

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

CRA-S-2765-SB-2017 (O&M)

Date of decision : 07.08.2020

Ikramuddin @ Kami

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Kunal Dawar, Advocate for the appellant.

Mr. Chetan Sharma, AAG, Haryana.

ANIL KSHETARPAL, J.

The challenge herein is to the judgment passed by the learned Additional Sessions Judge, Faridabad, dated 24.07.2017, convicting the appellant under Section 376 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter to be referred as "the POCSO Act") and the order of sentence, which reads as under:-

Offence under which convict has been sentenced	Period of imprisonment	Amount of fine imposed	Imprisonment in default of payment of fine
376 IPC	Rigorous imprisonment for 10 years.	₹5,000/-	Rigorous imprisonment for one month.
6 POCSO Act	Rigorous imprisonment for 10 years.	₹5,000/-	Rigorous imprisonment for one month.

In brief, the case of the prosecution is that the prosecutrix got registered the case by stating that she has a goat. On 22.04.2016, she and her neighbour Ikramuddin alias Kami (Fuffa) had gone to jungle to take leaves of trees for the goat. The appellant asked her to climb on a tree so as to chop the leaves and throw them on the ground. She also climbed on another tree and did the same thing. Thereafter, the appellant, by threatening her, took her in his lap and carried her in a pit where he committed rape upon her. Thereafter, she came back to her house along with the appellant and narrated the incident to her Bua (Father's sister) namely Jaitunisha. The prosecutrix changed her clothes and the clothes, worn by her at the time of incident, were washed by her sister, namely Saniya. The parents of the prosecutrix came back to Village at 8:00 PM as her mother had gone with her father to the hospital as he is not keeping good health. When her parents came back, she narrated the entire incident to them and thereafter, the action was sought to be taken against the appellant. After the registration of the case, medico legal examination of the prosecutrix was conducted at 11:00 PM on 23.04.2016.

On conclusion of the investigation, the report under Section 173 of Cr.P.C. was filed in the Court and the copy whereof was supplied to the appellant free of cost. On finding *prima facie* case against the appellant, he was charged with the offence under Section 376 IPC and Section 6 of the POCSO Act, to which he had pleaded not guilty and claimed trial.

The prosecution, in order to prove its case, has examined the following witnesses:-

PW.1 The Prosecutrix;

- PW.2 Jatitunisha;
- PW.3 Lady Constable Sunaina;
- PW.4 Sharwan Kumar, Draftsman;
- PW.5 Virender Singh, Clerk, MCF, NIT Zone, Faridabad;
- PW.6 Moharrir Head Constable Sharmila;
- PW.7 Constable Asha;
- PW.8 Constable Burfi;
- PW.9 Dr. Bishanwati;
- PW.10 Lady Assistant Sub Inspector Suman;
- PW.11 Dr. Manish Dayal
- PW.12 Sushil, Station House Officer;
- PW.13 Assistant Sub Inspector Asha.

The statement of the appellant under Section 313 Cr.P.C. was recorded while confronting him with all the incriminating evidence produced by the prosecution, who pleaded innocence and false implication upon him. However, no evidence in the defence was led by the appellant.

As noticed above, the learned trial Court convicted and sentenced the appellant.

This Court has heard the learned counsel for the appellant as well as Mr. Chetan Sharma, Assistant Advocate General, Haryana and with their able assistance, gone through the record and the judgment passed by the trial Court.

Learned counsel for the appellant has contended as under:-

- 1) There are material contradictions/improvements in the

deposition of the prosecutrix;

- 2) The parents of the prosecutrix have not been examined although they were cited as witnesses in the challan;
- 3) The report of the Forensic Science Laboratory has been produced to prove existence of semen on the clothes worn by the prosecution although it is the case of the prosecution that the clothes, worn by the prosecutrix at the time of incident, were washed;
- 4) The report of DNA has not been placed on file.
- 5) The age of the prosecutrix has not been proved because no ossification test was conducted, although directed by the doctor.

Per contra, learned Government Counsel has submitted that the age of the prosecutrix was less than 10 years, while referring to register of births and deaths maintained by Municipal Council. He further submitted that the alleged improvements are immaterial and rather natural. He further submitted that the prosecution has produced sufficient evidence to prove its case.

Before this Court proceed to examine in detail the arguments of learned counsel for the appellant, it would be appropriate to notice that the prosecutrix/victim/juvenile has appeared as prosecution witness as PW1. She has given her age as 12 years on the day she was examined in the Court i.e. 14.07.2016. She has narrated the incident that the appellant committed penetrative sexual assault on her. She was grilled in cross-examination by the learned counsel appearing for the appellant but she stuck

to her ground. The prosecution has also examined PW2 Miss Jaitunisha, paternal aunt of the victim. The victim narrated the entire incident to her aunt first of all as her parents were not at home. The prosecution has also examined Dr. Bishanwati, Medical Officer, Civil Hospital, Faridabad, who had examined the victim and prepared her medico legal report. It may be noted here that the counsel appearing for the appellant did not cross-examine the Doctor at length. In her cross-examination, she was only asked questions about the prosecutrix was referred for ossification test and she took into possession clothes of the prosecutrix which she was wearing at the time of her medico legal question. No other question was put to her in her cross-examination.

Now the stage is set to examine the contentions of learned counsel for the appellant in detail.

Learned counsel for the appellant has referred to the statements of the prosecutrix which resulted in registration of an FIR, under Section 164 Cr.P.C. and deposition in the Court. He contends that the prosecutrix has made a lot of improvements and, therefore, her statement cannot be made sole basis to convict the appellant. It may be noted here that the prosecutrix at the time of incident was not even 10 years old. As per Ex.PD, Register of Birth and Death, she was born on 04.07.2006, whereas the incident took place on 22.04.2016. Thus, her age was approximately two months short of 10 years. Still further, she had studied only upto Class 3. She belongs to a very poor family. While registering the FIR, she has briefly given her version. However, when her statement under Section 164 Cr.P.C. was recorded before the Judicial Magistrate Ist Class on 23.04.2016, she

disclosed the facts in detail. Thereafter, once she appeared as PW1 in July, 2016, she further elaborated. In substance, her statement with regard to penetrative sexual assault is consistent. Small variations in the statement of a child on irrelevant facts does not lead the Court to ignore her statement. Still further, her statement stands corroborated by the medical evidence as well as evidence of her aunt PW2-Jaitunisha. Learned counsel for the appellant has pointed out that the victim has consistently stated that her clothes were washed by her younger sister Saniya. Hence, the report of the Forensic Science Laboratory that the semen was found on the *salwar* and underwear of the victim, cannot be believed. It may be noted here that no doubt the victim had stated that her younger sister had washed her clothes, however, there is no statement that the clothes were washed with soap. The clothes worn by the victim at the time of incident were brought at the time of medical examination separately and were taken into possession by the Doctor. The report of the Forensic Science Laboratory is categorical. Still further, as noticed above, when the Doctor appeared as PW9, she was not cross-examined on this aspect of the matter.

Next argument of learned counsel that the parents of the victim have not been examined, therefore, the best evidence has been withheld. It is the case of the prosecution itself that when victim reached back home after the alleged incident, her parents were not found present at home as her mother had taken her father to a hospital and she returned at about 8:00 PM. However, the victim went to her paternal aunt who resides in the neighbourhood and disclosed this fact. The paternal aunt has appeared as PW2 and corroborated the statement of the prosecutrix. Thus, the parents of

the victim were not important witnesses. It has come on record that the paternal aunt and the mother of the victim had accompanied her when she went to the police and for medical examination. Once, the paternal aunt has been examined, it would not be possible to hold that the best evidence has been withheld.

Learned counsel for the appellant has relied upon the judgment in the case of **Jitendra Kumar Vs. State of Uttrakhand, 2017 Criminal Law Journal 1671** to contend that since the parents have not been examined, therefore, the appellant deserves acquittal. This Court has carefully read the aforesaid judgment. In that case, the eye witnesses were not examined by the prosecution. Thus, the Court held that since the best evidence has been withheld by the prosecution, therefore, the appellant is entitled to acquittal.

Learned counsel has further relied upon the judgment of Guwahati High Court in the case of **M.D. Baharuddin Vs. State of Assam, Law Finder Doc ID #718815**. In that judgment also, the Court went on to hold that since three vital persons were not made witnesses and that too, without assigning any reasons as to why they were not made witnesses, the Court is entitled to draw adverse inference in view of Illustration (g) of Section 114 of the Evidence Act.

Learned counsel has further relied upon a Division Bench Judgment of Sikkim High Court in the case of **Anish Rai Vs. State of Sikkim, 2018 Criminal Law Journal 4193**. In that case, victim had studied upto 5th Class. The Principal of the School was not examined by the prosecution. The admission register was not seen by the Investigating

Officer. The victim had also given different date of birth from what was recorded in the school register. In those circumstances, the Court held that the prosecution has failed to prove that the victim was minor.

Learned counsel has further relied upon the judgment of the Supreme Court in the case of **Alamelu and another Vs. State represented by Inspector of Police, AIR 2011 SC 715**. In the aforesaid judgment, only transfer certificate issued by the School was produced to prove the age of the girl. The Court held that in the absence of evidence of the person who made the entry or who got recorded the date of birth, the transfer certificate would not have much evidentiary value. Hon'ble the Supreme Court considered Section 35 of the Evidence Act and held that since the best evidence has been withheld, therefore, the age of the prosecutrix is not proved.

As noted above, all the judgments which have been relied upon by the learned counsel for the appellant are in the facts of the case and are not applicable to this case particularly when the prosecution has produced the register of Births and Deaths issued by the Municipal Corporation, Faridabad. An official from the office of Municipal Corporation, Faridabad has also been examined to prove the date of birth of the prosecutrix. The official had brought the original register in the Court. No doubt, the official was not the person who had made entry in the register with regard to date of birth of the prosecutrix, however, that would not itself be sufficient to create a doubt particularly when the evidence of the prosecution is consistent. Still further, at the most the case of the appellant is that the prosecutrix was not below 12 years of age at the time of incident. That aspect would be

examined in the later part of the judgment.

Next argument of the learned counsel is with respect to non-production of DNA report. It may be noted here that the prosecution has examined Doctor as well as police official who had delivered the sample for DNA examination to the Forensic Science Laboratory. The prosecution was granted opportunity but the report was not produced. However, in the present case, the prosecution has produced sufficient material to prove its case. At the cost of repetition, the victim, her aunt, and the Doctor who medico legal examined her on 23.04.2016 have been examined in the Court. Still further, the report of the Forensic Science Laboratory has been produced as Ex.PA, wherein it was opined that human semen was detected on the vaginal swabs, *salwar* and underwear of the victim. In view of the aforesaid evidence, mere non-production of the DNA report would not be sufficient to discard the evidence of the prosecution.

Now with regard to the age of the prosecutrix, it may be noted that as per Section 5 of the POCSO Act, if the age of the victim is below 10 years, then the offence committed falls under Section 5 i.e. aggravated penetrative sexual assault and, therefore, punishable under Section 6, where the minimum sentence provided is rigorous imprisonment for a term which shall not be less than 20 years. Whereas in the present case, although the appellant has been convicted under Section 6 of the POCSO Act, however, the sentence awarded is less than the minimum prescribed. The appellant has been sentenced to undergo rigorous imprisonment for a period of ten years which is the minimum prescribed under Section 4. Section 3 defines the offence of penetrative sexual assault whereas Section 4 provides for

punishment for the offence of penetrative sexual assault. Sub-Section 2 of Section 4 further provides that if the penetrative sexual assault is on a child below 16 years of age, the convict shall be punished with imprisonment for a term which shall not be less than 20 years.

Keeping in view the aforesaid facts, even if the argument of the learned counsel for the appellant is accepted that the prosecutrix was more than 12 years as she herself had given her age as 12 years, still the punishment awarded by the learned trial Court is below the minimum sentence provided under the POCSO Act.

However, since there is no appeal filed by the State, this Court does not find it appropriate to re-open the question of sentence.

Keeping in view the aforesaid facts, this Court does not find it to be a fit case for interference. Hence, the present appeal stands dismissed.

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

07.08.2020

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No