

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

**Crl. Appeal No.D-567 of 2019
Date of Decision: January 12, 2021**

Irshad

...Appellant

VERSUS

State of Haryana

...Respondent

**CORAM: HON'BLE MR. JUSTICE S.N.SATYANARAYANA
HON'BLE MRS. JUSTICE ARCHANA PURI**

Present: Mr.Rajesh Lamba, Advocate
for the appellant.

Mr.Aman Bahri, Addl. Advocate General, Haryana
for the respondent-State.

ARCHANA PURI, J.

Challenge in the present appeal, is to the judgment of conviction dated 07.05.2019 and order of sentence of even date passed by learned Addl. Sessions Judge, Palwal, vide which appellant Irshad was held guilty and convicted under Section 4 of the Protection of Children from Sexual Offences Act, 2012, Section 376(3) and 506(II)IPC. For the commission of offence under Section 376 (3) IPC, the appellant was sentenced to undergo rigorous imprisonment for a period of twenty years and fine of ₹25,000/- was also imposed, in default whereof, he was to further undergo rigorous imprisonment for a period of six months. Likewise, for commission of offence under Section 506(II) IPC, the appellant was

sentenced to undergo rigorous imprisonment for a period of three years and

fine of ₹5,000/- was imposed, in default whereof, he was further to undergo rigorous imprisonment for a period of one month.

Background facts in nutshell are as follows:-

That, on 02.06.2018, at about 7.00 a.m., the prosecutrix (name withheld) had gone to fields to answer the call of nature and there, Irshad had come and finding her alone, caught hold of her and committed rape upon her and he also extended threat that, in case the prosecutrix discloses this incident to anyone, then she and her family members would be killed. Having reached her house with much difficulty, the prosecutrix apprised her mother about the incident caused by Irshad having come to the fields and having committed rape upon her.

The proceedings in the present case were initiated, on the basis of the complaint filed by the prosecutrix. Accused Irshad was apprehended. On completion of investigation, challan was presented against him.

On presentation of challan, compliance of Section 207 Cr.P.C. was made and on the basis of material coming forth, charges were framed against accused-appellant Irshad under Section 4 POCSO Act, Sections 376 (3) and 506(II) IPC, to which he pleaded not guilty and claimed trial.

In endeavour to establish its case, the prosecution examined as many as 14 witnesses, besides adducing documentary evidence. Prosecutrix (name withheld) herself stepped into witness box as PW-1 and her parents, both mother and father, stepped into witness box as PW-2 and PW-3 respectively. Besides the aforesaid witnesses, prosecution also examined PW-4 Dr.Pushp Priya, L/MO, PW-5 L/Ct. Nisha, PW-6 ESI Rohtash Singh, PW-7 ASI Sharwan Kumar, PW-8 L/Ct. Sunita, PW-9 Head Teacher of the school of victim, PW-10 L/HC Shobha, PW-11 SI Anju, PW-12 L/Ct. Jai

Shree, PW-13 L/ASI Papita and PW-14 Dr.Ajay Goyal.

Thereafter, evidence of the prosecution was closed.

On closure of the prosecution evidence, all the incriminating circumstances, appearing in the prosecution evidence were put to accused-appellant in his statement under Section 313 Cr.P.C. However, the accused-appellant denied those allegations and pleaded false implication. However, no evidence was led in defence by the accused-appellant.

After hearing learned Public Prosecutor, learned defence counsel and on appraisal of the evidence brought on record, vide impugned judgment of conviction and order of sentence, accused-appellant was held guilty, convicted and sentenced, as already detailed in earlier portion of the judgment.

Feeling aggrieved by the aforesaid judgment of conviction and order of sentence, accused-appellant has filed the present appeal.

In pursuance of notice issued by the Court, learned State counsel made appearance on behalf of the State. Even the lower Court record was requisitioned.

We have heard learned counsel for the appellant as well as learned State counsel and have perused the record.

At the very outset, learned counsel for the appellant assiduously submitted that to secure the verdict of conviction for the appellant, it was incumbent upon the prosecution, to establish the guilt of the appellant, beyond shadow of reasonable doubt. However, it is submitted that there are various flaws, coming forth, in the version put forth by the prosecution, which negates the prosecution version and renders the

same doubtful, more particularly, in view of the prosecutrix as well as her

parents, having not supported the prosecution version, while deposing in the witness box. It is submitted that while appearing in the witness box, neither the prosecutrix nor her parents have stated about rape having so committed by Irshad and this raises improbability of the prosecution version. Also, it is submitted that learned trial Court has given unduly weightage to the medical evidence, which is also not reliable. Moreover, it is submitted that there is no concrete evidence qua the age of the prosecutrix, coming on record, therefore, benefit of the same, ought to have been extended to the appellant.

Thus, summing up his arguments, learned counsel for the appellant, made a prayer for acceptance of the appeal, to set aside the impugned judgment and to acquit the appellant of the charges levelled against him.

On the contrary, learned State counsel has refuted the claim of the appellant, tooth and nail. He submits that even though, prosecutrix and her parents, have turned hostile and did not support the prosecution version but however, their statements, as such, cannot be discarded in *toto*. The cross-examination, so conducted by learned Public Prosecutor, after they having turned hostile, has to be taken into consideration and even, there is sufficient medical evidence brought on record to establish the fact of sexual assault of the prosecutrix and DNA report sufficiently establish the incriminating role of the appellant. Also, it is submitted that no evidence, as such, has been brought on record by the appellant, to rebut the legal presumption operating against him, as per Section 29 of the Protection of Children from Sexual Offences, Act. In the light of the same, it is submitted by State counsel that learned trial Court has rightly held the accused-

appellant guilty and convicted him and had adequately sentenced him. As

such, a prayer has been made for the dismissal of the appeal.

Considering the nature of the accusations against the appellant, the assessment of the age of the prosecutrix is of paramount consideration. Though, in the complaint Ex.P2, the date of birth of the prosecutrix, as such, has not been specifically disclosed but she stated herself age to be 13 years 5 months in Ex.P2. Even, in the statement Ex.P4, recorded before the Magistrate, the victim had stated her age to be 13-14 years. However, while deposing in the witness box, the prosecutrix disclosed her age to be 16 years. Even, PW-2 mother and PW-3 father of the prosecutrix, while facing cross-examination at the behest of learned Public Prosecutor, had though stated that they do not know the date of birth of the prosecutrix but they also stated the prosecutrix to be 16-17 years old.

However, the prosecution, to so substantiate the fact of the age of the prosecutrix, has examined Jaan Mohd., Head Teacher, Government Primary School, Village Chhainsa as PW-9. He had produced the record of admission and withdrawal register, which is Ex.P14 and also brought admission form, which is Ex.P15. The school leaving certificate of victim issued by him is Ex.P16. He specifically stated that the documents are correct, as per the original record. As per the entry in the said record, the date of birth of the prosecutrix, is 20.04.2004. Very true, as so pointed out by learned counsel for the appellant that the birth certificate of the victim was not given at the time of admission, but however, it is pertinent to mention that the date of birth was so recorded at the behest of the parents, at the time of admission of the prosecutrix in Class-1 in the school. Since, the entry regarding the date of birth in the school record had been recorded at the time of admission of the prosecutrix in the school on 10.04.2009, in any

case , it cannot be stated to have been managed or manipulated, at a later stage i.e. after taking place of the occurrence in question. The recitals of the admission and withdrawal register, as such, are admissible in evidence, as per Section 35 of the Indian Evidence Act and the date of birth, so stated in the said register is 20.04.2004. At the same time, learned counsel for the appellant, while making reference to the Aadhaar Card of the prosecutrix, copy whereof, has come on record as Mark-A, states that therein, the date of birth of the prosecutrix is stated to be 01.01.2005 and therefore, there is variation in the age of the prosecutrix coming forth and therefore, with certainty, the prosecutrix is not established to be a '**child**'. May it be so, but it is pertinent to mention that Aadhaar Card had been produced by the prosecutrix, at the time of appearing in the witness box as PW-1 and therein, the date of birth is stated to be 01.01.2005. However, the school record, as already observed aforesaid, had come into existence, much prior to the occurrence in question and the entry had been made at the behest of parents of the prosecutrix. In the Aadhaar Card, the date of birth is mentioned as 01.01.2005. May it be so, but in any case, the age of the prosecutrix is definitely less than 18 years. Thus, considering the material on record, learned trial Court has rightly concluded the prosecutrix to be falling within the definition of '**child**' as defined under Section 2(d) of the POCSO Act.

Now, let us consider the question of establishment of rape. Undisputedly, when the prosecutrix and her parents stepped into witness box as PW-1 to PW-3, they did not support the prosecution version. The prosecutrix had categorically stated that the person present in the dock, did not commit rape upon her and she was declared hostile and was cross-

relied upon by the prosecution, were put to her. In her cross-examination, she had though stated about not making of application Ex.P1 and statement Ex.P2, but however, she had admitted the suggestion to be correct about both these documents, to be bearing her signatures. Under what circumstances, her signatures existed on these documents, as such, has not been explained by her, more particularly, when it is not the version of the prosecution about the police to have obtained her signatures on blank papers or under any other pressure. She has also admitted about having undergone medical examination. Likewise, qua the statement Ex.P4, she has identified her thumb impressions. She has taken a faint plea about this statement to have been made under the pressure of the police but there is nothing, as such, coming on record, as to how and under what circumstances, the pressure was so exerted and whether any further steps have been taken to apprise the higher authorities about the conduct of the police, if it be so, as now submitted. Likewise, even the parents of the prosecutrix, when appeared in the witness box as PW-2 and PW-3 have not supported the prosecution version, but they admitted the suggestion to be correct about the statement of the victim to have been recorded before the learned Illaqa Magistrate and about her having undergone medical examination.

However, simply on the score that these witnesses did not support the prosecution version in the Court, does not *ipso facto* lead to the conclusion that no such occurrence had taken place. Their testimonies, as such, cannot be discarded in *toto*. It is a matter of common knowledge that when in our society, there occurs a case of sexual assault and that too with the child, hush-hush behaviour of the people is there. Many a times, there is family and societal pressures, besides the threats extended by the wrong

doer to the victim party, because of which, material witnesses, do not support the prosecution version. However, the testimony of the hostile witnesses can be relied upon by the prosecution, to the extent to which it supports the prosecution version and cannot be treated as washed off the records. There is no legal bar to base conviction of the accused, upon such kind of testimony, if corroborated by other reliable evidence. It should be noted that while facing cross-examination, the prosecutrix has identified her signatures on Ex.P1 and Ex.P2 and she has also admitted about having undergone medical examination. Though, she had stated about the statement Ex.P4 before the Magistrate, to be an outcome of pressure of the police but however, no reason, as such, has been assigned, as to why the police intend to falsely implicate the appellant by making the prosecutrix as tool. No bitterness or animosity at the behest of the police, towards the accused-appellant, as such, is coming forth. Neither the accused, in his statement under Section 313 Cr.P.C., has stated about the reason for false implication.

In the light of the aforesaid, now, it is very important to make reference to the medical evidence, coming on record. PW-4 Dr.Pushp Priya, while deposing in the witness box, has proved copy of MLR of the victim, which is Ex.P8 and the material recitals of the MLR are as herein given:-

“History:- Brought by police for sexual examination, a/h/o sexual assault around 7am on 02.06.2018 by person name Irshad, h/o penetration into urethral area is given by pt, pressing of both breast, h/o changing cloths or washing the perineal area.

Physical development:- Average built, unmarried, secondary sexual character well developed. LMP 22//05/2018, h/o menarche achieved at around 10 years of age.

General condition of the person:- Pt is asymptomatic, pt is

well oriented to time, place and person, PR 82/Min, BP 120/70mmHg, RR 22/Min.

Injuries:- No fresh and old injury mark seen on whole body.

Investigation:- UPT Negative on OPD slip no.04007066432 dated 02/06/2018.

Even, in the aforesaid MLR, opinion has been given that-'**possibility of sexual assault cannot be ruled out and depends on semen and DNA analysis of supplied cloth and swabs.**'

In the MLR Ex.P8, there is mention of the various articles/samples taken by the doctor and also in her affidavit Ex.P4/A, the concerned doctor has categorically stated about the articles/samples handed over to the police, which are as under:-

- “1. One vulval swab taken sealed with seal for seminal analysis in RFSL Bhondsi, Gurgaon.*
- 2. One vaginal (anterior) swab taken sealed with single seal for DNA analysis in RFSL, Bhondsi, Gurgaon.*
- 3. One vaginal (posterior) swab taken sealed with single seal for seminal analysis in RFSL, Bhondsi, Gurgaon.*
- 4. Pink color salwar taken sealed with five seals for seminal analysis in RFSL, Bhondsi, Gurgaon.*
- 5. An envelope bearing five seals directed to Assistant Director, RFSL, Bhondsi Gurgaon containing MLC carbon copy, forwarding letter and attested sample seal.*
- 6. Carbon copy of MLC No:-PP/GHP/08/2018.”*

In the light of the same, it is important now to make reference to RFSL report Ex.PX, which reveals that the laboratory examination was carried out to detect the presence of semen on the exhibits and as per this report, '**Human seven was detected on exhibit-1a (Two microscopic glass slides), exhibit-1b (One cottonwool swab on stick described as vaginal**

swab), exhibit-2a (Two microscopic glass slides), exhibit-2b (One cottonwool swab on stick described as vulval swab), exhibit-3a (Four microscopic glass slides), exhibit-3b (One cottonwool swab on stick kept in a polythene packing described as vaginal swab) & exhibit-4 (One dirty pink coloured sawlar). However, semen could not be detected on exhibit-5 (One dirty maroon coloured underwear).

Furthermore, to know about the connectivity of the accused-appellant with the commission of crime, the DNA profiling of the semen was got conducted. As per DNA report Ex.PY from FSL, Madhuban, the result of examination was stated to be-DNA was extracted from item Nos.1A, 1B, 2A, 2B, 3A, 3B, 4 & 6 and subjected to Autosomal STR, analysis by using identifiler plus kit. There is no amplification of DNA in item No.1A, 1B, 2A, 2B and 3A. DNA profile obtained from item No.3B and 4 is compared with DNA profile of item No.6.

As per conclusion in DNA report-The Autosomal STR analysis indicates that DNA profile of seminal stains on source of item no.3B (Cotton Swab) and item No.4 (Salwar) is matching with the DNA Profile of Irshad (Source of item No.6).

It is well settled that the result of genuine DNA test is scientifically adequate and reliance upon the same can be laid to establish the connectivity of the wrong doer.

Thus, in the light of such medical evidence brought on record, sexual assault upon the prosecutrix, as such, and the role of the appellant, is established. When linkage of the appellant, as such, through scientific manner is coming forth, it was incumbent upon the appellant, to lead

POCSO Act, operating against him. It is pertinent to mention that there is not an iota of evidence, adduced by the appellant, to explain how and in what circumstances, his semen was found on the clothes the victim. It has been rightly observed by the trial Court that except the simple denial in Section 313 Cr.P.C., there is no explanation for finding traces of his semen on the *salwar* of victim and for the result of DNA report, giving conclusion that his semen was found on the articles of the victim.

Thus, considering the material on record, learned trial Court has rightly reached the conclusion about the commission of sexual assault upon the prosecutrix by the appellant and rightly held him guilty and convicted him for the commission of offence under Section 4 POCSO Act and Section 376 (3) IPC. However, considering the testimonies of the prosecutrix and her parents, no sufficient evidence, as such, has come on record about the appellant to have extended threats to the lives of prosecutrix and her parents and thus, offence under Section 506(II) IPC, does not stand established and appellant is acquitted of the charge under Section 506 (II) IPC.

However, it is pertinent to note that sentence has been awarded under Section 376(3) IPC, while considering the same to be greater in degree than Section 4 of the POCSO Act, in view of Section 42 of POCSO Act, which provides for imposition of sentence, under the POCSO Act or IPC, which is greater in degree. Since, offence under Section 376(3) IPC provides for minimum punishment of twenty years, the same is definitely greater in degree and learned trial Court has sentenced the appellant under the aforesaid Section. Now, it is submitted by learned counsel for the

appellant that the amendment in the IPC, thereby, adding Section 376(3)

IPC, received assent of Hon'ble President of India on 11.08.2018 and in the light of the same, it is submitted that no retrospective effect can be given to this provision, in view of the occurrence in question (allegedly) having taken place on 02.06.2018. However, the submission so made is not tenable, as the Criminal Law (Amendment) Act, 2018, was deemed to have come into force on 21.04.2018 and that being so, it was in force at the time of taking of place of occurrence in question on 02.06.2018. Thus, the submission made on this count, is not tenable. Learned trial Court has imposed the minimum sentence, so provided in the aforesaid Section 376(3) IPC and the same is just and reasonable.

With these observations, the present appeal is partly accepted, while setting aside the conviction and order of sentence, vis-a-vis Section 506(II) IPC.

(S.N.SATYANARAYANA)
JUDGE

(ARCHANA PURI)
JUDGE

January 12, 2021
Vgulati

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No