

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

207

CRM-A-447-2020 (O&M)

Decided on : 31.10.2022

State of Haryana

....Appellant

Versus

Surender @ Kallu

.... Respondent

**CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MR.JUSTICE JAGMOHAN BANSAL**

Present: Mr.Hitesh Pandit, Addl.A.G., Haryana, for the appellant.

G.S. Sandhawalia, J.

CRM-9176-2020

Application has been filed for condonation of delay of 84 days in filing the appeal.

Keeping in view the averments made in the application duly supported by affidavit of the concerned official, we are of the considered opinion that sufficient cause is made out to condone the delay as it is settled principle that each and every day's delay is not to be explained. Accordingly, delay of 84 days in filing the appeal is hereby condoned.

CRM stands disposed of.

CRM-A-447-2020

The present application has been filed under Section 378(3) Cr.P.C. by the State for grant of leave against the judgment of acquittal dated 30.08.2019 recorded by the Fast Track Court, Faridabad in FIR No.31 dated 01.04.2018 under Sections 376 IPC and Section 6 of the POCSO Act at Police Station Women Sector 16, Faridabad.

2. The respondent-accused who is the uncle (chacha) of the victim has been granted the benefit of doubt qua the charge which was framed against him under Section 376 I.P.C. and under Section 6 of the POCSO Act. The Trial Court came to the conclusion that though the age of the victim had been proved to be 27.05.2009 and that she was a minor at the date of the alleged incident being around the age of 8 years but the accused has been able to create a dent in the case of the prosecution. Therefore, keeping in view the evidence on record and the totality of the circumstances, it was held that the prosecution could not prove the occurrence of the charge against the accused beyond all shadow of doubts. The Trial Court had framed the following points for determination of the Court and accordingly answered the points No.(ii) to (iv) in favour of the accused-respondent:

“(i) Whether the prosecutrix was minor on the relevant time?

(ii) Whether the accused had committed rape upon the prosecutrix?

(iii) Whether the accused had committed the offence of penetrative sexual assault upon the prosecutrix?

(iv) Whether in the given facts and circumstances of the case, the accused has been able to create a dent in the case of the prosecution?”

3. Counsel for the State has vehemently argued that there was no justifiable reason as to why the minor girl would depose against the respondent-accused and the Trial Court was not justified in granting the benefit of acquittal especially keeping in view the medical also which shows that the hymen was torn. It is submitted that some of the statements had also been recorded and medical had also been conducted at Delhi though the prosecution had thereafter proceeded at Faridabad and

therefore, there was no reason for the prosecution to falsely implicate the accused.

4. We have perused the record and find that the reasons given by the Trial Court are justified. It has also scanned the record and evidence of the witnesses in detail and given valid reasons to grant the benefit of acquittal. In short and substance, the points which weighed with the Trial Court to disbelieve the statement of victim was the matrimonial dispute which was prevailing amongst the mother and father of the victim and the fact that the complainant being the mother was residing separately since around 5 years and had never looked after the victim. There was litigation both in the form of criminal and divorce proceedings inter se the parties and the fact that the lodging of the FIR after the child had been taken away by the mother, was the ground which weighed with the Trial Court apart from the contradiction of the child witness itself. It was noticed that the statement of the victim was recorded in the presence of the Legal-Aid-Counsel on 04.04.2018 (Ex.P-1) wherein allegations had been made that in the absence of her aunt, the accused had taken off the pajami of the victim and inserted his finger inside her vagina. The grandparents were sleeping and she was sleeping with her uncle and her mouth had been gagged and threat was extended to her and she did not disclose the fact to anyone. She had felt pain in the stomach and had been admitted in a hospital at Delhi. Similarly, qua her statement (Ex.P-2) recorded before the Child Welfare Committee on 05.11.2018 she had stated that the accused had taken her in his lap and gagged her mouth and put his hand inside her pajami. The uncle had then touched her vagina from his finger and had told her not to disclose the fact to anyone.

5. In comparison to the statement recorded on 04.04.2018 under Section 164 Cr.P.C., she had deposed that her aunt had gone to Delhi and the accused had closed the door and gagged her mouth and taken off her leggings and told her not to tell anyone about it. He had put off the light and made her sleep with him. It was further narrated that he had done this twice. In contrast to the statement made before the Court by the said victim who had appeared as PW-2 which was recorded in the presence of her mother on 05.11.2018, she had stated that her uncle had shut the door of the room where she was present and put off her clothes and put his finger in her vagina. It was alleged that the other family members were on the ground floor and the aunt had gone to the parental house and the victim was present at the upper floor. On account of the threat raised she had not disclosed this fact to anyone and disclosed it only to her mother at the house who then informed her maternal uncle and then took her to the hospital. While discussing the evidence, the Trial Court also noticed that there were 3 rooms at the residence at Faridabad, two at the ground floor and one at the first floor and the child used to sleep with the grandmother at the ground floor and the other uncle, Gajender and his wife used to reside at the first floor and she had never told about the stomach pain to her grand-parents and her uncle Gajender and his wife and small child were not present at the house and they had gone to some other place.

6. While keeping in view the testimony of the complainant, PW-3, the mother, Shashi Gautam, it was noticed that the child had been brought to Delhi on 25.03.2018 and had been taken to the AIIMS for medical examination thereafter and the FIR was admittedly lodged only on 01.04.2018. It was further noticed that there was a divorce case and a criminal case pending against the husband and a complaint was also filed

at the CAW Cell at Delhi and though a compromise had taken place but no money was received by her till date and there was no settlement arrived at. It also came on record that she had come to know about the fact that her husband had married someone else and she had gone to meet the victim at Faridabad and had been pressurized to take the victim with her and she had telephonically quarreled with her husband and she was living separately from her husband and children from 31.07.2013. Noticing the fact that she never looked after the child and the litigation was pending inter se and even the fact that the child had been taken away and she was in the custody of the mother for a week, it was held that she was in complete influence of her mother on account of the strained relationship. She had then lodged the criminal prosecution and the victim had been tutored. It was accordingly noticed that there was contradiction between the 3 statements (Exs.P-1 to P-3) as to the manner in which the occurrence had taken place and the fact that the defence witnesses also appeared in support of the accused who were none but the father and sister-in-law. Thus, the benefit was granted keeping in view the fact that there was no exact date of occurrence and the fact that the premises on the first floor were in the control of the other brother who was married and living with his family which came to be proved from the statement of DW-2.

7. The record might go on to show that the medical records were showing that the hymen was torn when the examination of the victim had taken place on 31.03.2018 under anesthesia which would be clear from the statement of PW-9, Dr.Ritu Yadav, Senior Resident. However, it was specifically mentioned that there was no laceration or cut seen and no bleeding or discharge seen. It has come in cross-examination that the

alleged history of sexual assault was narrated by the mother of the victim

and the Doctor also asked about the history of the sexual assault from the victim also. The incident was of one week earlier and that the tearing of the hymen could be on account of cycling, horse riding, masturbation and trauma etc. There was nothing to show that there was any sign of redness or irritation on the private parts of the victim to show that she had been manipulated in the manner in which the prosecution had put forward its case in different manner, as noticed by the Trial Court also.

8. A perusal of the statement of the victim would also go on to show that the complainant had come to meet her 3-4 times at Faridabad during the period of separation but had never taken the child to Delhi and she was staying at Faridabad along with her brother. It was also stated that her father had solemnized the second marriage and that is why he was not coming and staying at Faridabad and the child had come to know about the second marriage when there was quarrel at the house and the mother had come to take her to Delhi only on that day. In cross-examination, it also came forth that the child used to sleep with the grandmother at the ground floor and the uncle, Gajender and his wife along with small child used to reside at the first floor. The statement of the mother would go on to show that a divorce case and a criminal case were pending inter se parties and no money had been received in lieu of the compromise and her husband was living with some other woman and she had also volunteered that she married him. She had further admitted that there was constant pressure by her husband and the in-laws to take the victim with her and the pressure was for the last 2-3 months and that she had taken the victim with her after giving a written intimation to the police but at that time had not been told about the occurrence. She also admitted that she had telephonically

quarreled with her husband and volunteered that she was being

telephonically abused by her husband after getting drunk and the fact that the child was living with her in-laws since 31.07.2013 and she had never come to meet the victim earlier. The school fees, food and lodging expenses were being borne by the in-laws and the husband and she denied the suggestion that on account of the bad relation with her husband, she had falsely implicated the accused by tutoring the prosecutrix.

9. The said factum of the child being brought up by the father and the grandparents has also further been proved by PW-6, Ms.Nisha Varshney, Principal, BSR Academy, Faridabad who in her cross-examination, stated that her mother had never come to school and did not sign the admission form on account of the fact that she had strained relationship with her husband and the child was accompanied by her father and grandmother at the time of admission.

10. All the above facts would go on to show that the relationship between the parties was strained and they were living separately. On account of the fact that the wife came to know that the husband had married someone else and they started living separately even from the child, she had come to take the child. After keeping the child for a period of a week, the statement was recorded and the criminal law was set into motion. The Trial Court, keeping in view these facts and the fact that there were discrepancies in the statements recorded at various points and that the child was always staying with the grandparents at the ground floor rightly came to the conclusion that there was no occasion for the incident to happen on the first floor and had given the benefit of doubt to the accused. The motive to false implicate and pressurize the family of the husband has been apparently brought on record and it was admitted by the complainant

herself to that extent and it was apparent from the statement that the wife

was living separately for almost 5 years. If she had any love and affection for the children, she would not have abandoned them and only on account of the fact that she had come to know that her husband had married again, she took the extreme step. Thus, there would be a valid reason to put pressure on the family of the husband keeping in view the fact that the marriage had gone beyond repair at that point of time and no compensation had been received. The husband also appeared as DW-1 in support of his brother to state that he was falsely involved in FIR lodged under Sections 307, 506 IPC and he was acquitted.

11. A perusal of the judgment of acquittal dated 30.08.2019 (Ex.D-5) would go on to show that the allegations were made that an attempt was made to kill her by strangulating her with chunni on 16.08.2012. The Trial Court had found that there were various discrepancies and infirmities and did not feel the confidence to convict the husband on account of the fact that there was already a matrimonial dispute inter se the parties. It was further held that the injuries found on the neck of the victim were not strangulation marks and there could be reasons for false implication on account of the background of the case.

12. In his statement, even the father had stated that on account of tutoring, the false case had been lodged and the accused only occasionally came to the residence and remained out of station most of the time and never went upstairs as the family of the younger brother was living there. He had also placed on record 4 complaints which had been lodged against him by his wife at various places. Similar was the statement of the defence witness, DW-2, Pooja, wife of Gajender Gautam and the sister-in-law who had stated that they were living separately on the first floor and

they had no concern with the activities of the in-laws family and that

whenever she used to go out of the house, she used to keep it locked and her brother-in-law had never entered the room at the first floor in her absence.

13. Thus, keeping in view the above facts and circumstances and the fact that there was acrimony between the husband and the wife to the extent that even criminal prosecution was launched in the form of trial under Section 307 I.P.C. and no independent person could be examined even though they were living in a crowded locality. The fact that the child had been practically abandoned and the stance of the husband was also that the wife was living separately at her parental home. Thus, it is apparent that the benefit of doubt which has been extended to the accused had justifiable reasons. Solely on account of the fact that the child had stated against her uncle, the Trial Court has, with careful consideration, kept the same in mind. It is also to be noticed that the Trial Court Officer which recorded the acquittal had also recorded the statement of the victim on 05.11.2018 and was in a position to observe the child at the time her statement was recorded. In such circumstances, while keeping in mind the principle that the statement of the child witness is to be examined with caution, the Court has not accepted the version of the victim while noticing that there were various discrepancies in her statement recorded before various authorities.

14. It has been time and again held that as a rule of prudence that there should be corroboration of other dependable evidence before conviction as such is recorded on the basis of the evidence of a child witness. The same has to be scrutinized closely and if the Court finds it reliable then only conviction can be based upon it. The Apex Court in

(CrI.) 481 has held that it is for the Court to ascertain by examining the evidence and from the contents thereof whether there is any evidence of tutoring. Similarly, in **Panchhi & others Vs. State of U.P., 1998 (4) RCR (CrI.) 74**, it was held that a child witness could be swayed by what others tell him and therefore, was an easy prey to tutoring.

15. In **Nivrutti Pandurang Kokate & others Vs. State of Maharashtra, 2008 (2) RCR (CrI.) 74**, it was observed by the Apex Court as under:-

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

16. Similarly, in **State of Madhya Pradesh Vs. Ramesh and another 2011 (2) RCR (CrI.) 582**, it was held that the evidence of a child witness must be evaluated more carefully and only in case there is evidence on record that the child had been tutored, the Court could reject the statement and the influence had to be drawn from the contents of the deposition of the child witness.

17. In **Hamza Vs. Muhammadkutty @ Mani & others**, the

the High Court while noticing that the child witness was only 7 years old on the date of incident and he was under the care and guardianship of his mother's parents. Thus, the possibility of tutoring could not be ruled out. Therefore, it had placed reliance upon the earlier judgment of **State of Madhya Pradesh Vs. Ramesh (supra)** that once there was a evidence on record that the child had been tutored, the Court could reject his statement partly or fully.

18. The Trial Court, thus, keeping these principles in mind examined all the statements made by the child at the various stages and has rightly come to the conclusion that there were various discrepancies. The view which has been taken is not suffering from any perversity or illegality and this Court being a Appellate Court would not normally interfere in the order of the acquittal. Since there is a double presumption as such of innocence in favour of the respondents/accused, reliance can be placed upon the judgments of the **C. Antony Vs. K.G. Raghavan Nair, 2002 (4) RCR (Criminal) 750, Gamini Bala Koteswara Rao & others vs State of Andhra Pradesh, AIR 2010 SC 589, Anil Kumar Gupta Vs. State of U.P., 2011 (2) RCR (Criminal) 292 and Sanjeev & another Vs. State of Himachal Pradesh, 2022 (2) RCR (Criminal) 341.**

19. Thus, keeping in view the cumulative background, this Court is of the opinion that the judgment of the Trial Court does not suffer from any perversity or infirmity as it has taken into account all relevant statements and the background of the parties. Therefore, keeping in mind the fact that there is double presumption of innocence in favour of the accused on account of the acquittal recorded, we are not inclined to interfere with the same. Accordingly, for the reasons given above, the

prayer for leave to contest is declined and the present application is, hereby dismissed.

(G.S. SANDHAWALIA)
JUDGE

31.10.2022
Sailesh/naveen

(JAGMOHAN BANSAL)
JUDGE

Whether speaking/reasoned :	Yes
Whether Reportable :	Yes