

**In the High Court of Punjab and Haryana, at Chandigarh**

**Criminal Revision No. 26 of 2020 (O&M)**

**Date of Decision: 21.07.2020**

Sudam Ansari

... Petitioner(s)

Versus

State of Punjab

... Respondent(s)

**CORAM: Hon'ble Mr. Justice Anil Kshetarpal**

Present: Mr. Vijay Lath, Advocate  
for the petitioner(s).

Mr. Luvinder Sofat, Assistant Advocate  
General, Punjab for the respondent.

**Anil Kshetarpal, J.**

The revision petition has been filed challenging the correctness of judgments passed by the Principal Magistrate, Juvenile Justice Board, S.A.S. Nagar and the learned Special Court convicting the petitioner under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”).

In brief, the case of the prosecution is that on 20.08.2014, the first informant-Mohammad Sadeek got recorded his statement to the effect that he is working as a labourer. He has three daughters and two sons. His eldest daughter Karina, aged about 15 years, resides in village Reekpur, State of Uttar Pradesh, whereas his two daughters and two sons are residing with him at SAS Nagar (Mohali). The prosecutrix, aged about 13 years, had studied upto 5<sup>th</sup> class. She used to go to learn stitching work from the wife of Santokh Lal, residing nearby. On 19.08.2014, the prosecutrix had gone to

the house of Santokh Lal at 11.00 a.m. but she did not return back home. After having searched for her, the matter was reported to the police. The first informant stated that he had suspicion that some unknown person might have enticed her away.

The prosecutrix was recovered from residential room in the factory on 12.11.2014. After medical examination, she was produced before the learned Judicial Magistrate where her statement under Section 164 Cr.P.C. was recorded. On completion of the investigation, the police submitted the final report. The petitioner was nominated as accused in the report. The Court further found that the petitioner is a juvenile. Thus, the petitioner was tried by the learned Principal Magistrate, Juvenile Justice Board, S.A.S Nagar.

In order to prove its case, the prosecution examined the following witnesses:-

- “1. PW.1 Constable Jagtar Singh;
2. PW.2 The Prosecutrix;
3. PW.3 Dr. Maninder Kaur;
4. PW.4 Dr. Vijay Bhagat;
5. PW.5 Mohammad Sadeek, First Informant;
6. PW.6 Dr. Parminder Singh;
7. PW.7 Assistant Sub Inspector Palwinder Singh;
8. PW.7 Lady Head Constable Karamjit Kaur;
9. PW.8 Surabhi Prashar, Judicial Magistrate Ist Class;
10. PW.9 Constable Manpreet Singh;
11. PW.9 Head Constable Sewa Singh;

12. PW.10 *Rajwinder Kaur, Teacher;*
13. PW.12 *ASI Ramesh Kumar; And*
14. PW.13 *Santosh Devi.”*

After the closure of prosecution evidence, the statement of juvenile in conflict with law under Section 313 Cr.P.C. was recorded, in which all the incriminating evidence was put to him, however, he denied the same and pleaded false implication. The petitioner did not lead evidence in his defence.

The learned trial Court, on appreciation of evidence, found that there are material contradictions in the case set up by the prosecution with reference to kidnapping and forcibly taking away of the prosecutrix by the petitioner. However, the learned trial Court held that the prosecutrix was minor at that time and the petitioner had maintained physical relations with her and therefore, he is guilty of rape. Thus, the learned trial Court acquitted the petitioner under Section 363, 366A, 120-B, 342, and 506 IPC, however, convicted the petitioner under Section 376 IPC and Section 4 of the POCSO Act and sentenced him to undergo detention in the Special Home for a period of two years under Section 15(1)(g) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

An appeal filed by the petitioner was dismissed by the learned Special Court with modification to the effect that the petitioner cannot be convicted simultaneously under Section 376 IPC and Section 4 of the POCSO Act keeping in view of Section 42 of the POCSO Act and therefore, the petitioner was held guilty under Section 4 of the POCSO Act. However, the quantum of sentence was maintained.

This Court has heard learned counsel for the petitioner and the learned Assistant Advocate General, Punjab and with their able assistance, gone through the judgments passed by both the Courts below as also the record requisitioned.

In the present case, two issues need adjudication:

1. What was the age of the prosecutrix at the time of the alleged incident?
2. If the prosecutrix is proved to be more than 18 years, whether she had consented to the physical relationship between her and the petitioner.

With regard to the age of the prosecutrix, the prosecution has relied upon her school leaving certificate to prove that her date of birth is 09.10.2013. Smt. Rajwinder Kaur, a teacher from the school where the prosecutrix studied, has been examined as PW.10. In her cross-examination, she has admitted that no proof of age was taken by the school at the time of her admission. The date of birth was entered in the school register as was orally told by the parents. Apart therefrom, the prosecution has also relied upon ossification test to prove the radiological age of the prosecutrix. PW.4 Dr. Vijay Bhagat has been examined by the prosecution. He has opined that the age of the prosecutrix is between 15 to 17 years. In the cross-examination, he has stated that the age of the prosecutrix may be 19 years.

Now let us examine oral evidence. Before the learned Judicial Magistrate on 04.12.2014, the prosecutrix made a statement under Section 164 Cr.P.C. while disclosing that she is 12 years old. When the prosecutrix appeared in evidence in the Court, she stated that her age at the time of the

incident was 13 years.

However, the evidence of the prosecutrix's father-Mohammad Sadeek, who appeared as PW.5, is important. He has stated that he shifted from his village in the State of Uttar Pradesh to Mohali (Punjab) at least 20 to 25 years ago. He further states that he was married at his village in Uttar Pradesh when he was 15 years old with Anwari Begum. He has three daughters and two sons. His daughters are elder to both the sons. His eldest daughter Karina Banu was born when he was in his village. The prosecutrix is two and half years younger to her. His youngest daughter is studying in "Madarsa".

From the statement of PW.5 Mohammad Sadeek, noticed above, it is apparent that the age of his eldest daughter Karina Banu is more than 20 years even while taking a conservative view because he has categorically stated that he has shifted from his village Reekpur, State of Uttar Pradesh to S.A.S.Nagar, Mohali, Punjab at least 20 to 25 years ago. When Karina Banu was born, he used to stay in the village. The prosecutrix is stated to be two and half years younger to the eldest daughter. Thus, it can be safely assumed that the prosecutrix was 18 years of age at the time of the alleged incident. This fact is also supported by the ossification test report and the statement of PW.4 Dr. Vijay Bhagat, who has stated that she may be 19 years of age.

Both the Courts below have very heavily relied upon the school record where her date of birth is recorded as 09.10.2003. This makes the prosecutrix less than 11 years of age at the time of incident. It is admitted by PW.10 Smt. Rajwinder Kaur, the Teacher, who had brought the school record that no proof of age of the prosecutrix was furnished when she was

admitted in the school. Still further, if one carefully reads the statement of PW.3 Dr. Maninder Kaur, she has stated as under:-

- “1. Breast B/L Symmetrical well developed nipples everted.  
No external marks of injury. Hair grown scanty.*
- 2. Abdomen Umbilicus inverted. No external mark of injury,  
no scar mark.*
- 3. Pelvic organs, pubic hair scanty. No mating, no  
discharge, hair clippings taken as sample-3, vulva well  
developed. There is whitish discharge on the introitus.”*

The doctor had examined the prosecutrix on 13.11.2014. Once the entire evidence is analysed, it is apparent that the date of birth in the school record does not appear to be correct. Even the prosecutrix does not claim that she was less than 11 years at the time of incident. Her father also does not allege that she was less than 11 years at the time of incident. No doubt, Mohammad Sadeek, the first informant has stated that she is 13 years of age. However, in cross-examination, he has admitted that the age of the prosecutrix was 18 years.

Before relying upon the school record, the Courts were expected to critically analyse the remaining evidence available on the file. There is huge variation/difference in the age as per the school record and the report of the ossification test. In these circumstances, it would not be safe to rely upon school record particularly when date of birth of the prosecutrix recorded therein is found incorrect. Now the court is left with the ossification test report and the opinion of the doctor based thereon. It is also supported by the evidence of the prosecutrix's father. Before convicting an

accused, the Courts are expected to carefully and critically analyse the prosecution evidence available on the file. In the present case, both the Courts below, in the considered opinion of this Court, have failed in performing their bounden duty.

Keeping in view the aforesaid facts, it is held that the prosecution has failed to prove that the age of the prosecutrix was less than 18 years on 19.8.2014.

Now the next issue which requires consideration is whether the prosecutrix was a consenting party or the petitioner continued to maintain physical relations with the prosecutrix against her wishes all this while. It will be noted here that the prosecutrix stayed with the petitioner for two months and 23 days i.e. from 19.08.2014 to 12.11.2014. Both the Courts have already held that the prosecution has failed to prove that the prosecutrix was kidnapped or forcibly taken away against her wishes. It has come in evidence that there are material variation/contradictions in the statements of the prosecutrix herself, given at various stages. Therefore, the Courts have correctly recorded that the prosecution has failed to prove the charge of kidnapping. Now with regard to the charge under Section 4 of the POCSO Act, it is to be noted that when the prosecutrix appeared as PW.2, she has stated that the petitioner took her to Bahadurgarh, where his sister and brother-in-law are residing. It has been alleged that they used to threaten and force her to do the entire work of their home. It is also stated by the prosecutrix that the petitioner took her advantage and used to commit rape with her daily till the time she remained there. It has come in evidence that the prosecutrix was found all alone when the police along with her parents

recovered her on 12.11.2014. She had opened the door of the premise. This fact is confirmed by Constable Jagtar Singh who appeared as PW.1; father of the prosecutrix Mohammad Sadeek who appeared as PW.5; Lady Head Constable Karamjit Kaur, who appeared as PW.7; and the Investigating Officer Ramesh Kumar, Assistant Sub Inspector, who appeared as PW.12. The Investigating Officer has further stated that when the police went to the premises, the door of the factory and the place from where the prosecutrix was recovered, was already open because her parents first went inside. It was the prosecutrix who had opened the door. The petitioner was not present at home when the police party reached there. The petitioner arrived there after 20-25 minutes. He has also stated that in the rooms adjoining to that of the petitioner, three/four families were residing. The prosecutrix, as noticed above, has stayed with the petitioner for more than two and a half months. It has also come in evidence that the petitioner and the prosecutrix were residing in neighbourhood at S.A.S. Nagar, Mohali. They knew each other from before. Still further, at the cost of repetition, the petitioner is alleged to have taken the prosecutrix to a place where his sister and brother-in-law were residing. In the adjoining rooms, three/four families were residing. The factory was located on a busy road. The prosecutrix did not allege that she was tied or locked in a room. She did not claim that she ever made a complaint to the sister or brother-in-law of the petitioner. She also did not claim that she ever complained to anyone from the families residing in the adjoining rooms.

Still further, on careful reading of the statement of PW.3 Dr.

Maninder Kaur, it is apparent that no external marks of injuries were found

on the person of the prosecutrix.

Keeping in view the aforesaid facts, this Court is of the considered opinion that the petitioner is entitled to the benefit of doubt. Hence, the judgments passed by both the Courts below are set aside. The petitioner be set free, if not required in any other case.

The miscellaneous application(s) pending, if any, shall also stand disposed of in terms of the main order.

**(Anil Kshetarpal)**  
**Judge**

**July 21, 2020**  
**“DK”**

Whether speaking/reasoned :Yes/No

Whether reportable : Yes/No