

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

340

CRA-S-808-SB-2015 (O & M)
Date of Decision: 16.05.2018

Raju Yadav

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Ms. Aditi Girdhar, Advocate
for the appellant.

Mr. Neeraj Poswal, A. A.G., Haryana.

ANIL KSHETARPAL, J.

Appellant is in the appeal against the judgment of conviction under Section 342 and 376 IPC as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO' – Act for short) and order of sentence passed by the learned Additional District and Sessions Judge, Faridabad. Relevant extract of the order of sentence reads as under:-

<i>Offence under which convict has been sentenced</i>	<i>Period of imprisonment</i>	<i>Amount of fine imposed.</i>	<i>Imprisonment in default of payment of fine</i>
342 IPC	Rigorous imprisonment for one year	Rs.5,000/-	Rigorous imprisonment for seven days
376 IPC	Rigorous imprisonment for ten years	Rs.25,000/-	Rigorous imprisonment for one year
4 of POCSO Act	Rigorous imprisonment for ten years	Rs.25,000/-	Rigorous imprisonment for one year

Facts as noticed by the learned Additional Sessions

Judge are extracted as under:-

“2 The brief facts of the prosecution case are that on 11.6.2014 complainant (name withheld to protect identity and hereinafter referred to as prosecutrix) recorded her statement to the effect that her father and mother are working as labourers in KPC Company 13/3, Faridabad. She is studying in 8th class in Sharda Public School. She stated that they are four brothers and sisters. She further stated that on 10.06.2014 at about 3:00 p.m. she went to bathroom and thereafter washing her hands, in the meanwhile Raju Yadav who is living alone in the room adjacent to the bathroom, closed her mouth tightly and pushed her to his room and then bolted the room from inside. Thereafter he committed rape upon her against her wishes due to which she became unconscious due to fear. She further stated that at about 7:00 p.m. when his father and mother returned, they searched for her. When her mother saw from the window of Raju, complainant was lying unconscious there. Raju was also present in the room. She stated that her father, mother and the landlord opened the door of the room and she regain consciousness with the help of water.

On the basis of aforesaid complaint

Ex.PD, formal FIR ExPJ was recorded. During

investigation accused was arrested and prosecutrix as well as accused were medico-legally examined. During further investigation, statement of prosecutrix under section 164 Cr.P.C. was got recorded. Accused suffered disclosure statement Ex.P26 during investigation and got demarcated the place of occurrence. Rough as well as scaled site plan were prepared. Statements of witnesses under Section 161 Cr.P.C. were recorded. All other necessary formalities of investigation were completed and then final report under Section 173 Cr.P.C. so as to prosecute accused was prepared and was submitted in the Court of learned Area Magistrate. Learned Judicial Magistrate, Faridabad, vide her Order dated 7.8.2014 committed the case to the Court of Sessions after making compliance of the provisions of Section 207 Cr.P.C.”

Prosecution in order to prove the guilt of the accused examined following witnesses:-

“PW1 - Anoj Kumar, draftsman,

PW2 – constable Kuldeep no.2844,

*PW3 - Dr. Arpana Gupta, MO B.K.Hospital,
Faridabad,*

PW4 - Dr. Vandana Arora, Dental Surgeon,

PW5 - Inspector/SHO Kailash Chand,

PW6 - prosecutrix,

PW7 – Shyamdhhar Pandey,

PW8 -Dr. Manish Dayal, MO B.K. Hospital,

PW9 - EASI Kuldeep,

PW10 - ASI Manoj Kumar 729,

PW11 - ASI Rajinder Singh,

PW12 - Ms. Monica Khangwal, JMIC, Faridabad,

PW13 - Dr. R.S. Gaur, Orthopedic Surgeon,

PW14 - HC Neeraj Kumar,

PW15 – Lady Inspector Krishna”

Appellant was confronted with all the incriminating material produced by the prosecution in its evidence. In his statement under Section 313 Cr.P.C. he pleaded innocence and claimed trial.

This Court has heard learned counsel for the appellant as well as learned Additional Advocate General, Haryana for the State.

Learned counsel for the appellant has drawn attention of the Court to the report of medical examination of the prosecutrix and has submitted that no injury was found and, therefore, there was no forcible sexual intercourse. She has further submitted that the appellant and the prosecutrix were living in one building. She has further submitted that neither birth certificate has been produced nor school certificate was produced, although, it is the case of the prosecution that she was studying in 8th standard. Hence, she submitted that the appeal filed by the appellant deserves to be accepted.

On the other hand, learned State counsel has drawn attention of

been recorded that age of the prosecutrix is between 14 to 16 years with a margin of error of 6 months on either side. The conclusion drawn by the doctor is extracted as under:-

“Approximate bone age after ossification test is between 14-16 years with margin of error of six months on either side”

Apart therefrom, learned counsel for the State has drawn attention of the Court to Ex.PC, a report by Dr. Vandana Arora, Dental Surgeon, who has also opined that the age of the prosecutrix is between 12-13. The conclusion drawn by the Dr. Vandana Arora is extracted as under:-

“Xray Report :- As the three second molar are erupted in oral cavity but the roots of all second molars are incomplete hence the dental age of the patient is likely to be between 12-13 years.”

Dr. Vandana Arora has appeared in the witness box as PW-4 and proved the report.

Appellant appears to be a very poor person. Before the learned trial Court also he was provided with a legal aid counsel, who conducted the trial on behalf of the appellant. Even before this Court, appellant is represented by a legal aid counsel.

Before deciding the appeal, this Court is to determine two issues:-

(i) Whether the age of the prosecutrix is proved to be below 18 years at the time of incident?

(ii) If yes then whether the offence of rape is made out or not?

As discussed above, prosecutrix has been examined by two

doctors. Ossification test Ex.PA shows that approximate bone age of the prosecutrix is between 14-16 years with a margin of error of six months on either side whereas on dental examination opinion is that the age of the prosecutrix on the date of incident is between 12-13 years. Hence, from the medical evidence, the Court is unable to arrive at any final conclusion as to what is the correct age of the prosecutrix at the time of incident. However, there is one significant fact, which has been overlooked by the learned trial Court. Admittedly, prosecutrix was studying in 8th class in Sharda Public School. Prosecution has not produced any record from the school to establish the age of the prosecutrix. It was the duty of the prosecution to produce best evidence in the Court. However, same has been withheld from the Court. As per Section 114 of the Evidence Act if the best evidence is withheld, the Court is justified in drawing adverse inference against the party which has withheld with the evidence. In a criminal case, prosecution is bound to prove that the accused is guilty of the offence attributed to him beyond any reasonable doubt. Medical evidence produced to determine the age is always on the basis of approximation. Normally in the ossification test, it is written, that variation can be of two years on either side. However, in the present case, report talks of margin of error of six months on either side. Such being the position, it was obligatory on the part of the prosecution to produce the school record enabling the Court to arrive at a conclusion. Since the record from the school has not been produced the benefit of doubt has to be given to the appellant-accused.

Next issue which needs examination is whether the appellant is guilty of offence of rape. As per the medico legal report Ex.PB, no marks of external injuries were seen. Hymen was intact, no redness, edema or

bleeding was found.

Still further, when statement of prosecutrix was recorded by the Judicial Magistrate under Section 164 Cr.P.C., she submitted that when she went to washroom to wash her hands, the accused came and put his hand on her mouth which she got removed. Thereafter, he went and brought some cloth and put it on her mouth and then took her to his room and she became unconscious and when she regained conscious, she found that accused has done wrong act with her. However, when she appeared in the witness box before the Court, she improves upon her statement given before the Magistrate. She stated that appellant-Raju came to the washroom and got hold of her mouth. She with great difficulty removed his hand but he again caught hold and pulled her inside his room.

The relevant part of the statement of the prosecutrix in the Court is extracted as under:-

“We are four brothers and sister. I am student of 8th standard of Sharda Public School. On 10.6.2014, at about 3.00 pm I had gone to wash my hands in bathroom. Accused Raju came there and he got hold of my mouth, I faced great difficulty while removing his hand and he again caught hold of my mouth and he pulled me inside his room and bolted the door from inside. He pulled down my underwear and committed rape upon me. I became unconscious. My parents were looking for my whereabouts and my younger brother Reshu saw me from the window of room in a unconscious state and he informed my father and mother. Accused

had remained inside the room.”

It is not in dispute that prosecutrix and appellant used to reside in the same building. Her statement as extracted above, is clearly not the same as she stated before the Judicial Magistrate while getting recorded her statement under Section 164 Cr.P.C. During cross-examination she has stated that room of the appellant-accused is on the same floor opposite the room where prosecutrix lives with her family.

In view of the discussion made above, the judgment passed by the learned trial Court cannot be sustained and the same is set aside.

Hence, the appeal is allowed.

Appellant is acquitted of the charges and he be released forthwith if not required in any other case.

16.05.2018
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(ANIL KSHETARPAL)
JUDGE

Whether Speaking/Reasoned: Yes/No
Whether Reportable : Yes/No