

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

CRA-S-3346-2019 (O&M)
Date of decision : 17.07.2020

Shubham Sharma @ Honey

...Appellant

Versus

State of UT Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. S.D.S. Bali, Advocate for the appellant.

Ms. Ashima Mor, APP, UT Chandigarh.

ANIL KSHETARPAL, J. (ORAL)

Challenge in the present Criminal Appeal is to the judgment of conviction passed by the Additional Sessions Judge-cum-Judge, Special Court, Chandigarh dated 20.08.2019, convicting the appellant alongwith another for having committed an offence under Section 376 of the Indian Penal Code, 1860 (hereinafter to be referred as “the IPC”) and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter to be referred as “the POCSO Act”). The substantive part of the sentence reads as under:-

<i>Offence under Section</i>	<i>Sentence imposed</i>
4 of POCSO Act	Seven years Rigorous Imprisonment and to pay a fine of Rs.55,000/-. In default of payment of fine, he shall undergo rigorous imprisonment for six months.

The present appellant was a juvenile at the time of alleged incident.

In a nutshell, the case of the prosecution is that on 29.09.2017, the prosecutrix aged about 16 years met a police party and got recorded her

statement stating therein that she lives with her family. On 25.09.2017, when she was coming back to her house at about 02:00 AM at night after attending the birthday party of her friend and reached near the Saw Mill, Hallo Majra, then one boy who was also present in the birthday party of her friend to whom his friends were addressing as Honey, met her. He threatened her with a knife and took her to a Grocery Shop forming a part of House No.924. He called Raja to open the shop who as directed, opened the shop and the appellant-jvenile in conflict with law committed rape. At 04:00 AM, the appellant threw her out of the said Grocery Shop and fled away. Raja also closed the door of the shop. As she was perplexed due to the above incident, hence, she did not disclose about the same to anyone. In the evening, she disclosed the aforesaid fact to her mother who informed to the Police at telephone number 100. But when the police came, they decided not to report the matter as her father was out of town being a Truck Driver. When her father came on 29.09.2017, she got recorded her statement.

On the basis of the aforesaid statement of the prosecutrix, FIR was registered and the investigation was carried out. The statement of the prosecutrix was recorded under Section 164 of the Code of Criminal Procedure (hereinafter to be referred as “the Cr.P.C.”) before the learned Judicial Magistrate. Thereafter, both the convicts were arrested and sent to the Juvenile Home.

On finding a prima facie case against both the juveniles-in conflict with law, they were charged under Sections 376(D), 363, 366 of the IPC and under Section 6 of the POCSO Act, to which they pleaded not guilty and claimed trial. To substantiate its case, the prosecution examined the

following witnesses:-

<i>“PW1</i>	<i>SI Sarabjit Kaur</i>
<i>PW2</i>	<i>Dr. Navkiran Kaur, Senior Resident</i>
<i>PW3</i>	<i>Victim girl</i>
<i>PW4</i>	<i>Sangeeta Bajaj, Head Mistress</i>
<i>PW5</i>	<i>Dr. Rajeev</i>
<i>PW6</i>	<i>Sunita, Scientist B</i>
<i>PW7</i>	<i>SI Rajbir Singh</i>
<i>PW8</i>	<i>HC Mahabir Singh</i>
<i>PW9</i>	<i>HC Balbir Kaushik</i>
<i>PW10</i>	<i>HC Yash Pal</i>
<i>PW11</i>	<i>SI Sarwan Singh”</i>

On conclusion of the evidence of the prosecution, the statements of both the juveniles in conflict with law under Section 313 of the Cr.P.C. were recorded while confronting them with the incriminating evidence produced by the prosecution, to which they pleaded innocence and false implication.

Both the convicts, in their defence, examined Baljinder Singh as DW1, who is a Member of Panchayat of Village Kheri, Tehsil Rajpura, District Patiala to prove that the convict-Hoshiar Singh is resident of the Village and Paramjit Kaur as DW2, Hoshiar Singh's mother.

This Court has heard learned counsel for the appellant as well as Assistant Public Prosecutor, Union Territory, Chandigarh and with their able assistance gone through the record and the judgment passed.

Learned counsel appearing for the appellant has submitted that the prosecution has failed to prove its case. He submitted that there was delay of four days in lodging the FIR. He further submitted that the statement of the alleged friend of the prosecutrix, has not been recorded. He further submitted

that the prosecution did not enquire about the ownership of Grocery Shop, the alleged place of occurrence. It also failed to find evidence to link Hoshiar Singh @ Raja with the aforesaid shop. The prosecution also did not examine parents of the prosecutrix. He further submitted that the prosecutrix did not give consent for internal medical examination. Hence, the Court has committed an error in convicting the appellant only on the basis of two abrasions on the back of the prosecutrix.

On the other hand, learned Assistant Public Prosecutor, Union Territory, Chandigarh, has supported the judgment passed by the learned trial Court.

On careful critical analysis of the record with the judgment passed by the learned trial Court, this Court has come to a conclusion that the learned trial Court has committed a material irregularity and perversity while convicting the appellant. In this case, the prosecution has miserably failed to establish its case before the Court. The detailed reasons are as under:-

- 1) It is the case of the prosecution that the alleged incident took place on intervening night of 25/26.09.2017 at 02:00 AM, when she was returning all alone from birthday party of her friend namely Varsha. The prosecution has not joined Varsha in its investigation. It is the case of the prosecutrix that the appellant was also present in the aforesaid birthday party. Thus, it was necessary for the prosecution to prove that there was any party. However, as noticed above, the prosecution did not lead any evidence except bald statement of the prosecutrix that there was a party. In this regard, the statement of the prosecutrix makes an interesting reading. In Ex.P1, her first statement to the Police, she states

that on 25.09.2017, when she was returning from the birthday party of her friend (name not disclosed) at 02:00 AM, the appellant who was also present in the birthday party, raped her in a shop which is a part of House No.924 after threatening her with a knife. When her statement under Section 164 of the Cr.P.C. was recorded, she made a statement that she went to the house of her friend namely Varsha on 25.09.2017 and the party was on 26.09.2017 in the evening. The aforesaid party was thrown by some relative of her friend. Here she does not state that the party was birthday party of her friend. When the prosecutrix appeared in evidence as PW3, she stated that on the intervening night of 25/26.09.2017, she was raped at 02:00 AM. Thus, there is no clarity of the date when the alleged incident took place.

- 2) Still further, it is the case of the prosecutrix that when she disclosed this fact to her mother in the evening of 26.09.2017, her mother informed Police at Telephone Number 100, but when the Police came, no statement was made. However, no record of the call made by the mother of the prosecutrix to the Police and its visit at their residence, has been produced.
- 3) There is a delay of four days in filing the complaint to the Police. The prosecution has tried to explain the same by submitting that her father who works as a Driver, had gone out and came back on 29.09.2017. After consulting him, a decision was taken to lodge a case. However, the prosecution has failed to examine the prosecutrix's father to prove that he was not in town on 25.09.2017, 26.09.2017, 27.09.2017 and 28.09.2017.

- 4) Further, when the prosecutrix was taken for medical examination, she was accompanied by her mother. She did not give consent for her internal medical examination. Rather, she made a statement that she does not want to get herself internally examined from a lady Doctor. On external medical examination, the Doctor had found two abrasions over her lower back. Still further, when detailed history was written by the Doctor, the prosecutrix disclosed that an unknown boy pushed her into a nearby shop and molested her, after which she ran back to her house. At that stage, she does not disclose that she has been raped. She also did not disclose the name of the boy. She also disclosed to Doctor that neither she knows the boy nor his age. It was also recorded in the history that she did not complain of pain in abdomen and vaginal bleeding. There was no complaint of vomiting or burning.
- 5) Still further, it is alleged by the prosecutrix that she was returning all alone at 02:00 AM dead in the night. She also states that she was not having a mobile phone with her. It has come in evidence that the alleged incident took place in thickly populated area. The alleged place of incident is a part of residential house but she never raise alarm.
- 6) The prosecution did not verify the ownership or tenancy of the alleged place of occurrence. It was not verified that whether the appellant's friend, the other convict namely Hoshiar Singh @ Raja, was having any connection with the owner or tenant of the Grocery shop. The Investigating Officer admitted that he did not make any enquiry regarding the ownership or tenancy of House No.924, Hallo Majra, Chandigarh. He also admitted that he did not enquire about the girl on

whose birthday party the prosecutrix had gone. The prosecutrix has stated that the Investigating Agency had recorded the statement of her friend. However, as per the Investigating Officer, he did not associate the alleged friend of the prosecutrix. In cross-examination, she stated that she does not know father's name of Varsha, her friend. She is also not aware about Varsha's house number. She further stated that her neighbours had also participated in the party but had left the venue before she left. However, she could not disclose the exact number of the neighbours who had come to attend the party. The prosecution has also not examine any of her neighbours to prove that there was any party.

- 7) The prosecution did not record the statements of parents of the prosecutrix during investigation.
- 8) Dr. Navkiran Kaur, PW2, does not depose that she informed the prosecutrix that on internal medical examination, she would suffer pain. Therefore, the statement of the prosecutrix that the Doctor informed her that she would suffer pain and, therefore, she refused internal medical examination, does not stands corroborated. Still further, once the prosecutrix refused internal medical examination from a lady Doctor, an adverse inference ought to have been drawn against the case of the prosecution, which unfortunately the learned trial Court has overlooked. Section 114 of the Evidence Act, 1872 enables the Court to draw adverse inference, if a party does not produce the evidence, which ought to have been produced. Illustration (g) of Section 114 of the Evidence Act, 1872 provides that evidence which could be and is not produced would, if produced, be unfavourable to the person who

withholds it. It means that if a party or witness does not produce the best evidence, which could be produced, then the Court would be entitled to presume that if that evidence had been produced, it would have been unfavourable to the person who withholds it.

- 9) In view of the aforesaid overwhelming reasons, the presumption under Section 29 of the POCSO Act, stood rebutted. In fact, on critical analysis of the evidence of the prosecution itself, the presumption stood rebutted by the preponderance of evidence. Thereafter, it was for the prosecution to prove its case beyond the shadow of reasonable doubt. No doubt, in Section 29 of the POCSO Act, the word used by the Statute is "shall", however, it raises a rebuttable presumption as defined in Section 4 of the Indian Evidence Act which provide for three different types of presumptions, by using three different expressions i.e. "May Presume", "Shall Presume" and "Conclusive Proof". Section 4 is extracted as under:-

“4. May presume. Shall presume. Conclusive proof

May presume.—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

Shall presume.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

Conclusive proof.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”

On careful reading of Section 4 of the Indian Evidence Act, it is

apparent that the expression "May presume" enables the Court with a discretion to presume a fact. Whereas, the expression "Shall presume" mandates the Court to presume a fact. However, the word "Shall" does not mean that it is irrebuttable presumption. Once, the expression used is "Shall presume", then, it nonetheless raises a rebuttable presumption. However, the Court is bound to draw such presumption, although rebuttable. This would be clear from the next expression used i.e. "Conclusive proof" which means that such presumption is irrebuttable. Thus, the Evidence Act, 1872 itself explains the distinction between various kinds of presumptions.

Thus, there is no corroboration to the statement of the prosecutrix. As noticed above, the evidence of the prosecutrix is also not reliable.

For the aforesaid reasons, this Court is of the opinion that the judgment under appeal cannot be sustained. Hence, it is set aside. The appellant is honourably acquitted of the charges.

Accordingly, the present criminal appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

The Registrar General of this Court is requested to forward a copy of this judgment to the concerned Presiding Judge for information.

17.07.2020

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No