

In the High Court of Punjab and Haryana at Chandigarh

Crl. Appeal No. S-927-SB of 2015 (O&M)
Date of Decision: 6.10.2018

Munna alias Deen Mohd.Appellant

Versus

State of HaryanaRespondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Deepinder Singh, Advocate with
Mr. Ram Krishan Rana, Advocate
for the appellant.

Ms. Priyanka Sadar, AAG, Haryana.

ANITA CHAUDHRY, J

The appellant was convicted and sentenced to imprisonment
given below:-

<i>Offence under which accused held guilty</i>	<i>Period of sentence</i>	<i>Fine imposed (Rs.)</i>	<i>Sentence awarded in default of fine</i>
376 IPC	Rigorous imprisonment for ten years	25,000/-	Rigorous imprisonment for one year
363 IPC	Rigorous imprisonment for seven years	5,000/-	Rigorous imprisonment for three months
366-A IPC	Rigorous imprisonment for ten years	10,000/-	Rigorous imprisonment for one year
506 IPC	Rigorous imprisonment for three years	5,000/-	Rigorous imprisonment for one month
4 of POCSO Act	Rigorous imprisonment for seven years	25,000/-	Rigorous imprisonment for one year

Being aggrieved, he has preferred this appeal.

It would be necessary to give the facts leading to the registration of the FIR.

Shamsadi made a complaint to the police on 3.6.2014 that she had left her seven years old daughter in the house of her maternal uncle Fakruddin. The child was sent to village mosque to study. A call was received by the complainant on 2.6.2014 regarding an occurrence which had taken place with the minor daughter. She along with the husband came to village Dhauj and spoke to their daughter. The child accused Munna, a neighbourer. She disclosed that she had gone with Imran and Ashraf near the school to eat food (*falli*) where she met Munna who told her that there were lot of *fallis* in the *jawar* field and that he would give her *falli* and he took her to the fields and gagged her mouth and took off her salwar and removed his pants and kissed her and laid her down with an intention to rape her. The child started crying. Her cries were heard by Imran and Ashraf who came running. On seeing them Munna fled away. While leaving, he extended a threat that he would kill her if she informed anyone. The incident is stated to have taken place in the afternoon of 2.6.2014.

Acting on the complaint, the child victim was produced before the Magistrate for her statement under Section 164 Cr.P.C. where she made allegations of rape. The medical examination of the child was carried out.

Challan was presented under Sections 363, 366, 376, 506 IPC and Section 4 of the POCSO Act and charge was accordingly framed. The accused pleaded not guilty and claimed trial

The prosecution examined the victim, her mother, the medical officers and the Magistrate. The key witnesses namely Imran and Ashraf

were given up as unnecessary. No evidence was led in defence.

The trial Court accepted the statement of the victim and recorded his conviction and sentenced him to the punishment mentioned aforesaid.

I have heard both the sides.

The submission on behalf of the appellant is that the child was only seven years old and she had gone with two other boys together and it is impossible that such incident could have occurred and even if it is to be believed that there was some incident then the mother had only alleged that there was preparation and the child was laid on the ground with an intention to rape and the child started crying on which the two boys who were with her came forward and the accused ran away but when the statement of the girl was recorded under Section 164 Cr.P.C., allegations of rape were made but the medical evidence does not support the prosecution as no redness or swelling or any mark of injury was noticed and the hymen was intact. The counsel further submits that the mother of the victim did not support the prosecution version and had turned hostile though the victim stood by her statement. The counsel also submits that if her statement is seen, she also does not allege rape and she had only stated that the accused had touched her vagina. He also submits that at the most the case would fall under Section 7 of the POCSO Act. The counsel further contends that the trial Court had erred while convicting the accused under Section 376 IPC and awarded separate sentence under Section 376 IPC and Section 4 of the POCSO Act. The counsel further submits that Section 366-A IPC would not be attracted as there is no other person involved. Counsel also submits that it was not a case of kidnapping as the child victim was accompanied by

two other boys. Counsel further contends that the child in the cross-examination has admitted that she had been tutored by her grandfather and the child was not a competent witness and did not have full understanding or the consequences of her statement and the most important witnesses namely Imran and Ashraf were given up as unnecessary.

The State counsel supported the judgment of the Court below.

The complaint had been lodged by the mother who had received a call from her relatives where her child was living. On arrival, the complainant spoke to her daughter. In the first version given to the police the incident narrated was that the child was taken to the *jawar* fields on the pretext of giving her *falli* and her clothes were removed and the accused undressed himself and kissed her and laid her on the ground and lay upon her on which the child cried and on hearing her cries, Imran and Ashraf came and the accused fled away. Imran and Ashraf who were witnesses to the occurrence were not examined. They were important witnesses and they could have deposed whether they had found the girl undressed.

The child was taken before a Magistrate where she gave a different account and alleged that the accused had removed her clothes and his own clothes and had touched her vagina and had put his penis in her mouth and then raped her. She had stated that she had raised alarm on which Imran and Ashraf reached there and the accused ran away. The child's medical was done the next day. The medical officer did not find any swelling or injury or redness. The hymen was found intact. Samples were sent to the chemical examiner, the FSL report was negative. No semen was detected on the swabs.

At the trial, the complainant completely changed her version

and was turned hostile and she did not stand by her first statement. The victim on the other hand merely stated that the accused caught hold of her and lifted her and showed a knife and threatened to shoot her and she said that he had done nothing else. She stated that Ashraf and Imran were with her but then she added that the accused touched her vagina and he had taken off her clothes and his own clothes and touched her vagina with his penis. In the cross-examination, when probed she could not say whether there was a dispute between her maternal grandfather and father of the accused. She stated that she had come to the Court with her maternal grandfather. She admitted that she was making a statement as had been tutored by the maternal grandfather.

The medical evidence does not support the prosecution. There was no redness or injury to the private parts. The hymen was intact. No semen was found on the vaginal swabs. In the light of this evidence, the statement of the child victim has to be carefully examined. It is important to find out whether the statement made by her is implicitly reliable and whether it inspires confidence or whether the Court is impelled to seek corroboration. The statement has to be considered with close scrutiny and see whether this tender age child could form a discreet opinion of the nature of incident.

The statement of the child witness is broadly consistent with the first information report. We find that there is an improvement made in the statement recorded under Section 164 Cr.P.C. The medical evidence does not suggest any penetration. There was not even slightest penetration. The hymen was found intact. The medical evidence does not support the prosecution case. Therefore, the statement of the child witness cannot to be

relied upon fully. At the same time the child had no motive to falsely implicate the accused and some incident had taken place and therefore it is to be seen whether the child was sexually assaulted, whether there was a penetrative sexual assault or it was only a sexual assault that would fall under Section 7 of the POCSO Act.

The accused had also been charged for kidnapping the child. He had also been charged for the offence under Section 366-A IPC which requires the presence of some other person which is not the case here. The child had gone out of the house on her own. She had not been kidnapped. She was accompanied by two other boys of the neighbourhood/relatives and they were on their way to collect food from the shrubs. The allegations against the appellant are that he enticed the child and made her go to the *jawar* crop by offering her plenty of *falli* which was available in the *jawar* crop. It appears that the accused did have the intention of sexual assault and in furtherance of that he took the child victim to the site and removed her clothes and also removed his clothes and laid down upon the child and it is then that the child cried for help and the other two boys reached the spot and the accused managed to flee. For the sake of repetition it needs to be said that in the first version there was no complaint of penetrative sexual assault. There is no evidence of kidnapping. The medical evidence does not support the prosecution so far as rape is concerned. Therefore, conviction recorded under Section 376, 366-A and 363 IPC has to be set aside.

The version of the child victim, however, has to be accepted with respect to the allegations which were initially made in the complaint. The case would fall under Section 7 of the POCSO Act as the accused with the sexual intent had touched the vagina with his hand and then with his

penis and had physical contact. The victim in her statement in the Court had also stated that she was threatened. Therefore the prosecution was only able to prove sexual assault and threat by the accused and the appellant is convicted under Section 7 of the POCSO Act (punishable under Section 8 of POCSO Act) and Section 506 IPC. He is acquitted under Sections 363, 366-A and 376 IPC and Section 4 of the POCSO Act.

Counsel for the appellant refers to the custody certificate and states that the accused has already undergone more than the sentence which is provided under Section 8 of the POCSO Act.

The appellant is sentenced to rigorous imprisonment for five years under Section 8 of the POCSO Act along with fine of Rs. 25,000/- and in default of payment of fine, the appellant would further undergo rigorous imprisonment for one year. Conviction and sentence under Section 506 IPC is maintained.

The appeal is partly allowed. The conviction and sentence is modified as above. As per custody certificate the appellant has undergone the imprisonment. He be released on deposit of fine and if his custody is not required in connection with any other case.

(ANITA CHAUDHRY)
JUDGE

October 06, 2018
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : No