

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**CRA-S-1840-SB-2016
Date of decision: 06.04.2019**

Lal Bahadur

...Appellant

Versus

U.T., Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Kamal Kumar Yogi, Advocate (Legal Aid Counsel)
for the appellant.

Mr. Rajiv Vij, Addl. P. P., U.T., Chandigarh.

ARVIND SINGH SANGWAN, J. (Oral)

1. This appeal has been taken up in the category of those cases which are listed on Saturdays in which accused are in custody and their appeal is being represented by a legal aid counsel.
2. Prayer in this appeal is for setting aside the judgment of conviction dated 19.02.2016, passed by the Additional Sessions Judge-cum-Judge Special Court, Chandigarh, vide which, the appellant was held guilty for commission of offence punishable under Section 376 read with Section 511 of the Indian Penal Code (for short 'IPC') and Section 6 read with Section 18 of the Protection of Children from Sexual Offences Act, 2012 (*for short 'POCSO Act'*) as well as the order of sentence dated 20.02.2016, wherein the appellant was sentenced to undergo rigorous imprisonment for a period of 07 years and to pay a fine of Rs. 25,000/- and in default of payment of fine, to further undergo simple imprisonment for 03 months, for commission of offence under Section 376(2) read with Section 511 IPC, as

it was further observed that though the convict has been held guilty under Section 376(2)/511 IPC as well as Section 6 read with Section 18 of the POCSO Act, but as provided under Section 42 of the POCSO Act, the punishment is awarded only under Section 376(2)/511 IPC which is greater in degree to Section 6 read with Section 18 of the POCSO Act and there is no need to award punishment separately under the POCSO Act.

3. Brief facts of the case, as per prosecution, are that PW-2/complainant Chander Kala, mother of the prosecutrix, gave a complaint to the police that she was working as a Cook in House No. 570, Sector 8, Chandigarh and on 10.05.2015, at about 7 AM, she was at home and her husband had gone away for work and in the meantime, a distant relative, namely Lal Bahadur (appellant), came there. He told her that his mobile phone was lost. Thereafter, she left her children, a girl (prosecutrix) aged about 7 years and a boy aged about 5 years with Lal Bahadur and set to her work in the house. At 12 PM, when she came to room, she found that Lal Bahadur was lying naked on the bed and had made the prosecutrix sit on him and he was trying to insert his penis into the genital of her daughter/prosecutrix while her son was playing nearby them. On seeing this, she raised alarm and started crying and in the meantime, the owner of the house, namely Manjeet Singh, came there, however, finding an opportunity, Lal Bahadur wore his clothes and ran away from the spot. Thereafter, Chander Kala gave a complaint Ex. P-1 to the police for taking legal action against the accused, on the basis of which, a formal FIR Ex. P8, under Sections 376, 511 IPC and Sections 6, 18 of the POCSO Act was registered. The accused was arrested on the same day and was got medico-legally

examined. The police recorded the statement of the accused under Section 161 Cr.P.C. During investigation, PW-2/complainant Chander Kala refused to get the prosecutrix medico-legally examined and thereafter, the police submitted the report under Section 173 Cr.P.C.

4. The trial Court framed the charge under Sections 376 read with Section 511 IPC and under Sections 6 and 18 of the POCSO Act, to which, accused pleaded not guilty and claimed trial.

5. In the prosecution evidence, the prosecutrix appeared as PW-1 and supported the prosecution version and stated that the accused forcibly entered into her house and took off her clothes. The accused also removed his clothes and made her to sit on his private part and tried to insert his penis into her private parts. Thereafter, her mother came there and she lifted her up from the accused and took her into her lap and started weeping and thereafter, her father came there and her father and mother thrashed the accused and he ran away from there.

6. In cross-examination, a specific question was put to the prosecutrix that what the accused did with her on the day of incident? In reply, she stated that accused entered into their house and made her to sit on him and he removed his clothes and lay down naked on the bed and made her to sit on his private parts and tried to insert his penis into her private parts.

7. PW-2/complainant Chander Kala also deposed on the same line and stated that when she entered into room, she saw accused Lal Bahadur laying naked on the bed and trying to commit wrong act with the prosecutrix but he ran away and thereafter, she called the police and gave

the complaint Ex. P1. She further stated that since the accused had only attempted to commit rape with her daughter, she refused to get her daughter/prosecutrix medico-legally examined.

8. PW-3 Dr. Karam Singh, Radiologist stated that on 13.05.2015, I radiologically examined the prosecutrix for determination of her bone age and as per galstun study, the radiological age of the prosecutrix was 8-10 years (+/- 2 years). He has also stated that he has seen the corresponding combined report issued by him and Dr. Davinder Kumar, Dentist, GMSH, Sector 16, Chandigarh and the report is Ex. P3 bearing signatures at point A. Similar statement was made by PW-5 Dr. Davinder Kumar, Dental Surgeon, GMSH, Sector 16, Chandigarh that according to his opinion, based on the examination of the prosecutrix, her dental age was 6 to 8 years and he has also signed the report Ex. P3 along with PW-3. PW-4 HC Subhash Sharma proved on record Ex. P-5 regarding DDR No. 30.

9. PW-6 Dr. Satyam Tyagi, EMO, GMSH, Sector 16, Chandigarh proved on record the medical report of the appellant as Ex. P6 and as per this report, there was nothing to suggest that appellant was incapable of performing sexual intercourse.

10. PW-7 SI/IO Sarabjit Kaur, Incharge Police Post Lake, Chandigarh proved on record all the relevant documents relating to conducting of investigation Ex. P7 to Ex. P10, which are the *ruqa* sent to police station, formal FIR, endorsement made by the SHO, arrest memo of the accused as well as the site plan of the place of occurrence. PW-8 HC Yash Pal proved the scaled site plan as Ex. P11.

11. Thereafter, statement of the accused was recorded under

Section 313 Cr.P.C. and all the incriminating evidence, which had come on record, were put to accused. In a question about his implication in the case, he stated that he is innocent and has falsely been implicated as there was a financial dispute between the mother of the prosecutrix and his family and when he asked the complainant about the same, she asked him to sit in her room and left to go to market and in the meantime, the complainant called the police, however, no defence evidence was led.

12. After hearing both the parties and appreciating the material on record, the trial Court convicted the appellant for commission of offence punishable under Section 376 read with Section 511 IPC and Section 6 read with Section 18 of the POCSO Act and sentenced him as noticed above. Hence, the present appeal.

13. Learned counsel, appearing for U.T., Chandigarh, has filed custody certificate, according to which, the appellant has undergone actual sentence of 03 years, 10 months and 26 days as on today and total sentence of 05 years, 01 month and 15 days including remissions.

14. Learned counsel for the appellant has argued that in the absence of any medical evidence, the trial Court has wrongly held that appellant is guilty of committing offence punishable under Sections 376(2) read with Section 511 IPC.

15. Learned counsel for the appellant has further argued that as per the version of PW-2/complainant, her landlord Manjeet Singh had come outside and he had called the police, however, this witness has not been examined by the police, which raises suspicion about the prosecution version.

16. Learned counsel for the appellant has further argued that there are material discrepancies in the statement of the prosecutrix as well as the complainant/mother of the prosecutrix. In the statement of the prosecutrix, it has come that the accused forcibly entered into her house, whereas PW-2/complainant has stated that accused was a distant relative, i.e. brother of *Jethani* (wife of the elder brother of complainant's husband). She made him to sit near her children and she went out for work. Learned counsel further stated that it has also come in the cross-examination of this witness that the appellant was known to the complainant for the last five years and he was not a stranger to her family.

17. Learned counsel for the appellant has further submitted that the prosecutrix has not stated that her father, i.e. husband of the complainant, knew about the presence of the appellant outside their room, whereas it is so stated by PW-2.

18. Learned counsel for the appellant has pointed out another contradiction that PW-1/prosecutrix deposed that her mother and father thrashed the appellant, whereas PW-2/mother of the prosecutrix has stated that on hearing hue and cry, the landlord came outside and tried to catch the accused/appellant, however, he escaped and ran away from there. Learned counsel for the appellant further submitted that in fact there was some money dispute between the complainant and his family and on that account, he was called at complainant's home and later on, the complainant called the police and implicated him in a false case.

19. In reply, learned counsel, appearing for the U.T., Chandigarh, has submitted that from the statement of the two doctors, PW-3 Dr. Karam

Singh, Radiologist and PW-5 Dr. Davinder Kumar, Dental Surgeon, it is proved that the age of the prosecutrix was approximately 08 years and she has duly supported the prosecution version and her stand was clear in the examination-in-chief as well as in cross-examination, where on a question posed by the defence, she has again stated that accused put off her clothes and tried to make penetrative sexual assault.

20. Learned counsel for U.T. Chandigarh has further submitted that the appellant has led no defence evidence to prove the plea taken by him that there was any money dispute between PW-2/complainant and his family as no defence witness was examined.

21. After having learned counsel for the parties, I find no ground to interfere in the findings recorded by the trial Court for the following reasons, however, subject to following modification:

(a) Both, PW-1/prosecutrix and PW-2/complainant, are consistent in their statements that the appellant/accused entered into their house; removed his clothes and lay down naked on the bed and then removed the clothes of the prosecutrix and tried to commit rape on the prosecutrix. Therefore, from the statements of the prosecutrix as well as her mother/complainant, it is proved that the appellant has committed offence of aggravated sexual assault, as defined in Section 9 read with Section 18 of the POCSO Act.

(b) The prosecution has also proved statement of PW-3 Dr. Karam Singh, Radiologist and PW-5 Dr. Davinder Kumar, Dental Surgeon that the age of the prosecutrix was approximately 08 years, moreover, the appellant could not lead any evidence that the prosecutrix was not of the age of 08

years.

(c) However, the prosecution has failed to lead any medical evidence to prove that it was the case of aggravated penetrative sexual assault. Admittedly, PW-2, mother of the prosecutrix, did not get her medico-legally examined. Moreover, her landlord Manjeet Singh, who, as per FIR, arrived at the place of occurrence, was never examined as a witness. The place of occurrence is a servant room within the house of aforesaid Manjeet Singh and as per PW-2, she had left the accused with her kids in the servant room and went inside the house to do the domestic work which shows that she was present in the premises of the house where the place of occurrence i.e. servant room is situated and she was not outside. Admittedly, the accused is a close relative of PW-2 and as per defence set up by the appellant, his family had some money dispute with PW-2. PW-2 has admitted that accused is brother of her Jethani (wife of the elder brother of complainant's husband), however, this aspect was not properly deal with by the trial Court.

(d) PW-2, in her examination-in-chief as well as in cross-examination, has stated that the accused tried to commit rape on her minor daughter and in the cross-examination she has stated that *“since it was only an attempt and my daughter was wearing her underwear after the incident so I refused for her medico-legal examination. My daughter was wearing clothes.”* The statement of the prosecutrix is on similar line where she has stated that the accused attempted to commit her rape.

(e) In view of the above, while upholding the judgment of conviction, passed by the trial Court, I find that the charge under Section

376 IPC read with Section 6 of the POCSO Act is liable to be modified and the appellant is held guilty of offence punishable under Section 10 read with Section 18 of the POCSO Act.

(f) A Division Bench of Himachal Pradesh High Court in ***Bakshi Ram vs. State of Himachal Pradesh, 2015 (44) R.C.R. (Criminal) 661*** has held that the sentence awarded under Section 6 of the POCSO Act can be reduced in mitigating circumstances.

(g) As per custody certificate dated 14.02.2019, the appellant is the first offender and he is a young man and has no criminal background. The appellant has undergone total sentence of 05 years and 15 days, out of which, he has undergone actual sentence of 03 years, 09 months and 05 days as on 14.02.2019.

22. In view of the above discussion, this appeal is partly dismissed and while upholding the judgment of conviction, the sentence awarded to the appellant is reduced to minimum sentence of 05 years provided under Section 10 of the POCSO Act. The amount of fine is also reduced to Rs. 2500/- and in case of non-payment of fine, the appellant will undergo simple imprisonment for 15 days.

23. The appellant be released forthwith if not required in any other case.

24. A copy of this order be sent to the Superintendent/Deputy Superintendent, Model Jail, Chandigarh for compliance.

April 06, 2019

Waseem Ansari

**(ARVIND SINGH SANGWAN)
JUDGE**

*Whether speaking/reasoned
Whether reportable*

*Yes/No
Yes/No*