

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

205

CRM-A-2941-2019 (O&M)

Reserved on: 02.12.2022

Date of Decision: 14.12.2022

STATE OF HARYANA

-Appellant

Versus

VISHAL

-Respondent

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE KULDEEP TIWARI**

Argued by: Mr. Pradeep Prakash Chahar, DAG, Haryana
for the appellant.

Mr. Navneet Singh, Advocate
for the respondent.

KULDEEP TIWARI, J.

1. The instant application, seeking grant of leave, is directed against the order of acquittal dated 31.07.2019 rendered by learned Additional Sessions Judge, (Exclusive Court for Heinous Crime against Women), Kurukshetra, whereby, the respondent has been acquitted from the charges framed against him, under Sections 363, 336-A of Indian Penal Code (hereinafter referred to as "IPC"), Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act") and Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "SC/ST Act"), in case FIR No. 190 dated 02.06.2018, registered at Police Station Ladwa, District Kurukshetra.

2. The present application, seeking leave to appeal, has been filed by the State of Haryana with the averments that the learned trial Court has not appreciated the statement of the prosecutrix (identity of the prosecutrix is withheld in terms of explanation attached to Section 33 (7) of POCSO Act) in its right perspective, and, that the statement of the prosecutrix is self sufficient to bring home the guilt of the respondent/accused. It has been further averred that the learned trial Court has not considered the vital aspect of statutory presumption, which existed against the respondent/accused, as prescribed under Sections 29 and 30 of the POCSO Act, therefore, onus was upon respondent/accused to prove his innocence beyond reasonable doubt. The learned counsel for the State specifically argued that the version of prosecutrix acquires corroboration from medical evidence as well as from statement of PW12, Bala Devi.

3. Before examining the legality of the order of acquittal, it is apt to first deal with the factual aspects of the present matter.

FACTUAL MATRIX

4. The prosecution agency was set into motion, upon a complaint (Ex. P35) being moved, on 02.06.2018, by the father of the prosecutrix, wherein, he stated that he belongs to Scheduled Caste and his younger daughter, aged about 17 years, has been enticed away by the respondent/accused, in the night of 31.05.2018, by alluring her, and, that the respondent/accused has abducted her. It was further stated therein that by doing the aforesaid act, the respondent/accused defamed his family

and the people of Scheduled Caste in the society, and, he requested for legal action against the respondent/accused. Accordingly, on the basis of aforesaid complaint, the present FIR was registered under sections 363, 336-A of IPC and Section 3 of the SC/ST Act, at P.S. Ladwa, District Kurukshetra. The investigation was carried out thereupon. Thereafter, on 07.06.2018, the prosecutrix was recovered from the house of PW12, Bala Devi wife of Jaipal, resident of Village Manoharpur (Biharigarh), District Saharanpur, Uttar Pradesh, and she was brought back to P.S. Ladwa. On the next day, her statement was recorded before the learned Illaqa Magistrate. The prosecutrix, in her statement recorded before the Magistrate under Section 164 Cr.P.C., did not point any accusing finger at the respondent/accused, and, stated that she went to the respondent/accused in the night of 31.05.2018, out of her own volition. She further stated that she stayed with the respondent/accused for three hours, and, at about 03:30 a.m. the same night, when she was returning to her house, she found the gate of her house open, whereupon, she got anxious and returned to the respondent/accused and requested him to take her with him to save her life at the hands of her family members. It is apposite to reproduce the relevant extract of her statement (supra):-

“Stated that on 31.5.2018, I left from the house all alone in the night at about 12 o'clock. I went to Vishal on the same night. The house was in the neighborhood of his house and he was alone in that house. I stayed there for 3 hours and I returned to my house in the night itself at 03.30 o'clock. Then I saw that the gate of my house is opened. I felt fear then I returned back near to Vishal. Then I told him that my

family members would kill me. Then, he took me to UP along with him. We had been left there by his one friend. We took room there on rent, which was the house of the aunt (bua) of his friend. We stayed there for seven days. An Inspector came there in the yesterday evening and brought us back from there. I do not want to say anything more. Now, I want to go to the house near my parents.”

5. Thereafter, the prosecutrix was medico-legally examined. The accused was arrested on 07.06.2018. The certificate with regard to the age as well as caste of the prosecutrix was also secured by the investigation agency, and, finally, challan was filed against the respondent/accused before the learned Special Court.

PROCEEDINGS OF TRIAL COURT

6. The respondent/accused was charge-sheeted for commission of offence punishable under Sections 363, 336 of IPC, Section 5(1) of the POCSO Act, which is punishable under Section 6 of POCSO Act, and Section 3(1)(xi) of the SC/ST Act. The prosecution, in order to prove its case, examined as many as 14 witnesses, and, proved on record the age as well as the caste of the prosecutrix, by leading oral as well as documentary evidence. However, the learned trial Court did not find the statement made by the prosecutrix credible and recorded the order of acquittal, which is now under challenge before this Court.

7. With the able assistance of learned counsel for the State, we have examined the entire record of the learned trial Court and have also perused the order of acquittal.

8. In order to prove the age of the prosecutrix, the prosecution

examined PW1, Shishpal, Computer Clerk, Office of Civil Surgeon, LNJP Hospital, Kurukshetra, who brought the original birth record pertaining to the year 2001 and proved the birth certificate of the prosecutrix as Ex.P1. The prosecution also examined PW3, Balbir Singh, Headmaster, Government High School, Village Ban, who proved on record the secondary examination certificate of prosecutrix as Ex.P6. Therefore, from the aforesaid two certificates, we can safely conclude that the date of birth of the prosecutrix is 28.09.2001, and, on the date of occurrence, she was, to be precise, 16 years 8 months and 3 days of age.

9. Likewise, to prove the caste of the prosecutrix, the prosecution examined PW7, Gopal Krishan, AWBN, Office of Tehsildar, Ladwa, who brought and proved on record the Scheduled Caste certificate of the prosecutrix as Ex.P11. Therefore, the aforesaid certificate also lends support to the claim regarding the prosecutrix being a member of Scheduled Caste community.

10. Now, another question which arises for consideration is that whether the prosecutrix was enticed away and subjected to sexual assault by the respondent/accused. The prosecution examined the prosecutrix as PW11. Before we take into consideration the statement of prosecutrix, which she deposed in the witness box, it is important to note here that the Investigation Officer did not record her statement under Section 161 Cr.P.C., and, only her statement under Section 164 Cr.P.C. was recorded. When the prosecutrix stepped into the witness box, she categorically levelled allegations against the respondent/accused to the effect that he

has committed sexual assault upon her, in the night of 31.05.2018, after taking her to a deserted house and thereafter, with the help of his friend Ravi, he forcibly took her to U.P. on a motorcycle, where she was kept in a rented house for 7 days and was repeatedly subjected there to sexual assault. Thereafter, she was recovered by police and both the prosecutrix and the respondent/accused, were brought back to P.S. Ladwa. The examination-in-chief of the prosecutrix reads as under:-

“My date of birth is 28.09.2001. I have passed 11th class. On 31.05.2018, at about 08-09.00 p.m., I had gone to meet Poonam, my sister-in-law, wife of Darshan, my cousin. She asked me to go for a walk. I, while returning back from walk, met accused Vishal on the way, who took me to a deserted house and kept me there for three hours. Accused Vishal committed penetrative sexual assault upon me there. Thereafter, he made a telephonic call to his friend Ravi. Ravi came at the spot and accused Vishal made me sit on the motorcycle by threatening to kill my brother and they took me forcibly to U.P. on the motorcycle. They took me to Biharigarh Manoharpur where accused Vishal kept me in a rented house for seven days. Accused Vishal committed rape with me there repeatedly. After seven days, at about 07.00 p.m., the police along with my father came there and brought me and accused Vishal at Police Station Ladwa.

2. I was produced before the Magistrate where my statement was recorded. (At this stage, the sealed envelope containing the statement of the victim recorded by Shri Jitender Singh, learned JMIC, Kurukshetra under section 164 Cr.P.C. is opened. The statement is read over to the witness, after seeing the contents of the same, witness states that it is the same statement which was deposed by her before the Magistrate and appended her signatures, after accepting the contents of the same to be correct. She also identified her signatures on the same. The said statement is Ex.P25). I was medically examined at Government Hospital, Kurukshetra.

11. From a conjoint reading of the statements made by the prosecutrix under Section 164 Cr.P.C., and, made before the learned trial Court, it clearly transpires that they are material contradictions in both the statements. In her statement recorded under Section 164 Cr.P.C., she did not level any allegation against the respondent/accused qua her being enticed or being sexually assaulted, whereas, her examination-in-chief narrates a completely different story. The statement of prosecutrix, under Section 164 Cr.P.C., was recorded on 8.6.2018 while being accompanied by her parents, and, the respondent/accused stood arrested on 7.6.2018, i.e. a day before the recording of her statement. The Magistrate has also given a Certificate that the statement of prosecutrix, under Section 164 Cr.P.C., was recorded at her own volition, without any fear or coercion, after ascertaining her willingness to make the statement, which makes it

clear that she made the statement without hers being under anyone's pressure. Therefore, by no stretch of imagination, it can be assumed that she was then under any influence or threat of the respondent/accused. This fact remains undisputed from the arrest memo of respondent/accused, recovery memo of prosecutrix and the memo of handing over the prosecutrix to her parents. Therefore, the allegation that she was subjected to sexual assault by the respondent/accused, which surfaced only when the prosecutrix deposed before the learned trial Court and not prior thereto in her statement under Section 164 Cr.P.C. Thus, the statement recorded by prosecutrix in her examination-in-chief does contain visibly material improvements from the previous, made before the learned Magistrate, and, that too, without any pressure from any quarter concerned. Therefore, her examination-in-chief, as recorded before the Court does not inspire confidence and hence, cannot be relied upon.

12. Even, the Investigation Officer opted not to record the statement of prosecutrix under Section 161 Cr.P.C. Although, it is not an obligation upon the investigation agency to record her statement under Section 161 Cr.P.C., however, it does affect the credibility to be attached to the evidence of the witness, more so, when there are glaring inconsistencies and contradictions in her statement under Section 164 Cr.P.C. and in her examination-in-chief, as recorded before the Court.

13. It is a settled proposition of law that the statement made under Section 164 Cr.P.C. can never be used as substantive evidence of

the fact stated therein, that, it can only be used to support or contradict the evidence given in Court by a person, who makes or records the same. The basic object of recording of statement of witness under Section 164 Cr.P.C. is to deter a witness from changing his/her version in future, under the fear of being involved in perjury. Here is the case, where the prosecutrix, in her statement under Section 164 Cr.P.C., totally exonerated the respondent/accused. However, when she was examined in the Court, after about 10 months, she came up with a totally new story and levelled serious allegations of kidnapping and sexual assault against the respondent/accused. This throws a doubt on the veracity of the prosecution case and has an adverse impact upon the probative value of the statement of prosecutrix.

14. Further, the statement of prosecutrix stands falsified by PW12, Bala Devi. As per the examination-in-chief of prosecutrix recorded before the Court, she was taken to U.P. on a motorcycle and was kept in a rented house, belonging to PW12, Bala Devi, for 7 days, where the respondent/accused repeatedly committed rape upon her and she was not allowed to go out of the room enabling her to complain anyone. However, when Bala Devi was examined as PW12, she stated that the accused and the victim came to live in their house. In her cross-examination, she stated that the prosecutrix used to sit with them, had meals with them and the door of the house was kept open. She further stated that the prosecutrix and the respondent/accused did not enter into any quarrel while in her house and the respondent/accused used to go out

of the house for work and their relations were cordial. She further stated that the prosecutrix and the respondent/accused used to sleep along with her family and the bathroom of rented room was at some distance, having a separate way from the rented room, and, that the kitchen was also outside. This statement of PW12, Bala Devi, clearly falsifies the allegations, as levelled by the prosecutrix, that the respondent/accused had threatened her to make her obscene video viral if she made any attempt to raise alarm in the rented house. Moreover, the allegation, inasmuch as, pertaining to the threat to viralize prosecutrix's video is concerned, the prosecution has not produced on record any obscene video to corroborate the statement of prosecutrix.

15. It was further alleged by the prosecutrix that on 31.05.2018, when she was returning after a walk with her sister-in-law, she met the respondent/accused on her way, who took her to a deserted house and kept her there for three hours and committed penetrative sexual assault upon her. First of all, the prosecutrix did not allege the aforesaid events in her statement recorded under Section 164 Cr.P.C., and, secondly, the prosecution never examined the sister-in-law of prosecutrix to prove the aforesaid allegations. Therefore, the withholding of the above material evidence adds to the dents in the prosecution story.

16. Furthermore, the prosecutrix was medico-legally examined by Dr. Namrata, Medical Officer, LNJP Hospital, as PW10, who proved on record her MLR Ex.P24. When PW10, Dr. Namrata, was put to cross-examination, she categorically admitted that there was no fresh mark of

injury on the body of prosecutrix and the date of occurrence was disclosed to her, by the prosecutrix, as 02.06.2018, however, she did not disclose the name of the person, who committed penetrative sexual assault upon her. When viewed in the light of aforesaid cross-examination of PW10, Dr. Namrata, the statement of prosecutrix, as portrayed before the Court, fails to inspire confidence of this Court, for one amongst the prime reason, that there are material improvements and contradictions from her previous statement made before the learned Magistrate. Therefore, the statement of the prosecutrix lacks credibility and thus, cannot be relied upon to reverse the order of acquittal, as recorded by the learned trial Court.

17. Learned counsel for the State argued that, in view of provision of Sections 29 and 30 of the POCSO Act, a statutory presumption arises against the respondent/accused, and, the onus is upon him to prove his innocence, and that, in the present case, he has failed to prove his innocence, therefore, the statutory presumptions stand against him and he is liable to be convicted for the charges framed against him. A cumulative reading of Sections 29 and 30 of the POCSO Act, would provide that, once the foundational facts have been proved by the prosecution, only then the statutory presumption is raised against the accused and the onus shifts upon the accused to prove his innocence. In the present case, as we have discussed above in detail, the prosecution has failed to prove the foundational facts, upon which statutory presumption can be raised. "*Presumption*" is a rule of law, which enables

the Court to presume existence of a fact on the basis of certain proved facts. The Court cannot presume existence of certain facts in vacuum. The prosecution has to discharge its initial burden by proving those facts which are essential to raise the statutory presumption. In the case in hand, the prosecution has failed to discharge its initial onus, therefore, the statutory presumption cannot be raised at the instance of the prosecution.

18. The order of acquittal cannot be interfered with lightly. It is well established law, as laid down by the Hon'ble Supreme Court in **Harijana Thirupala vs. Public Prosecutor, High Court of A.P., (2002) 6 SCC 470**, that upon passing of an order of acquittal, presumption of innocence in favour of accused gets reinforced and strengthened.

19. Upon a cumulative reading and appreciation of the evidence on record, this Court comes to a conclusion that the statement of prosecutrix is unworthy of acceptance because the same is found to be replete with infirmities. There are considerable inconsistencies and discrepancies in the statements of witnesses, which consequently makes it fabricated and unreliable. Moreover, the reasoning given in the learned trial Court's judgment does not suffer from any gross perversity or absurdity of mis-appreciation and non-appreciation of the germane evidence on record. The learned trial Court has taken a holistic view in the matter and analyzed the evidence of all the witnesses in a wholesome and harmonious manner. It is trite law that order of acquittal should not be disturbed unless there are substantial or compelling circumstances.

20. Therefore, this Court does not find any ground to interfere

with the order of acquittal. In sequel, the application for leave to appeal is hereby declined, being bereft of merits, and, the impugned judgment of acquittal rendered by the learned Additional Sessions Judge, Kurukshetra, is hereby upheld.

21. The case property, if any, be dealt with in accordance with law. The record be forthwith sent down.

(SURESHWAR THAKUR)
JUDGE

(KULDEEP TIWARI)
JUDGE

14.12.2022
devinder

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