IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

211 **CRA-D-1436-DB of 2014 (O&M)**
Reserved on: 21.09.2022
Date of Decision: 30.09. 2022

Amit ...Appellant

Versus

State of Haryana ... Respondent

CORAM : HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Lalit Goyal, Advocate and
Mr. Anmol Jindal, Advocate for
Mr. Tribuwan Singla, Advocate for the appellant.

Mr. Anmol Malik, DAG, Haryana.

N.S.SHEKHAWAT, J.

Feeling dissatisfied and aggrieved by the judgment of conviction dated 17.05.2014 and order of sentence dated 20.05.2014 passed by the learned Additional Sessions Judge, Special Court, Sonipat, whereby, the appellant was convicted and sentenced to undergo rigorous imprisonment under Sections 302 IPC (for life), 201 (for three years) and 363 (for five years) and to pay a fine of Rs.20,000/-, 5000/- and 10,000/-, respectively, alongwith default clause, the appellant has preferred the instant appeal under Section 374 Cr.P.C., before this Court, praying for his acquittal. The learned trial Court had framed charges for commission of the offences under Sections 365, 376, 302, 201 of IPC and Section 6 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter to be referred as **'the POCSO Act'**), which was subsequently

AMIT RANA
2022.10.12 16:36
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amended and instead of Section 376 IPC, the accused was charge sheeted under Sections 376(2)(f) and 376(2)(i) of IPC, to which, he also pleaded not guilty and claimed trial. After holding the trial, vide the impugned judgment, the learned trial Court acquitted the appellant of the charge under Sections 376(2)(f) and (2) (i) IPC and Section 6 of the POCSO Act, however, he was held guilty for the commission of the offences under Sections 302, 363 and 201 IPC and was sentenced as mentioned above.

The brief facts as unravelled from the report under Section 173 Cr.P.C., are that about 12.30 a.m., on 07.08.2013, a police team headed by SI Kuldeep Singh, Station House Officer, Police Station Baroda was present on patrolling duty, when the complainant (names of the complainant, being the father of the victim, as well as of victim have been withheld in view of Section 33 of the POCSO Act and Section 228-A of the IPC) came there and submitted a complaint to the police to the effect that he had two daughters. His elder daughter/victim was 4½ years old and younger daughter is aged about 2½ years old. His aunt (Bua) Sona Devi has been residing in their village Gharwal alongwith her children for the last 20/22 years. His aunt (Bua) Sona Devi had four daughters and a son. He had gone to Gohana for labour work as per his daily routine. At about 06.30 p.m., he returned back home, but did not find his daughter, i.e., the victim at home and asked his wife about the victim. His wife told him

AMIT RANA
2022.10.12 16:36
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that the victim was standing with Amit (appellant) and demanding the eatables from him. Even he did not find Amit at his home since that time. Complainant tried to search for the victim alongwith his family, but could not find her. Even Amit had not returned home and he expressed doubt that his daughter had been kidnapped by Amit son of his aunt (Bua) and requested to the police to search for his daughter, i.e., the victim and to arrest Amit for further proceeding. On the basis of the said statement Ex.PW7/A, the police proceedings were conducted and the FIR Ex.PW11/A was registered against the present appellant.

After the investigation as per law, the final report under Section 173 Cr.P.C., was presented in the Court of learned Area Magistrate. Since the offence was triable by the Court of Sessions, it was committed to the Court of learned Sessions Judge and vide the impugned judgment and order, the appellant was convicted and sentenced, as explained above.

We have heard learned counsel for the parties and have carefully perused the evidence available on the file with the assistance of both the learned counsel.

Learned counsel for the appellant vehemently contended that the appellant has been rightly acquitted of the charge under Section 376(2)(f) and 376(2)(i) of the IPC and Section 6 of the POCSO Act, however, the learned trial Court committed grave error

AMIT RANA
2022.10.12 16:36
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in convicting the appellant for the offences punishable under Sections 363, 302 and 201 IPC. Learned counsel further argued that in the instant case, even after perusing the medical record, PMR and FSL report, no cause of death could be given by the Dr. Kamal Singla PW18, who had conducted the postmortem on the dead body. Learned counsel had submitted that even there was no medical evidence on record to prove that the deceased was subjected to sexual intercourse at the hands of the present appellant or any other person and there was no motive to commit the said crime. Still further, the trial Court committed grave error in convicting the appellant only on the basis of 'last seen' evidence and the provisions of Section 106 of the Evidence Act have been wrongly invoked, as, the prosecution had not been able to discharge the initial burden of proving the offence against the present appellant. Learned counsel pointed out various inconsistencies in the statements of PW7 father of the victim, PW16 mother of the victim and PW17 Shilak Ram to contend that the trial Court had wrongly placed reliance on the said witnesses and even the testimonies were not sufficient to prove the involvement of the appellant in the crime. Still further, it was submitted that the prosecution had not been able to prove that it was the appellant only, who had kidnapped the victim from her house and the prosecution story was highly doubtful.

AMIT RANA
2022.10.12 16:36
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The submissions made by the learned counsel for the appellant have been vehemently opposed by the learned State counsel, who submitted that the learned trial Court had examined the matter in detail and the conviction is based on due appreciation of evidence by the trial Court. He prayed for dismissal of the appeal, which was without any substance.

The learned counsel for the appellant vehemently contended that in the instant case, the prosecution could not prove that the deceased had died due to drowning and it has been wrongly presumed that she had died a homicidal death. In fact, even as per Dr. Kamal Singla, PW18, and the postmortem Ex.PW18/B, the cause of death in the instant case could not be established even after the postmortem examination. However, we do not agree with the contentions raised by learned defence counsel in this regard. The prosecution had examined Dr. Kamal Singla, PW18, who had exhibited the postmortem report Ex.PW18/B and stated that after perusal of the FSL report Ex.PX and the diatom test report, no opinion regarding the cause of death could be given. He denied the suggestion that there was possibility of death of victim being caused by drowning. The FSL report Ex.PX shows that diatom test of clavicle and sternum of the dead body had been conducted and the same was found to be negative. Consequently, once the diatom test is found to be negative, it is established that the death had not occurred due to

AMIT RANA
2022.10.12 16:36
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drowning. However, we agree with the findings by the learned trial Court that in case the doctor had expressed inability as to cause of death, than it does not mean that the Court becomes helpless on this score. In fact, the reports from the experts are sought by the Court to form an opinion with regard to certain facts and to do complete justice in the matter. The Court otherwise also is not bound by the opinion of the experts and has to form an independent opinion, keeping in view the entirety of evidence adduced by both the parties to impart complete justice in the matter. In the instant case, neither the prosecution nor the defence had set up a case that the deceased, who was a girl child of 4 ½ years of age had died a suicidal or accidental death. In fact, it can never be presumed that a child aged 4 ½ years would commit suicide. Still further, the places, where the dead body was thrown in the canal or where the dead body was found, were at such a long distance from the house of the deceased that it was almost impossible for such a small child to go there and suffer an accidental death. Still further, the attending circumstances of the case and the evidence led by the prosecution clearly show that she had died a homicidal death and her dead body was thrown in the river after killing her. Even though the medical evidence does not provide a clear cut finding that the death was homicidal in nature, but looking into the evidence led by the prosecution, it can be safely concluded that the deceased had died a homicidal death. Still further, the doctor

AMIT RANA
2022.10.12 16:36
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conducted the postmortem examination, had the occasion to see the dead body only, whereas this Court has to appreciate the entire evidence and has to form an opinion on the basis of evidence led by the parties. Consequently, when the death is not proved to be suicidal or accidental and had not taken place due to drowning as per Dr. Kamal Singla PW18, it can be safely and conclusively held that the deceased had been killed and was then thrown in the river. The learned trial Court has also recorded the similar observations and we uphold the same.

In the instant case, the charges were framed against the appellant for aggravated penetrative sexual assault against the appellant, however, he was acquitted of the same. Finally, the learned trial Court had convicted the appellant under Sections 363, 302 and 201 IPC. Admittedly, it is a case of circumstantial evidence and in order to base the judgment of conviction, we have to appreciate the evidence to find out whether the chain is complete in all respects against the accused and the prosecution evidence is consistent only with the hypothesis of the guilt of the accused. We proceed to analyse the evidence in the light of various celebrated pronouncements of the Hon'ble Apex Court. By applying the ratios of various pronouncements of the Hon'ble Supreme Court, we have to appreciate the circumstances, which the prosecution had relied upon to link the appellant with the offences, for which, he has been charged. The

AMIT RANA
2022.10.12 16:36
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prosecution examined PW16 mother of the victim and Shilak Ram PW17 to prove that immediately prior to the occurrence, the accused was 'last seen' with the victim. PW16 mother of the victim clearly stated that she knew the appellant, who was present in the Court as he was cousin of her husband and living in their neighbourhood. At about 06.30 p.m., on 06.08.2013, she was present in her house and her daughter, i.e., the victim was standing in the street. After the same time, she saw that the appellant was also standing with her and the victim was asking him to give some toffees. She was doing household work at that time and was busy in the same. Some time after that, she found that neither her daughter nor accused were there in the street. In the night, a person, namely, Kuldeep told her that he had seen the appellant taking the victim towards the village Bhawar side. They started making search for her on the way to village Bhawar. Shilak Ram PW17, who was resident of the same village, met them and informed them that the accused/appellant had made the victim to sit on his bicycle by telling him (PW17) that her mother had gone to attend a Satsang at village Bhawar and that he was taking her daughter towards Bhawar. She was subjected to cross-examination by the defence, but her testimony could not be shattered in any manner. Even Shilak Ram PW17 deposed on similar lines. He was posted as a helper in the department of public health and also used to operate the Government tubewell installed at Bhawar road Gharwal and used to

AMIT RANA
2022.10.12 16:36
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visit the tubewell for the said purpose. At about 06.30 p.m., on 06.08.2013, he was going from his home towards the Government tubewell to operate it. The tubewell is situated near the canal. The appellant met him on the road and a small child aged about 4½ year was with the appellant. The appellant requested him to make that girl sitting at his bicycle by saying that the mother of that girl had gone to attend Satsang at village Bhawar and that girl was also to be taken there. He told the accused that he had to go till the canal only to operate the tubewell and at this, the accused told him to drop her near the canal by saying that he would take the girl from there only. On his request, he made the girl to sit on his bicycle and proceeded towards the canal. He dropped the girl near the canal and the accused was already standing there as he had taken the lift from a motorcyclist and reached there prior to Shilak Ram. He handed over the custody of the victim to the appellant and went away. Next morning, he came to know that the said girl was daughter of PW16 and the accused/appellant had abducted her. He saw the photographs Ex.P19 and Ex.P20 of the victim and identified the same girl from the photographs. He identified the clothes of the girl also.

From the testimonies of both the said witnesses, it is evident that they had 'last seen' the victim in the company of the present appellant, immediately before the time, when she was thrown in the canal by the appellant. Still further, PW16 is the sister-in-law

AMIT RANA
2022.10.12 16:36
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Chandigarh

(Bhabhi) of the appellant, being the wife of his cousin. Even the defence has not suggested to her that she was inimical towards the accused nor any other reason for false implication has been suggested to her. Similarly, Shilak Ram PW17 was an independent witness and both of them had made consistent statements and the defence could not shatter their testimonies in any manner. The learned trial Court correctly placed reliance on the said statements.

The learned defence counsel referred to certain minor inconsistencies appearing in the statements of PW16 and PW17 with regard to the time of sharing of the information by PW17 Shilak Ram with PW16 mother of the victim. In fact, both PW16 and PW17 are poor and rustic villagers and could not be expected to remember each minute detail with regard to divulging of information regarding giving the lift to the victim by the accused. As a matter of fact, we have gone through the testimonies of both the witnesses and find no reason to disbelieve the testimonies of the said witnesses, which completely established that both of them had seen the appellant with the deceased in the evening of 06.08.2013, firstly near the house of the victim and then taking her on the road leading to the canal and finally near the canal as well.

Once the prosecution had discharged the initial burden the onus is shifted on the kidnapper, in view of Section 106 of the Evidence Act. The prosecution had led sufficient evidence that the

AMIT RANA
2022.10.12 16:36
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appellant is established to have kidnapped the victim, in such a case, the onus would shift on the kidnapper to establish as to how and when the kidnapped individual came to be released from his custody.

It has been held by the Hon'ble Supreme Court in ***Sunder @ Sundarajan*** *Vs.* ***State by Inspector of Police,*** *2013(1) RCR (Criminal)* 943 as follows:-

> *"26. Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the appellant, we are of the view, that the instant submission is wholly misplaced and fallacious. Insofar as the instant aspect of the matter is concerned, reference may be made to the judgment rendered by this Court in Sucha Singhs case (supra), wherein it was held as under:-*
>
> *"21. We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others.*
>
> *A perusal of the aforesaid determination would reveal, that having proved the factum of kidnapping, the inference of the consequential murder of the kidnapped*

AMIT RANA
2022.10.12 16:36
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Chandigarh

> *person, is liable to be presumed. We are one with the aforesaid conclusion. The logic for the aforesaid inference is simple. Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnappers custody, till he was eliminated. The instant conclusion would also emerge from Section 106 of the Indian Evidence Act, 1872 which is being extracted hereunder :*
>
> ***106 - Burden of proving fact especially within knowledge.***
>
> *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*
>
> ***Illustrations***
>
> *(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*
>
> *(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.*

Thus, it is apparent that the prosecution had led sufficient evidence to show that the victim was taken away by the appellant and was thrown in the canal by him.

AMIT RANA
2022.10.12 16:36
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The learned counsel further submitted that the prosecution had failed to prove the motive on the part of the present appellant to commit the crime and to kill the victim. In fact, the charges were also framed against the accused/appellant that he had subjected the victim to penetrative sexual assault, but the said charge could not be proved during the trial and the accused has been acquitted of the charge. However, the prosecution had led sufficient evidence to show that the underwear and skirt of the victim were found hanging at a Sheesham tree near the western pavement of Butana Branch canal, which was quite close to the place, where the custody of the victim had been handed over by Shilak Ram PW17 to appellant/accused. These clothes were duly identified by the father of the victim to be of the victim. The father of the victim also stated that some toffees were also found lying at the spot, where skirt and underwear of the victim were recovered in his presence. The photographs Ex.P7 and P8 also show that wrappers of toffees were lying at the spot and the said fact corroborates the version of PW16, mother of the victim that the victim had been allured by the accused on the pretext of giving toffees to her. This clearly shows that the accused/appellant must have molested or sexually assaulted the victim and later on must have thrown the victim in the canal. Still further, the prosecution had led sufficient evidence to show that the accused had committed the offence, in such an eventuality, the motive is not

AMIT RANA
2022.10.12 16:36
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certainly to be established by the prosecution. It is very difficult to find the motive for committing a particular offence by an accused as it is hidden in the mind of the criminal and it is impossible to read the mind of another. No doubt, the motive, if proved is of great importance, however, the absence of the same, does not render the case of the prosecution to be unbelievable, especially, when there was sufficient evidence on record, which was found to be trustworthy and inspires confidence. Consequently, when sufficient evidence has been found pointing towards the guilt of the accused, absence of motive or a weak motive would not come to the rescue of the present appellant.

It has been held by the Hon'ble Supreme Court in the matter of ***Praful Sudhakar Parab*** ***Vs.*** ***State of Maharashtra*** **2016(3)** *R.C.R. (Criminal) 707* as follows:-

> *17. Further in* ***Paramjeet Singh Vs. State of Uttarakhand, 2010 (4) RCR (Criminal) 548:, 2010(5) Recent Apex Judgements (R.A.J.) 459: 2010 (10) SCC 439,*** *this Court held that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. Following was stated in paragraph 54:*
>
> > *"So far as the issue of motive is concerned, the case is squarely covered by the judgment of this court in Suresh Chandra Bahri (supra). Therefore, it does not require any further elaborate discussion. More so, if motive is proved that would supply a link in the chain of*

AMIT RANA
2022.10.12 16:36
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> *circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. (Vide:* ***State of Gujarat v. Anirudhsing*** *[supra])*

18. The High Court while considering the motive has made following observations at page 46:

> *Although prosecution is not very certain about the motive, upon taking into consideration the evidence of PW-4 and PW-6, a faint probability is created, regarding intentions of the accused to lay hands on the cash which could have been in possession of the victim, as against the initial story that the accused was enraged against the victim, because the victim used to tease him on the point of his marriage with a bar girl Helen Fernandes. Motive is a mental state, which is always locked in the inner compartment of the brain of the accused and inability of the prosecution to establish the motive need not necessarily cause entire failure of prosecution".*

The learned counsel referred to the testimonies of PW8 Har Kishan and PW9 Surender @ Sonu, who was declared hostile by the prosecution. In fact, the said submission does not advance the case of the defence in any manner. PW8 Har Kishan admitted that he runs a shop of general merchandise like toffees etc. in his house at Gharwal. However, he did not recognize the accused. Similarly PW9 also did not support the case of the prosecution, however, there was

AMIT RANA
2022.10.12 16:36
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otherwise sufficient evidence on record to prove the complicity of the accused and the fact that the said witnesses had turned hostile, would not help the appellant in any manner.

Still further, the accused was examined under Section 313 Cr.P.C. and all the incriminating circumstances were put to him. However, in his reply, he simply denied the allegations by stating that he was innocent and had been falsely implicated in the instant case. Even, he did not chose to lead any evidence in his defence. The appellant failed to furnish any explanation whatsoever in relation to the offence, when he was examined under Section 313 Cr.P.C. No doubt, in terms of Section 313 Cr.P.C., the appellant/accused had the freedom to maintain the silence before the Court. The accused may chose to maintain the silence or complete denial even when his statement under Section 313 Cr.P.C. is being recorded, but of course the Court would be entitled to draw an inference, including an adverse inference, as may be permissible to it in accordance with law. One of the main objects of recording of a statement under this provision of Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity then the consequence in law must follow. In the present case, the accused has simply denied his involvement in the crime and

AMIT RANA
2022.10.12 16:36
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had offered no explanation as to why he was falsely implicated by his own close relatives. Even, he led no evidence in his defence as well.

Still further, the prosecution has examined PW6 Subhash, who joined the investigation on 09.08.2013. The appellant suffered disclosure statement Ex.PW6/A in his presence and the memo Ex. PW6/B was prepared. The accused led them towards the place from where he had kidnapped the deceased and also led them towards the Butana Branch canal and identified the place, where he had committed rape upon the victim and had killed her. Subsequently, on 10.08.2013, the dead body of the victim was recovered from the canal. Similarly, the prosecution examined Raj Kumar PW12, who was also a witness to the disclosure statement made by the appellant. The statements of Subhash PW6 and Raj Kumar PW12 were duly supported by HC Ramesh Kumar PW15, who had interrogated the appellant and during his interrogation the appellant had suffered a disclosure statement. Even, SI/SHO Amir Singh PW19 was examined, who conducted the initial investigation and found sufficient incriminating evidence against the present appellant. All the statements were found to be creditworthy and there is no reason to disbelieve the said statements. In the presence of the said witnesses, the accused had suffered disclosure statement which led to the identification of the places of commission of crime and ultimately the dead body was recovered on 10.08.2013.

AMIT RANA
2022.10.12 16:36
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In view of the above, we find no reasons to interfere with the impugned judgment and order passed by the learned trial Court and same is upheld and affirmed.

Resultantly, the instant appeal stands dismissed.

All the pending miscellaneous applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with in accordance with law after the expiry of the period of limitation.

The accused shall be taken into custody forthwith, if on bail in the instant case, to serve the remaining sentence.

The trial Court record be transmitted back.

(SURESHWAR THAKUR)
JUDGE

30.09.2022 **(N.S.SHEKHAWAT)**
amit rana **JUDGE**

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No

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2022.10.12 16:36
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