

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-1104-2019 (O&M)

Date of decision:15.12.2022

Mohit

....Appellant

V/s.

State of Haryana

.....Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Sarfraj Hussain, Advocate
for the appellant.

Mr. Pawan Girdhar, Addl.A.G., Haryana.

Ritu Bahri, J.

1. The appellant-Mohit has come up in appeal against the judgment of conviction dated 23.10.2019 and order on quantum of sentence dated 24.10.2019 passed by learned Additional Sessions Judge, Faridabad whereby he has been convicted as under:-

<i>S.No.</i>	<i>Offence under section</i>	<i>Sentence</i>
(i)	376 IPC	Sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/- (Rupees five thousand only) and in default of payment of fine, the convict-accused shall further undergo rigorous imprisonment for a period of two months.
(ii)	3 of SC/ST Act	Sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/- (Rupees five thousand only) and in default of payment of fine, the convict-accused shall further undergo rigorous imprisonment for a period of two months.

2. The case set up by the prosecution was that on 07.04.2017

prosecutrix alongwith her mother had gone to bank in village Sikri and when she was getting prepared the photocopy of the Aadhar card, at that time, one boy started looking and giving gestures of smile towards her. He had also given her telephone number on a paper slip. She started talking to that boy on telephone and during that telephonic conversation, he allured her by way of deceitful talking and asking her to marry with him. On 10.04.2017 at about 07.00 a.m., she was called by that boy through telephone and he also threatened her to disclose his relations with her to her family members if she did not meet him. When she was returning back after leaving her brother Bunty in school, then Vicky Dagar met her and took her in a hotel Suhana. Due to fear she went to the hotel with him. Thereafter, in a room of the hotel that Vicky Dagar had committed rape upon her. He had also called his friends in the hotel and they also committed rape upon her. Thereafter, she made noise and public gathered there and gave beatings to them but they fled away from there. On this complaint, the FIR was registered and investigation was conducted. Statements of the witnesses under Section 161 Cr.P.C. were recorded and challans under Section 173 Cr.P.C. against Vijay Pal @ Vicky Dagar @ Kalu son of Sh. Banwari Lal, Mohit son of Sh. Hukam Chand and Pankaj son of Lt. Ved Pal were prepared. After presentation of the challans, all the aforesaid accused were charge sheeted under Sections 376D & 506 IPC and Sections 6 and 17 of POCSO Act and Section 3 of SC/ST Act vide orders dated 16.09.2017 and 01.11.2017 to which they did not plead guilty and claimed trial.

3. The prosecution examined 23 witnesses and tendered in evidence FSL report as Ex.P1 and DNA report as Ex.PY.

4. The statements of all the accused under Section 313 Cr.P.C.

were recorded and they pleaded innocence.

5. The trial Court, first of all proceeded with respect to factum of the age of the victim. As per the evidence given by the victim PW1 and her mother PW5, date of birth was not disclosed by both the witnesses. As per PW16 Vinod Kumar, who had brought the record of the school in which she was admitted on 25.03.2013 vide admission No. 6236 in class 9thA and as per the school record, her date of birth was 08.12.1999. He also proved and testified the copy of admission and withdrawal register as Ex. PW16/A and the school leaving certificate Ex.PW16/B, admission form EX.PW16/C and the verification report of date of birth of prosecutrix was Ex.PW16/D. PW23 Inderjeet Head Master brought record of transfer certificate (Ex.PW16/B) of the prosecutrix which was issued by their school on 24.03.2013. The date of birth of prosecutrix was 18.12.1999 as per transfer certificate Ex.PW16/B which was issued on the basis of admission and withdrawal register at sr. No. 1723 and the copy of the same was Ex.PW23/A. Further PW9 Dr. Sonia Upadhyay Medical Officer, General Hospital, Ballabgarh deposed in her examination in chief that for age verification, patient had to be referred to dental surgeon/dental surgeon radiologist B.K.Hospital, Faridabad.

6. The trial Court, after taking into account the evidence of admission, withdrawal register (Ex.PW16/A), school leaving certificate (Ex.PW16/B) and the verification report (Ex.PW16/D) came to a conclusion that the victim was not a minor as per Section 2(D) of the Protection of Children from Sexual Offences, Act (hereinafter referred to as 'the POCSO Act') and was more than 18 years of age at the time of alleged occurrence i.e. on 10.04.2017. This finding was rightly recorded by the trial Court and

does not require any interference.

7. The prosecutrix, while appearing as PW1 admitted her signature on the statement dated 10.04.2017 made under Section 164 Cr.P.C. (Ex.PA), which was the complaint made by her (at page No. 205 of the trial Court record). A perusal of the translation of Ex.PA shows that on 07.04.2017, she had gone to Seekri, Ballabgarh with her mother for bank work. When she was getting photocopy of Aadhar Card, it was Vicky Dagar who had given his telephone number to her on a piece of paper and started calling her. On a telephone, he had also given her promise of marriage. It was Vicky Dagar who had asked her to come and taken her in hotel Suhana on the highway. He forcibly committed rape upon her in the hotel room and, thereafter, his another friend who was thin, tall and of wheatish colour came and forcibly committed rape upon her. When the third boy came, she made noise and the crowd gathered there. Vicky Dagar was caught and beaten by the mob. Both the boys escaped from there and the third boy helped her. She prayed for legal action being taken against Vicky Dagar and his friend. **She had specifically stated that third boy helped her** and after being beaten by the mob, Vicky Dagar and his friend ran away from there. The prosecutrix had given another statement on 15.04.2017 (Ex.PB) under Section 164 Cr.P.C. before the learned Judicial Magistrate 1st Class, Faridabad which was recorded after a gap of five days. A perusal of the translation of Ex.PB (at page No. 211 of the trial Court record) shows that the same version given in the Ex.PA had been reiterated to the effect that it was Vicky Dagar who became her friend and he used to talk to her on telephone and promised her to marry. On 10.04.2017, he made her sit in the car and took her to a hotel where Vicky and his friend

Pankaj forcibly committed rape upon her. When she stopped them, Pankaj broke window glass and tried to cut the vein of her hand and threatened to kill her. When she raised alarm, a man saved her and the crowd caught and beaten three of them. Thereafter, they fled away.

8. Ex.PW10/A is the translation of the statement of the prosecutrix which was recorded before the Child Welfare Committee, Faridabad on 15.04.2017 (at page No. 243 of the trial Court record). Even in this statement, she had told the name of the boy as Vicky Dagar who had taken her to the Hotel Suhana after making her sit in the car. Vicky's friends also came there. The name of one of his friends was Pankaj. Vicky and Pankaj committed rape upon her. Thereafter Pankaj went out and the another boy who was outside came in and also raped her. Then Pankaj came again and tried to rape her again and when she raised alarm, Pankaj tried to cut her hand by breaking the window glass. People heard the noise and saved her.

9. In all the three statements as referred above, the prosecutrix had initially named Vicky Dagar and identified Pankaj. The name of the third person had not been reflected anywhere. While appearing as witness PW1, she did not recognize accused, who committed rape upon her. She was declared hostile and when she was cross-examined by learned counsel for the State, she denied the suggestion of false deposition or of being won over by the accused. In cross-examination conducted by learned defence counsel, she deposed that she had not seen the accused earlier anywhere and it was for the first time, she had seen the accused in the Court.

10. A perusal of the statement given by the prosecutrix while appearing as PW1 at page No. 93 of the trial Court record shows that on

10.04.2017, she left her brother Bunty in the school and one boy came with whom she had talked telephonically earlier and had not met him before, brought a car and asked her to accompany him on which she refused. Then that boy told her that he would disclose about her telephonic conversation with him to her parents and also threatened to kill her and her younger brother. He forcibly made her sit in the car and took her to a hotel namely Suhana. That boy gave her a cold drink and took her to a room and committed rape upon her. She did not know the name of that boy but the other boy who came thereafter, was calling him Vicky. When Vicky went outside, another boy came inside and he also committed rape with her. Thereafter, second boy went outside and third boy entered the room who also tried to commit rape with her. She hit her foot on the window pane and the glass was broken. She did not know the names of second and third boys who had raped her. She raised alarm and another boy who was passing outside the room also raised alarm on which public gathered. Out of three aforesaid boys, two ran away whereas the third boy was caught hold by public. In cross-examination, she stated that she had not seen the accused earlier anywhere and it was for the first time that she had seen them in the Court. PW5 mother of the prosecutrix also turned hostile and deposed that she did not know the accused present in the Court as she had not seen them earlier.

11. The other evidence was MLR (Ex.PW9/A) which was proved by PW9 Dr. Sonia Upadhyay, who stated that on 10.04.2017, she had examined the prosecutrix and there was an alleged history of sexual assault on the day of examination. The following injuries were found on the person of the prosecutrix:-

1. “Multiple linear abrasions of variable size ranging from 3.7 cm. Present over flexor aspect of left fore-arm, 6 cm from wrist joint with reddish colour.

2. Two linear abrasions reddish colour, vertically placed over extensor aspect of left fore-arm, 3 cm from wrist joint.”

12. She further deposed that **there was no evidence of any tear/laceration/injury on vulva/vagina/perineum. Hymen ruptured. No evidence of any tear/lacerated/injury on hymen margin/vagina.**

13. Learned counsel for the appellant vehemently argued that since neither prosecutrix nor her mother nor any other witness had implicated the appellant in the subject crime, therefore, no direct incriminating evidence had come on record as against the appellant. The learned trial Court had committed a grave error in holding the appellant guilty only on the basis of DNA report (Ex.PY). He further stressed that the DNA report (Ex.PY) could not be made the sole basis for holding the accused guilty as this report itself was not proved to be reliable. He submitted that the link evidence was defective. There was inordinate delay in sending the clothing and vaginal swab etc. of the prosecutrix to FSL, Madhuban for the purpose of DNA profiling which had not at all been explained and, therefore, the possibility of the sample being contaminated or fabricated could not be ruled out. Hence, it was urged that the conviction of the appellant as recorded under Section 376 of IPC was liable to be set aside.

14. We have carefully gone through the record. Undoubtedly, neither the prosecutrix nor her mother nor any other witness of the prosecution had implicated the appellant in crime as alleged and the learned trial Court had mainly relied upon the DNA report (Ex.PY) for convicting the appellant. Undisputedly, it is revealed from the DNA report (Ex.PY)

that the DNA extracted from the blood samples of the present appellant was

compared with the DNA found on the salwar of the prosecutrix and the *allelic* pattern of the DNA on the salwar of the prosecutrix matched with the *allelic* pattern of the blood samples of the present appellant. However, the question that arises for consideration is as to whether the DNA report can be acted and relied upon beyond doubt and the forensic evidence collected against the appellant during the course of investigation was scientifically and legally proved and it could be used as a circumstance against him. It is pertinent to mention here that though no direct evidence had been produced against the accused/appellant on record connecting him with the offence of rape but the prosecution had heavily relied upon the DNA report (Ex.PY) prepared by FSL, Madhuban. The vaginal swab and clothing of the victim including the salwar worn by her at the time of occurrence had been sent to FSL, Madhuban. The blood samples of appellant-Mohit had also been taken for the purpose of DNA profiling and were sent to FSL, Madhuban. As per DNA report (Ex.PY), the DNA profiling of semen detected on the salwar of the prosecutrix on comparison, matched with the DNA profiling of blood samples of the appellant/accused Mohit and conclusively proved that they were of same biological origin. The blood samples of co-accused Vijay Pal and Pankaj were also taken, however, on being compared with the semen detected on the salwar of the prosecutrix, they did not match. On the basis of this report Ex.PY, the learned trial Court arrived at a conclusion that it was the appellant, who had committed rape upon the prosecutrix and had convicted him while observing that even though the prosecutrix and her mother had resiled from their version and had not implicated the accused in the crime of committing rape upon the victim, still, the fact that the victim was proved to be sexually assaulted and the seminal stains found on the

salwar of the prosecutrix matched with the DNA profiling of the appellant.

15. On perusal of the record, it is revealed that the vaginal swab and salwar etc. of the victim had been taken into possession by the police as on 10.04.2017 itself when she was medico-legally examined. PW4-ASI Savita stated that she had handed over the case property to PW-17 ACP Pooja Dabla on 11.04.2017. PW-17 ACP Pooja Dabla did not utter even a single word about the fact that samples/case property had been handed over to her and she had deposited the same in Malkhana. PW-22 HC Munesh in her affidavit Ex.PW22/A submitted that the samples including salwar and vaginal swab etc. of the victim were deposited by her in FSL, Madhuban on 27.05.2017 i.e. after 46 days from the date when the samples were taken into possession by the police (11.04.2017 to 27.05.2017). No evidence had come on record to prove that the samples remained intact in Malkhana. The blood samples of the appellant were taken on 28.07.2017 and were deposited in FSL, Madhuban on 03.08.2017. Undoubtedly, as per DNA report (Ex.PY), the DNA profiling of the semen detected on the salwar of the prosecutrix matched with the DNA profiling of the appellant, however, since there was delay in sending the samples of the victim to FSL, Madhuban and the blood samples of the appellant were also sent after a gap of more than 5 days, therefore, the possibility of tampering with the samples collected could not be ruled out and in our considered opinion, this fact created a serious doubt about the authenticity of the samples. In this regard, we are fortified by the observation made by Hon'ble Apex Court in a recent judgment rendered in *Manoj and others Vs. State of Madhya Pradesh (2022) SCC Online SC 677*, wherein the issue of DNA profiling methodology, which is statistical analysis as also collection and

preservation of DNA evidence was dealt with in detail and it was observed that if DNA evidence is not properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence as the same can be contaminated when DNA from another source gets mixed with DNA relevant to the case. Further, in a very recent case decided on 07.11.2022 pronounced by Hon'ble Apex Court in a case ***Rahul vs. State of Delhi Ministry of Home Affairs and another 2022(4) RCR (CrL.) 993***, the record showed that the samples relating to the accused and the deceased were seized by the Investigating Officer on 14.02.2012 and 16.02.2012 and they were sent to CFSL for examination on 27.02.2012. It was observed that under the circumstances, the possibility of tampering with the samples collected could not be ruled out. Therefore, the reports with regard to the DNA profiling were conceded to have become highly vulnerable, particularly in the circumstances when the collection and sealing of the samples sent for examination was also not free from suspicion and the conviction of the accused for commission under Sections 302, 376(2)(g) and some other Sections was set aside.

16. In view of the fact that in the instant case, no evidence had been produced by the prosecution to prove that the DNA evidence collected from the victim was properly documented, collected, packaged and preserved till the same reached to FSL, Madhuban, the same is not proved to have met the legal and scientific requirement for admissibility in a court of law. More so, nothing has come on record to prove that the required techniques were

reliably applied by the forensic experts while preparing the DNA report (Ex.PY) of the semen stated to be found on the salwar of the accused and in the absence of sub evidence, DNA report (Ex.PY) with regard to DNA profiling is presumed to have become highly vulnerable and cannot be relied upon beyond doubt. Since, the learned trial Court had convicted the appellant only on the basis of the DNA report (Ex.PY), therefore, in the peculiar circumstances as discussed above to the effect that this report cannot be considered beyond suspicion, in our opinion, the findings as given by learned trial Court as to guilt of the appellant for commission of offence of rape of the victim cannot sustain and accordingly, the same are set aside.

17. So far as the conviction of the appellant accused for commission of offence punishable under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as “SC/ST Act”) is concerned, it was argued by learned counsel for the appellant that the same was also liable to be set aside as the learned trial Court had ignored the fact that no evidence had been produced on record by the prosecution to prove that appellant had committed rape upon the victim while knowing that she belonged to scheduled caste. On a minute scrutiny of the evidence produced, we are of the opinion that the conviction of the appellant under the above said provision is not sustainable in the eyes of law. The provisions of Section 3(2)(v) of the SC/ST Act were amended on 26.01.2016 and by way of this amendment, the words “on the ground that such person is a member of Scheduled Caste or Scheduled Tribe” had been substituted with the words “knowing that such person is a member a Scheduled Caste or Scheduled

Tribe”. Therefore, subsequent to 26.01.2016, if the offence under the provisions of IPC which is punishable with imprisonment for a term of 10 years or more, is committed upon a victim who belonged to Scheduled Caste or Scheduled Tribe community and the accused person has knowledge that such victim belonged to Scheduled Caste or Scheduled Tribe community, then the charge under Section 3(2)(v) of the SC/ST Act is attracted. In the present case, neither the prosecutrix nor her mother nor any other witness deposed anything about the involvement of the present appellant in the crime of committing rape upon the prosecutrix. Rather the prosecutrix gave a complete go by the prosecution case by saying that none of the accused had committed rape upon her. In the circumstances, when she did not say that the appellant was even known to her previously or that he was the person who had also ravished her, he cannot be presumed to be having any personal knowledge about the fact that victim and her family members were members of the Scheduled Caste or Scheduled Tribe community. In our opinion, the provisions of Section 3(2)(v) of the SC/ST Act were not attracted and the learned trial Court, therefore, committed error in holding the appellant guilty under the above said provision. Therefore, the findings given by learned trial Court under this provision are also liable to be reversed and are accordingly set aside.

18. Keeping in view the above observations, the appeal is allowed by giving benefit of doubt to the appellant-Mohit and he is acquitted of the charges framed under Section 376 IPC and Section 3 of SC/ST Act. Judgment dated 23.10.2019 and order on quantum of sentence dated 24.10.2019 are hereby set aside.

19. Pending application, if any, stands disposed of.

(RITU BAHRI)
JUDGE

15.12.2022
Divyanshi

(MANISHA BATRA)
JUDGE

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