumption and without there being clear and cogent evidence against the appellant. The evidence on record is extremely sketchy and does not unerringly point out solely to a hypothesis of guilt of the appellant beyond the shadow of reasonable doubt.

Keeping in view the facts and circumstances of the case as discussed in the foregoing paras, it is clear that a material and substantial doubt is cast on the prosecution version. Appellant is indeed entitled to the benefit of doubt in this case.

Accordingly, this appeal is accepted. Impugned judgment of conviction and order of sentence dated 09.07.2013, passed by the learned Additional Sessions Judge, cum-Special Judge under POCSO Act, 2012, Rupnagar, are set aside while affording the benefit of doubt to the appellant. Consequently, he is acquitted of the charges as against him. The appellant is in custody. He be released forthwith, if not required in any other case.

March 27, 2018
s.khan/om

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.