

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

**Crl. Revision No. 2847 of 2017
Date of decision : 28.05.2018**

Bhura @ Rashid

... Petitioner

versus

State of Haryana

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Mr. Gautam Dutt, Advocate
for the petitioner.**

Mr. Arun Kumar, AAG Haryana.

ANITA CHAUDHRY, J.

The petitioner-jvenile in conflict with law has challenged the judgment of conviction and sentence passed by the Courts below.

The Juvenile Justice Board (in short, the Board) vide its judgment dated 11.01.2017 held him guilty under Sections 366-A, 376-D read with Section 34 IPC and under Sections 3 and 4 of the Protection of Children from Sexual Offence Act, 2012 (for brevity, POCSO) and ordered his stay in the Special Home for three years. The Appellate Court below modified the sentence and held him guilty under Sections 366 and 376 IPC, while his conviction under Section 4 of the POCSO Act was upheld. The sentence imposed by the Board was maintained and the appeal was dismissed.

The prosecution case, in brief, was that on 11.12.2014 prosecutrix (PW9) approached the police and in the presence of District

Protection Counsel made a statement that on 05.12.2014 she along with her brother had gone to the fields to ease in the evening at about 7:00 p.m. The appellant along with his brother-in-law came there. On gun point, the appellant forcibly made her to sit on the motor cycle. She was gagged and taken to the jungle in village Sikwara, Rafiq the third accused was also present. She was raped by them turn by turn. Rafiq went away while appellant and his brother-in-law took her to a house in village Sikwara. Asubi, mother of appellant offered to get her married to the petitioner. She was kept there for two days. On the third day, Sarju, mother of the appellant, Wahid, Hakku and Hasi took her and left at the outskirts of her village and threatened her not to report the incident. The prosecutrix returned home and narrated the incident to her parents.

On the basis of aforesaid statement, FIR was registered and investigated. The prosecutrix was medically examined. Vaginal swabs were taken and her clothes were sent for examination. The appellant was arrested on 12.01.2015. He was also medically examined. As he was a juvenile, challan against him was presented before the Board for enquiry. It was mentioned that the co-accused could not be arrested.

He was served with a notice of accusation for the offences under Sections 366-A, 376-D read with Section 4 of POCSO Act.

At the trial, sixteen witnesses were produced by the prosecution which included the prosecutrix and her parents and the investigating officer.

The incriminating evidence was put to the juvenile in his statement under Section 313 Cr.P.C., which were adjured.

No evidence in defence was led.

On appraisal of evidence, the trial Court held the petitioner

guilty and sentenced him in the manner indicated above. The juvenile filed the appeal. It is relevant to mention here that the first Appellate Court called the status report about the remaining accused and the police in the status report dated 30.05.2017 informed that Rafiq and Talim were found innocent and were not required in this case. The Appellate Court held that there was no inducement and the prosecutrix was kidnapped and was subjected to rape by the juvenile alone. As noticed above, it modified the conviction of the juvenile, but his sentence was maintained and the appeal was dismissed.

Dis-satisfied with it, the petitioner has filed the revision petition.

I have heard learned counsel for the appellant and learned State counsel, assisted by counsel for the complainant and have gone through the records carefully.

Learned counsel for the petitioner had urged that the Courts below have erred in placing implicit reliance upon the unreliable and incredible testimonies of the prosecutrix and her parents. He had submitted that, there was inordinate and unexplained delay in reporting the matter to the police. According to him, no occurrence had taken place and had there been kidnapping on 05.12.2014 the parents would have lodged a report. The prosecutrix was recovered on 07.12.2014, but the police was informed on 11.12.2014. All these things go to show that the story was concocted. He had further referred to the medical evidence on record and had urged that it totally belies the prosecution case as there was no mark of external injury and no semen was detected on the vaginal swab. It was urged that the prosecutrix was married a year prior to the alleged incident and her hymen

was ruptured and there was no medical evidence to support her statement that she was ravished. He had further urged that Sarpanch of the village, who had handed over the custody of the prosecutrix to her parents, was not cited as prosecution witness nor he was produced in the Court and the genesis of prosecution case had been concealed.

On the other hand, learned State counsel has supported the judgment. According to him, there was ample evidence on record to prove that the prosecutrix, a minor had been kidnapped and abducted and was subjected to rape by the petitioner and he was rightly convicted and sentenced.

It is not in dispute that the prosecutrix was minor on the date of incident i.e. 05.12.2014. Ex.PW12/B school leaving certificate shows her age as 08.02.1999. No evidence contrary thereto was brought by the petitioner. The case rests on the sole testimony of prosecutrix. The testimonies of her parents are hearsay. They only related what was told to them. No doubt conviction can be recorded on the solitary testimony of prosecutrix, but it has to be scrutinized with care and caution and cannot be mechanically applied to every case of sexual assault. On careful scrutiny of the evidence available on record, this Court is of the considered view that the prosecution case suffers from glaring defects and serious infirmities which go to the root of the case and speak volume about the veracity of the version propounded by the prosecutrix and her parents.

It was the case of the prosecution that the prosecutrix was kidnapped on 05.12.2014 when she had gone to ease alongwith her brother. It has come in the statement of parents of the prosecutrix that immediately thereafter their son told about the kidnapping of prosecutrix by the

petitioner and one other person on gun point. But no information was given to the police. As per prosecution case, the girl was handed over to her parents by the Sarpanch on 07.12.2014 and she disclosed to them about her kidnapping and rape by the petitioner and two others. This time also, the prosecutrix and her parents kept quiet and did not inform the matter to the police and after a considerable delay the matter was reported to the police on 11.12.2014 and FIR was lodged. Though, father of the prosecutrix attempted to cover up the delay and deposed that on 06.12.2014 a complaint was made to the police and the police took his signatures and that of his brother and Sarpanch on the papers. But there is nothing on record to show that any complaint was made to the police on 06.12.2014. The prosecutrix also deposed that between 06.12.2014 to 11.12.2014 her parents and she had gone to the police station for getting the FIR lodged, but the police did not record her statement. But it stands falsified from the fact that neither in the FIR nor in her statement recorded under Section 164 Cr.P.C., she had mentioned that earlier attempts were made to lodge the complaint with the police. The unnatural conduct of the parents of the prosecutrix and the inordinate and unexplained delay on the part of prosecution to report the matter to the police speaks volume about the veracity of the deposition made by the prosecutrix and her parents. They are contradictory as to when the prosecutrix had returned. As per PW6 (father of the prosecutrix), the girl was handed to them on 07.12.2014 by the Sarpanch at about 2:00 a.m. in the night, whereas PW7, mother of the prosecutrix deposed that they had gone to the house of Sarpanch three days after the occurrence at 10:00 p.m. and girl was given to them. The prosecutrix though claimed in her statement that she was kept in the house till 07.12.2014, but she contradicting herself

deposed in her cross-examination that she along with her parents had gone to the police station on 06.12.2014 to lodge a complaint.

Hon'ble Supreme Court in **Raju and others Vs. State of Madhya Pradesh, (2008) 15 SCC 133** has held that the accused must be protected against the possibility of false implication. It has been further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should without exception be taken as the gospel truth. It was held:

"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would

not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

(2009) 15 SCC 566 it has been held that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. It had been held as follows:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.

In this case, vital link in the chain of evidence is missing. The Sarpanch of the village had given the girl to her parents, but he was not cited as a prosecution witness. As per statement of prosecutrix and her parents, she was handed over to Sarpanch by the mother and relatives of the petitioner and the Sarpanch called her parents. He was an important witness but for the reasons best known to the investigating agency he was not cited as a prosecution witness and kept away from the witness-box. He was the best person to depose about the manner of her recovery.

The medical evidence also belies the story propounded by the prosecution witnesses. A perusal of statement of PW5 Dr. Ruchi Mangla would reveal that though her hymen was found ruptured, but it has come in the statements of prosecutrix and her parents that she was already married about a year prior to this incident. On examination, no external mark of injury was found on the body of the prosecutrix. Had she been subjected to

rape, as has been deposed by her, there would have been resistance and marks on her body, which were missing. The investigating agency did not bother to obtain final opinion regarding rape from the doctor. No semen was detected on the vaginal swabs. Human semen detected on the Salwar of the prosecutrix was never sent for DNA analysis.

In the case of **Munna Vs. State of Madhya Pradesh, 2014(10) SCC 254**, in a similar situation, the Hon'ble Apex Court held as under:-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecution in view of the statutory presumption under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

Onus of proof is on the prosecution to establish each ingredient beyond reasonable doubt. It is found that the evidence led by the prosecution suffers from serious infirmities and inconsistencies and the Courts below have erred in relying upon the statements of unreliable and untrustworthy witnesses. Allegations of kidnapping, abduction and rape carry grave implications. Therefore, for convicting any person for the offence, the degree of proof has to be of a higher standard and not mere possibility. The prosecution has failed to prove the case against the petitioner beyond shadow of reasonable doubt. The petition is allowed.

Judgment of conviction and sentence passed by the Courts below are set aside. The petitioner is acquitted. He be released from Special Home, Sonapat, if not required in any other case.

May 28,2018

Jiten

(ANITA CHAUDHRY)

JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No