

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

**CRA-S-2429-2019 (O&M)
Reserved on: April 06, 2022**

Date of Decision: May 13, 2022

Pawan @ Pamma

... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE VIVEK PURI

Present: Ms. Saloni Sharma, Advocate,
for the appellant.

Ms. Ruchika Sabherwal, AAG, Punjab.

Mr. Vipin Mahajan, Amicus Curiae.

Vivek Puri, J.

The present criminal appeal has been preferred against the judgment of conviction dated 25.01.2019 vide which the appellant has been convicted under Section 17 read with Section 3 of the Protection of Children from Sexual Offences Act, 2012 (for short 'Act, 2012') and order of sentence dated 29.01.2019 vide which he has been sentenced as following:-

<i>U/s</i>	<i>Sentence</i>	<i>Fine</i>	<i>In default of payment of fine</i>
<i>17 read with Section 3 of POCSO Act</i>	RI for 7 years	Rs.5,000/-	RI for one month.

It was further directed that the period of confinement undergone by the appellant to be set off against the substantive sentence.

The facts as put forth by the prosecution are to the effect that the victim aged about 8 years is the daughter of the appellant. The mother of the victim is a poor lady and working as a maid in the houses of other people. On 04.02.2017, the mother of the victim was away from the house to do the house hold work in some other house. The appellant along with her 7 years old son and the victim were present in the house. At about 2.00 p.m., an unknown young person, aged about 25 years, came to the house, who locked the brother of the victim and son of the neighbourer in the bathroom. He took the victim on the first floor of the house and made physical relation with her. The entire incident happened in front of the appellant, who had given permission to do shameful act with her daughter. Meanwhile, the neighbourer of the mother of the victim arrived at the spot and saw two minor children confined in the bathroom. She released them and informed the mother of the victim that a person is committing rape upon her daughter on the first floor of the house. The unknown person came down with the victim. An alarm was raised by the neighbourer of the mother of the victim, but the said person managed to slip away. His bicycle was still lying in

the house. The victim was in shock and fear and the shameful act had happened in front of her father. He permitted the rape upon the minor daughter by some unknown person. On the basis of the statement of the mother of the victim, the case was registered.

On completion of the investigation, the challan was presented in the Court and in terms of the order dated 12.05.2017, the case was committed to the Court of Sessions. A prima facie case under Sections 376, 120-B of the Indian Penal Code and Section 17 of the Act, 2012 was made out against the appellant. The charge was accordingly framed, the contents whereof were read over and explained to the appellant, who pleaded not guilty and claimed trial.

In support of its allegations, the prosecution has examined 09 witnesses, besides producing documentary evidence. The statement of the appellant under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') was recorded, but he was not led any evidence in defence.

The prosecution has put forth case to the effect that an unknown person had committed penetrative sexual assault upon the victim, who was aged 8 years at the time of occurrence, with the consent, concurrence and connivance of the appellant. The case has been registered on the basis of the statement of mother of the victim who has stepped into witness box as PW1. She has deposed to the effect that

on the day of occurrence i.e. on 04.02.2017, she had gone to do the house hold work in the house of other persons. The victim along with her minor son and husband were present in the house. At about 2/2.30 PM, a young person, aged about 25 years, came to their house and took the victim to the first floor of the house. The son of the complainant and the son of Sunita (PW6) were playing in the house at that time and they were bolted in the bathroom. The unknown person committed penetrative sexual assault upon the victim on the first floor of the house with the permission of the husband of the complainant. Sunita PW6 came to the house of the victim. On hearing the hue and cry of her son and the son of the complainant, she opened the bolt of the bathroom and got released the boys. They informed her that the victim has been taken to the first floor. Meanwhile, the young person brought the victim down stairs. It was suspected that he had committed rape with the victim and an alarm was raised to nab the said person. He left the bicycle at the house of the victim and succeeded to flee away.

Sunita, PW6, is well acquainted with the family of the victim and she has also testified in support of the version of the prosecution. The victim had also informed her that an unknown person had committed rape upon her after removing her underwear at the instance of her father.

The victim has stepped into the witness box as PW3. She has also testified to the effect that the unknown person was called by her father, who took her on the first floor of the house and took off her underwear and started touching her private parts. The unknown person also took off his clothes and had committed penetrative sexual assault. The unknown person also committed sodomy upon her. He also told that he will give something to her and had also given money to her father.

The victim was medico legally examined by Dr. Birinder Kaur Randhawa, PW2, and following observations have been recorded in the MLR:-

“Examination of genitalia – Medial side of thighs were normal, labia minora and labia majora were normal. Hymen was absent. Two vaginal swabs were taken and two vaginal sliders were prepared. There is scarring of posterior fourchette extending into mid-line of perineal area.”

Furthermore, as per the report of the chemical examiner (Ex.PW2/B), spermatozoa were detected in the vaginal swabs.

ASI Nirmal Kaur, PW4, had conducted the investigation of the case. Ms. Meenakshi Gupta, Judicial Magistrate First Class, Jalandhar, had recorded the statement under Section 164 Cr.P.C. of the victim. Krishana

Kalsi, PW7, is working as ETT Teacher in the Government Primary School, Chugitti, Jalandhar and as per the school record, the date of birth of the victim has been reflected as 21.11.2008. HC Surjit Singh, PW8, had carried the parcel to the office of chemical examiner. The case property was retained in the Malkhana by ASI Sardari Lal, PW9.

In his statement recorded under Section 313 Cr.P.C., the appellant has denied the correctness of incriminating evidence appearing against him. The defence version as put forth by him is to the effect that he had not committed any offence and has been falsely implicated at the instance of his wife. It has been alleged that the wife of the appellant had been pressurizing him to live separate in her parental house at Kartarpur along with the children. She used to quarrel with him and wanted to get rid of him. He is having great love and affection for his daughter, who has deposed at the instance of his wife. The appellant has further pleaded that he was not present in the house at the time of occurrence and nothing has been recovered from him. However, he has not led any defence evidence.

I have heard learned counsel for the parties, learned Amicus Curiae and perused the record.

While assailing the judgment of the learned trial Court, the learned counsel for the appellant has mainly argued that the occurrence took place on 04.02.2017 and

the FIR has been lodged on 11.02.2017 after a delay of 7 days. The delay in lodging the FIR renders the version of the prosecution to be doubtful. Furthermore, the mother of the victim i.e. PW1 and Sunita, PW6, are not the eye witnesses to the occurrence. The statement of the child witness has to be accepted with caution and care. The person who had allegedly committed penetrative sexual assault has not been apprehended and consequently, no conviction of the appellant can be recorded. The present case has been lodged on account of matrimonial dispute between the appellant and his wife and it is improbable that the appellant would have facilitated any other person to commit penetrative sexual assault upon his daughter aged about 8 years for a meager amount of Rs. 100/-.

On the contrary, while supporting the judgment of the learned trial Court, it has been argued by the learned State counsel that in cases of sexual assault, the delay in lodging the FIR is immaterial particularly when the victim was aged about 8 years at the time of occurrence. The child is a competent witness. The statement of the victim has been recorded after putting her preliminary questions and the learned trial Court was satisfied that the victim is capable giving of rational answers to the questions put to her. Moreover, unknown person, who had committed penetrative sexual assault upon the victim could not be

apprehended. It is not a case that such a person was tried and acquitted. Consequently, the appellant cannot draw any mileage from the fact that the person who had committed the penetrative sexual assault has not been apprehended. Furthermore, it cannot be said that on account of matrimonial dispute, the appellant would have been falsely implicated by his wife and daughter. The case of the prosecution cannot be termed to be improbable in the light of consistent and reliable evidence appearing in the instant case.

The learned Amicus Curiae has submitted that the date of birth of the victim is 21.11.2008. She was 8 years old at the time of occurrence. The date of birth of the victim is established from the school record. She has given a consistent version against the appellant in her statement recorded under Section 164 Cr.P.C. and also during the course of her deposition in the trial Court. The mother of the victim and family acquaintance Sunita, PW6, have also supported the version of the prosecution. The consistent version of the victim who has stepped into witness box as PW3 is supported by the medical evidence. Even spermatozoa have been detected in the vaginal swabs. Moreover, the act attributed to the appellant is covered under the definition of the penetrative sexual assault as provided under Section 3(a) of the Act, 2012. Consequently,

the conviction of the appellant is liable to be recorded under Section 4 of the Act, 2012 and not under Section 17 of the Act, 2012.

It is expected that an FIR is to be recorded with due promptitude. In the event the matter is reported to the police with due promptitude, it rules out the possibility of the introduction of coloured, concocted, exaggerated or false version. However, at the same time, it has to be borne in mind that delay in lodging the FIR is not necessarily a circumstance which would warrant the rejection of prosecution case in entirety in each and every case. The FIR is expected to reflect true picture of the occurrence without any embellishment or fabrication. No specific time limit has been prescribed for reporting the matter to the police. The delay in informing the police with regard to the incident or lodging the FIR is bound to occur due to variety of reasons depending upon surrounding circumstances existing at the time of occurrence and even subsequent to the commission of crime. The FIR is to be lodged promptly and if there is any delay, the prosecution is required to furnish a satisfactory and plausible explanation to the same. However, no straight jacket formula can be laid in this regard. Furthermore, in case of sexual offences, the criteria may be different. It shall not be out of place to mention here that in cases of penetrative sexual assault, the victim remains in a

traumatic state of mind. The victim and the family may be initially reluctant to approach the police as the honour of the family and the reputation of the victim will be at stake. The delay in lodging the FIR in such like cases is a natural phenomena. The delay in lodging the FIR in cases of penetrative sexual assault upon the victim who is of tender age can't be equated with the cases in other offences. The delay in case of sexual offence has to be considered with different yard stick more particularly when the act has been attributed to the father of the victim.

On adverting to the merits of the present case, it may be recapitulated that the victim was 8 years old at the time of occurrence. She was sexually abused, ravished and subjected to the penetrative sexual assault by an unknown person at the instance, active consent, connivance and concurrence of her father i.e. the appellant. Such a ghastly act must have put the victim in a state of shock and trauma. Even the mother of the victim would have been under shock when such an act has been committed against her daughter of tender age and that too at the instance of her husband. The first version of the case has been unfolded in the complaint Ex.PW1/A submitted by the mother of the victim to the police on the basis whereof the FIR was registered. It has been specifically and categorically mentioned that the victim was in a state of shock from the day of occurrence

and was also scared. Even while appearing in the witness box, the mother of the victim has deposed to the effect that the victim was in a state of shock and fear. As such, the state of mind of the victim, who was under shock and trauma and also her mother might have prevented the reporting of the matter to the police soon after the occurrence. Moreover, there is nothing to suggest that a false, coloured, concocted or exaggerated version has been introduced against the appellant as a result of afterthought. In such circumstances, the delay in lodging the FIR in the instant case is immaterial and does not in any manner render version of the prosecution against the appellant to be doubtful.

With regard to the age of the victim, the prosecution has set up the case to the effect that she was aged about 8 years at the time of the occurrence. The first version of the case against the appellant has been unfolded in the complaint (Ex.PW1/A), wherein the age of the victim has been specified as 8 years. The mother of the victim and victim herself during the course of their deposition in the Court have specified the age of the victim to be 8 years. Moreover, at the time of medical examination of the victim, her age has been recorded as 8 years in the MLR. In the statement of the victim that has been recorded under Section 164 Cr.P.C., she has given her age to be 7 years.

However, Krishana Kalsi, PW7, is working as ETT Teacher in Government Primary School, Chugitti, Jalandhar, where the victim was studying. The victim was got admitted in the school on 29.04.2015 in the first standard and as per the entries in the school record Ex.PW7/A, the date of birth of the victim has been reflected as 21.11.2008. In such circumstances, the age of the victim is proved and established to be 8 years at the time of occurrence.

There cannot be any bar to base the conviction on the testimony of a victim of sexual assault in the event her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, amounts to adding insult to the injury. In the event, the victim of sexual assault gives a vivid and reliable account of the entire episode, there cannot be any bar to base the conviction on the statement of such a witness. The statement of a victim of sexual assault can be relied upon if a deposition inspires confidence and is free from any embellishment or improvements. Moreover, the statement of a child witness has to be appreciated with care, caution and circumspection. In the event, the child has intellectual capacity to understand the questions and give rational answers thereto, her testimony can be accepted and the evidence of such a witness cannot be rejected merely on the score that there is no other supporting eye witness or

corroborative evidence provided the evidence of such a witness is reliable and convincing.

It is significant to note that the victim has stepped into witness box as PW3. Before recording her statement, the learned trial Court had put preliminary questions to her. The victim had given rational answers to the questions put to her. The learned trial Court had recorded the satisfaction before administering oath to the victim and recording her statement. The preliminary questions put to the victim are indicative of the fact that she understood the sanctity of the oath and was capable of giving rational answers to the questions put to her. Even in a statement recorded under Section 313 Cr.P.C., the appellant has not sought to dispute the version as put forth by the victim on the score that being a child witness she was not capable of giving rational answers to the questions and was not competent witness.

The victim in her statement recorded under Section 164 Cr.P.C. has specifically and categorically stated that the penetrative sexual assault was committed at the instance of her father i.e. the appellant. The appellant had sent the victim to the unknown person on the pretext of getting some eatable items. Even the unknown person had told the victim that he will give Rs. 100/- to her and had also given Rs. 100/- to her father. She has also attributed the act of penetrative sexual assault upon that person.

Furthermore, while appearing in the witness box, she has given a consistent version with regard to the commission of penetrative sexual assault upon her by an unknown person at the instance of her father. It is emerging in the statement that the unknown person was called by her father, who took her on the first floor of the house. The unknown person had also given money to her father and had committed penetrative sexual assault upon her. During her cross-examination, she has specifically and categorically denied the suggestion that the appellant had not helped the unknown person to commit rape upon her.

The version of the prosecution is also supported by the medical evidence. During the course of medico legal examination of the victim, it was observed as following:-

“Examination of genitalia – Medial side of thighs were normal, labia minora and labia majora were normal. Hymen was absent. Two vaginal swabs were taken and two vaginal sliders were prepared. There is scarring of posterior fourchette extending into mid-line of perineal area.”

Furthermore, an additional credence is available to the version of the prosecution from the report of the chemical examiner. Significantly, the spermatozoa were detected from the vaginal swabs. Dr. Birinder Kaur Randhawa, PW2, has specifically and categorically deposed

during the cross-examination that alive spermatozoa are usually detected within 48 to 72 hours and dead spermatozoa can be detected upto three weeks. The report of the chemical examiner provides additional credence to the statement of the victim and further strengthen the case of the prosecution.

Although, the identity of unknown person could not be established during the course of the investigation, but it cannot be termed to be circumstance to absolve the appellant of his criminal liability. It is not a case where the person who had committed penetrative sexual assault has been tried and acquitted. The unknown person had managed to slip away from the spot and his identity could not be established during the course of the investigation and it cannot be termed to be a circumstance which would enure any benefit to the appellant or tend to falsify the version of the prosecution against him.

The defence version of the appellant to the effect that he has been falsely implicated on account of matrimonial dispute cannot be accepted. It sounds unnatural and improbable that the mother of the victim would have projected her minor daughter aged about 8 years to level false allegations against the appellant and put the honour of the family and that of the child at stake and to peril.

During the course of cross-examination of Sunita, PW6, the appellant has sought to put forth a version to the effect that she has deposed against him having been pressurized by her husband as he wanted to get the tenanted portion vacated from the appellant. Significantly, no such plea has been put forth by the appellant in a statement under Section 313 Cr.P.C. In such circumstances, there cannot be any reasonable ground to disbelieve the version as put forth by the mother of the victim while appearing in the witness box as PW1 and also that of Sunita PW6. Their deposition also corroborates the version of the prosecution against the appellant.

Lastly, it may be mentioned here that the learned trial Court has recorded the conviction and sentenced the appellant for having committed the offence punishable under Section 17 read with Section 3 of the Act, 2012. Section 17 of the Act, 2012 provides punishment for abetment. It is significant to note that the penetrative sexual assault has been defined in Section 3 of the Act, which provides as following:-

- “3. Penetrative sexual assault** – A person is said to commit “penetrative sexual assault”, if –
- (a) *he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or **makes the child to do so with him or any other person;***

- (b) *he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- (c) *he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
- (d) *he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person”*

The punishment for penetrative sexual assault has been provided under Section 4 of the Act, 2012. The act attributed to the appellant is squarely covered under Section 3(a) of the Act, 2012 as he made the victim to have sexual intercourse with another person. In such circumstances, the conviction of the appellant is liable to be altered from Section 17 read with Section 3 of the Act, 2012 to Section 4 of the Act, 2012. It may be mentioned here that no prejudice will occur to the appellant in this regard. Section 17 of the Act, 2012 provides for the same punishment as provided for the offence. Even the learned trial Court has taken a fairly liberal view and has imposed the minimum sentence by considering the offence pertaining to the abetment under Section 17 of the Act, 2012 as defined under Section 3 punishable under Section 4 of the Act, 2012. Moreover, the

appellant has not been misled by any error or defect in the charge as the act attributed to him has been clearly mentioned in the charge. The error or defect in framing the charge will not vitiate the trial itself. Moreover, at the first instance, the charge was framed under Section 4 of the Act, 2012 by the trial Court and the same was subsequently altered to Section 17 of the Act, 2012. The object of framing the charge is to enable an accused to have clear idea of what he is being tried for and essential facts that he has to meet with. There is nothing to suggest that the appellant has been in any manner misled by any error in framing the charge. Moreover, there cannot be any bar to alter the conviction as the appellant is not being convicted or sentenced with regard to the offence of higher degree. The conviction is not being recorded for a graver offence and only the penal provision is being altered for recording conviction and sentence. No other irregularity or illegality is made out in the judgment of the learned trial Court which warrant interference by this Court.

The appellant being father of the victim was expected to act as a protector of the minor daughter. A father has significant and dominant position in the life of a daughter. Instead of providing protection and care to the daughter, the appellant has rendered her to be sexually abused by another person for small monetary gains.

On evaluating the evidence adduced on record, the prosecution has successfully proved and established the guilt of the appellant beyond the shadow of reasonable doubt. Accordingly, the appellant is held guilty and convicted under Section 4 of the Act, 2012. With regard to the quantum of sentence, the learned trial Court has taken fairly liberal view and imposed minimum sentence provided for the offence. Consequently, the conviction of the appellant is altered to be under Section 4 of the Act, 2012 and is sentenced as following:-

<i>U/s</i>	<i>Sentence</i>	<i>Fine</i>	<i>In default of payment of fine</i>
<i>4 of POCSO Act</i>	RI for 7 years	Rs.5,000/-	RI for one month.

With the aforesaid partial modification in the judgment of conviction and order of sentence, the instant appeal being devoid of merit, is dismissed.

Before parting with the judgment, the Court records the appreciation for the valuable assistance rendered in the matter by learned Amicus Curiae, Mr. Vipin Mahajan.

May 13, 2022
vkd

(Vivek Puri)
Judge

Whether speaking/reasonable : Yes
Whether reportable : Yes