

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

**CRM-29505-2019 in/and
CRM-A-2140-2019 (O & M)
Date of decision: 13.05.2022**

205

Bijender

....Appellant(s)

Versus

State of Haryana and others

....Respondent(s)

**CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JUSTICE VIKAS SURI**

Present: Mr. Anil Kumar Gahlawat, Advocate,
for the applicant.

Mr. Hitesh Pandit, Addl. A.G. Haryana.

None for respondent Nos.2 to 4.

G.S.SANDHAWALIA, J.

CRM-29505-2019

Application for condonation of delay of 11 days in filing the appeal is allowed, in view of the averments made in the application duly supported by affidavit.

Delay of 11 days in filing the appeal is condoned.

CRM stands disposed of.

CRM-A-2140-2019 (O & M)

The present appeal is directed against the order of acquittal

passed by the Additional Sessions Judge, Palwal in FIR No. 113 dated 30.03.2018 under Sections 120-B, 366, 216 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short 'the POCSO Act') lodged at P.S. Chandhut. The appeal has been filed by the complainant-uncle of the victim. The respondents, who are the accused in the session trial were Amit, the one who had eloped with the victim whereas Daya Ram is his father and Harish is the brother-in-law. On 21.05.2018, against Amit, charges under Section 120-B, 366 IPC and under Section 4 of the POCSO Act, 2012 were framed and against Harish charges under Sections 366/120-B IPC were framed and against the father Daya Ram charges under Section 216 IPC were framed. The Additional Sessions Judge, Palwal, who has granted the benefit of acquittal against the charges which were framed against the said persons, considered all the aspects while granting the said benefit.

The reasoning given to acquit as such was primarily that firstly the age of the prosecutrix-victim was not proved to be below 18 years since the date of birth certificate from the Registrar, Births & Deaths had not been produced. The prosecution had only placed reliance upon the record from the Haryana School Education Board, Bhiwani, which was the secondary examination certificate wherein, the date of birth was shown as 21.06.2000. It was also noticed that the original record had not been produced by PW-10 Bhupender, Clerk of the said Board and attestation had been done and the witness could not depose whether the entries regarding the age of victim were correct or wrong. It was noticed that there was nothing to show as to who got the victim admitted in school and whether she was studying in the

had not come into the witness box. The complaint had been lodged by the uncle, who is the present appellant herein, since the victim was residing with him. Therefore, material witnesses being the parents could only depose about the place of birth so that the evidence could be collected regarding the date of birth.

The benefit was accordingly given since it was noticed that the age of the prosecutrix was alleged to be 17 years and 9 months and she was short of just 3 months from 18 years. The issue of kidnapping and proving the charge under Section 366 IPC and the issue of enticing the victim to compel her, for marriage was adequately dealt with by noticing that she herself had stated that she had made a telephonic call to Amit and called him to her house. Thereafter they had gone to Delhi on his motor cycle and solemnized the marriage at a temple at Delhi. It was noticed that she had stated in her statement under Section 164 Cr.P.C. stated that she knew Amit for the last 2 years and it was on her asking he had taken her and there was no one responsible in their going away from the house and she was not enticed by anyone. The statement thereafter made in Court was also taken into consideration to come to the conclusion that it was contrary to the first statements recorded by the police and could be on account of the tutoring at the time when evidence had been recorded in the Court. Therefore, it was held that there was no force used by Amit and that once she was not held to be a minor, the question of kidnapping from lawful guardianship of her parents would not arise and the offence under Section 366 IPC was not established.

Similarly, regarding the charge of 120-B IPC and on account of

Harish, it was held that his complicity in the crime could not be established. The telephone of Harish had also been recovered but nothing had been brought on record that there was a conspiracy between Amit and Harish and no material had come on record regarding the mobile number of Harish nor the call details had been collected by the Investigating Officer. It was noticed that in earlier versions by the victim, nothing as such was there against Harish as he had not been named. Therefore, there was an improved version at a subsequent stage and even from the statement of PW-2, the only evidence regarding the complicity of Harish was that the father of Amit had told him that both of them had taken away the victim and, therefore, he was given the benefit of acquittal. Daya Ram, the father was also granted the benefit under Section 216 IPC on the ground that no money was recovered from the possession of the accused Amit and nothing could be proved regarding the aspect of providing any monetary assistance during the period the prosecutrix was missing and her recovery. It was accordingly held that Daya Ram had been roped in only on account that the victim is missing and the complaint had been made by her family and Amit had thereafter appeared in the police station due to the arrest of the father.

Counsel for the appellant has vehemently submitted that there is medical evidence on record to show that the offence under POCSO Act had been committed and the Medical Officer had also been examined to this effect. It has accordingly been submitted that the certificate of matriculation (Ex.P-22) showed that she was under 18 years and, therefore, the Trial Court was not justified in acquitting the accused. It is further submitted that there was scientific evidence in the form of DNA profiling from the under clothes of the victim and the blood sample of Amit. It is submitted that in

such circumstances, once the victim has also deposed to that effect at this stage against Amit, the acquittal was not justified.

We have gone through the judgment in detail and also examined the record and are of the considered opinion that the benefit of acquittal which has been granted to the respondents is well justified. The Trial Court has noticed that there are considerable variations between the narration of the incident by the victim before the police and the Magistrate and the testimony given by her in Court. Therefore, it came to the conclusion that it would not be safe to rely on the same. It is settled principle that acquittals are not to be disturbed if the Trial Court has examined the statement of the witnesses and the evidence which has been brought on record and has given justifiable reasons as such. Reference can be made to the judgment of the Apex Court in ***Gamini Bala Koteswara Rao & others vs State of Andhra Pradesh'*, AIR 2010 SC 589** wherein, it was held that this Court was to re-appraise the evidence and conclusion of the Trial Court but interference was only to be if the judgment was perverse i.e. against the weight of evidence.

In the present case, as noticed, it has come on record that the victim was thus short of 18 years as per the statement of the complainant being 17 years and 9 months had gone missing on 29.03.2018. Resultantly, the FIR was lodged on the next date after the complainant had made enquiries and came to know that Amit-the accused and Harish his brother-in-law had taken away the victim. It is not disputed that after Daya Ram and Harish were arrested on 31.03.2018, apparently, on the arrest of his father, Amit also reached the police station, due to which the prosecutrix

the said date and also her statement was recorded under Section 164 Cr.P.C. before the Magistrate. The Trial Court has noticed that at that point she had mentioned her age as 17 years whereas, in her deposition in Court on 18.07.2018, she had claimed she was 18 years old. In her statement recorded before the police, she had stated that on 12.00 o'clock on 29.03.2018, she had called Amit by way of telephone and they had gone to Delhi on his motor cycle and solemnized marriage on 30.03.2018 in a Temple at Delhi. They had stayed in a rented room in Delhi and developed physical relations between themselves and had come to the police station on 01.04.2018. Before the Magistrate, she stated that she could not solemnize marriage as she was under age and the fact that she had known Amit for the last two years. She had also stated that she was not allured or enticed by him and she had gone on her own volition and solemnized marriage and did not want legal proceedings against anyone. It has also come on record that after she had been recovered, her parents, who admittedly were not staying with her, had also accompanied her and she was taken back and her custody was handed over to them and statement had also been recorded in the police station (Ex.D-1) in the presence of a legal aid counsel and she had apprehensions of her safety from her parents.

It is, thus, apparent that her subsequent statement which has been recorded three months later in Court was with considerable improvement wherein, she has turned around to submit that she was forcibly taken from her house and wrong had been committed with her in Delhi. The brother-in-law was also introduced, though she admitted that Amit came back to Palwal when her father got Daya Ram jailed. In her cross

they had gone to Delhi on a bike of the accused and performed marriage in the temple and name of Harish had not been mentioned. The blame was stated to be of the police who had not recorded the said fact in Ex.P-1. Further, mention was made that the accused had threatened to kill her brother and she was confronted with the fact that it was not recorded in her initial statement Ex.P-1. She also admitted that a lady advocate was also present when her first statement was recorded. She also in her cross examination admitted that in her statement Ex.P-2 before the Magistrate she had not stated that she had been forcibly taken to Delhi and that he had made relations with her forcibly. It was also admitted that when Ex.D-1 was recorded, her parents were present in the police station and that she had apprehension from her parents regarding her safety. The appellant-complainant in his statement also while being cross examined admitted the fact that his brother Dharam Pal and *bhabhi* Raj Bala were present in the police station when the victim had appeared before the police and they had also accompanied her to Court where her statement was recorded by the Illaqa Magistrate. He stated that he was not present in the evening in the Police Station at Palwal when her custody was given to her brother and *bhabhi*.

It is thus apparent that there is considerable improvement as such in the statements of the victim who is the sole eye witness as such and to be considered the injured eye witness. Therefore, it is apparent that it is on account of the fact that after she was staying with her parents that she had made the statement against Amit and Harish. It is a matter of fact that the said parents were not examined as prosecution witnesses and apart from

record. In such circumstances, even the age of the victim was rightly held to be not proved that she could not be said to be below 18 years and, therefore, the charge under Section 4 would rightly fall. It was open to the prosecution as such to collect evidence regarding her date of birth to ascertain her correct date of birth and it should have been in the form of unimpeachable character. The Trial Court was well justified in holding that on account of the stringent provisions of the POCSO Act, the standard of proof of age is also stricter and the prosecution having failed to discharge the onus as such of age and to bring it within the ambit of the POCSO Act, which provides that the child has to be below the age of 18 years under Section 2(d) and then only the prosecution as such would have been successful. The basic element having not been proved, the Trial Court was well justified to acquit the accused as admittedly even when she appeared in the witness box, she had also produced her *Adhaar Card*, copy of which was taken on record as Mark 'A'. A perusal of the same would go on to show that her date of birth is shown as 02.08.2001, which is again contrary to the date of birth of 21.06.2000 as shown on the certificate of secondary examination.

In such circumstances, we are of the considered opinion that the acquittal has rightly been recorded by the Trial Court, who has examined the evidence in detail both in the form of oral and documentary evidence which came on record. Adequate reasons have been given to justify the acquittal, which counsel for the appellant could not point out that they were perverse in any manner and would require interference.

Accordingly, the present appeal stands dismissed.

(G.S. SANDHAWALIA)
JUDGE

13.05.2022
shivani

(VIKAS SURI)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No