

CRA-AD-79-2020 (O&M) -1-
IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-AD-79-2020 (O&M)
Date of Decision: 13.04.2023

Reena **.....Appellant**

Vs.

Sahil and another **.....Respondents**

CORAM: HON'BLE MR. JUSTICE G.S. SANDHAWALIA
HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

Present: Mr. Chand Ram Olla, Advocate,
for the appellant.

Mr. Vikram Singh, Advocate, for
Mr. Ishnoor, Advocate,
for respondent No. 1.

Mr. Ankur Mittal, Addl, A.G., Haryana, with
Mr. Saurabh Mago, A.A.G., Haryana.

HARPREET KAUR JEEWAN, J.

1. The present appeal has been filed by the appellant-complainant against the judgment of acquittal dated 06.12.2019, passed by Special Court, Karnal, whereby respondent No. 1 has been acquitted of the charges framed in FIR No. 142, dated 29.11.2018, registered under Sections 452 and 506 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'), at Police Station Women, Karnal.

2. The prosecution case in brief is that the victim was studying in 8th standard and her age is about 13-14 years. After returning from school, she used to go to the Government school in the village for playing. On

08.11.2018 at about 1-1.30 p.m., she had gone for playing along with her friends. The respondent-accused was already present there and was looking for an opportunity to commit a wrongful act on her. The respondent caught hold the victim and committed wrong act on her. While leaving, he threatened the victim of dire consequences if she discloses the same to others. The victim disclosed to her mother about the said act committed by the respondent when she reached home. The mother of the victim lodged a protest with the parents of the respondent, who assured her that the respondent will not do any immoral act again. However, the respondent continued harassing the victim. When the mother of the victim again protested against the parents of the respondent, they started abusing her saying that she was unnecessarily defaming their son.

2.1 On the night of 25th November 2018 at about 12:00 a.m., the respondent entered the house of the victim and knocked the door of the inner room. The appellant-complainant got up and opened the room and found that the respondent was standing there. On seeing the appellant, he fled away from the spot saying that he had come to take away the victim. If the appellant would come in his way, he would kill her. He also threatened to abduct the victim in future. The appellant and her family members again contacted the parents of the respondent who quarreled with them saying that they were defaming the respondent.

2.2 Ultimately, the mother of the victim gave a written complaint to the police on 29.11.2018 and on the basis of the same, a formal FIR was registered. During the investigation, the counselling of the victim was done and statement under the provisions of Section 164 of the Code of Criminal

Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.') was recorded and her medico-legal examination was conducted. The respondent was arrested on 27.12.2018 and after completion of the investigation, '*challan*' was presented against the respondent in the Court.

2.3 After presentation of the '*challan*', copies of the documents under Section 207 Cr.P.C were supplied to the respondent and charges under Sections 452/506 of the IPC and Section 4 of the POCSO Act, were framed against him on 29.01.2019. Alternative charge under Section 376 (3) IPC was also framed against the respondent to which he pleaded not guilty and claimed trial.

2.4 During the proceedings before the Trial Court, report was received from the Principal Magistrate, Juvenile Justice Board who during his jail visit, noticed the factum of juvenility of the accused, Sahil on 27.03.2019 who appeared to be a child from his physical appearance. Resultantly, the Trial Court on 28.03.2019 ordered his shifting from Karnal Jail to the place of safety immediately and to produce him on the next date so that his evidence could be recorded regarding this aspect. The needful was accordingly done. However, on 19.04.2019, the photocopy of the birth certificate of Sahil was produced by his father wherein his date of birth was depicted as 11.02.2000 as per the certificate issued from the office of the District Registrar (Births & Deaths) Karnal. Accordingly, on 23.04.2019, keeping in view the fact that the said certificate had been issued and he was a major and not a juvenile on 08.11.2018 the date of crime, keeping in view the provisions of Section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015, directions were issued to shift

him back to the District Jail, Karnal from the place of safety and the case was fixed for prosecution witness.

2.5 In order to prove the case, prosecution examined 13 witnesses, including the victim who appeared as PW-2 and her mother was examined as PW-3. Harpreet, teacher from the school of the victim appeared as PW-4 and Bhim Singh, Computer Clerk, MC, Karnal PW-5 proved the date of birth of the victim as 19.02.2004 by proving the copy of birth certificate (Ex. P-7). Raman Malhotra, Legal Aid Counsel, District Courts, Karnal appeared as PW-6. Recording of the statement of the victim under Section 164 of the Cr.P.C. was proved by Sh. Dharampal, JMIC, Karnal (PW-7). Dr. Kailesh Garg, M.O. GH Karnal (PW-8) proved the medico-legal examination report of the respondent. The medical evidence was proved by Dr. Diksha Thakur, MO, CHC, Kalka, who appeared as PW-12 The investigating officer appeared as PW-13. and the remaining witnesses proved the formalities conducted during investigation.

2.6 The following documents were proved by the prosecution:-

Ex.P1	Scaled site plan of the site occurrence.
Ex. P-2	Statement of the victim dated 29.11.2018 recorded by the LAC/Counsellor
Ex. P-3	Statement of the victim dated 29.11.2018 recorded by learned Magistrate under Section 164 of the Cr.P.C.
Ex.P-4	Complaint moved by the complainant to the police on 29.11.2018
Ex. P-5	MLR of the victim dated 29.11.2018
Ex. P-6	Memo vide which the custody of the victim was handed over to her mother on 29.11.2018
Ex. P-7	Copy of the birth certificate of the victim
Ex. P-8	Birth certificate of the victim
Ex. P-9	Application moved by the IO to Registrar, Nagar Nigam Karnal for verification of the birth certificates of the victim

Ex. P-10	Endorsement made by Sub Registrar, Nagar Nigam Karnal on the application (Ex. P-9)
Ex. P-11	Application dated 29.11.2018 moved by the Investigating Officer to learned Magistrate, Karnal seeking recording of the statement of the victim under Section 164 of the Cr.P.C.
Ex. P-12	Certificate appended by learned Magistrate alongwith the statement of the victim recorded under Section 164 Cr.P.C.
Ex. P-13 to Ex. P-15	Zimini orders dated 26.03.2019 passed by learned Magistrate on the application
Ex. P-16	Application dated 29.11.2018 moved by the Investigating Officer to learned Magistrate, Karnal seeking certified copy of the statement of the victim under Section 164 of the Cr.P.C.
Ex. P-17	Certified copy of the statement of the victim recorded by learned Magistrate under Section 164 Cr.P.C.
Ex. P-18	Application dated 28.12.2018 moved by the Investigating Officer before the Medical Officer, GH, Karnal seeking medico legal examination of the accused
Ex. P-19	Carbon copy of MLR of accused dated 28.12.2018
Ex. P-20	Disclosure statement of accused allegedly suffered by him during his interrogation on 27.12.2018
Ex. P-21	Demarcation of the site of crime got conducted by accused
Ex. P-22	Application dated 29.11.2018 moved by the Investigating Officer before the Medical Officer, GH, Karnal seeking medico legal examination of the victim
Ex. P-23	Carbon copy of the MLR of victim dated 29.11.2018
Ex. P-24	FIR of this case
Ex. P-25	Endorsement of the complaint (Ex. P-4) regarding registration of this case
Ex. P-26	Rough site plan of the site of occurrence prepared by the IO

2.6. The accused denied the prosecution and alleged false implication in his statement recorded under the provisions of Section 313 of the Cr.P.C. In his statement, respondent No.1-accused took the plea that he was innocent and was falsely implicated due to personal enmity and he wanted to lead defence evidence. The respondent also examined DW-1, Mandeep, Clerk, Government Senior Secondary School, Katlehri, to prove the documents pertaining to an information under the Right to Information

Act, 2005. The respondent also placed on record the following documents:-

Ex. D1	Arrest memo dated 27.11.2018
Ex. D2	Application moved by Om Parkash to Public Information office-cum-BEO, Chirao Karnal seeking RTI Act, 2005
Ex. D-3	Reply to application seeking RTI
Ex. D-4	Reply to the application seeking RTI, Act bearing No. 1330 dated 08.11.2019
Ex. D-5	Reply to application seeking RTI, Act bearing No. 1175, dated 06.02.2019
Ex. D-6	Copy of extract of students attendance register
Ex. D-7	Copy of extract of attendance register of school staff
Ex. D-8	Site plan of school

3. After hearing the Public Prosecutor and the defence counsel and on perusal of the record, the trial Court determined the date of birth of the victim as 19.02.2004 on the basis of the birth certificates Ex. P-7 and P-8. It was observed that the birth certificate Ex. P-7 was issued by the Municipal Authorities, Karnal, whereby an entry regarding registration of the date of birth was done on 12.03.2004. Ex. P-8 is the computerized birth certificate of the victim reflecting the same date of birth, i.e. 19.02.2004. The trial Court observed that since the date of birth of the victim was not controverted by the defence, hence, the said certificates Ex. P-7 and P-8 and the testimony of PW-5 was believed holding the date of birth of the victim as 19.02.2004.

3.1 However, the trial Court did not believe the prosecution case with regard to the respondent having committed trespass by entering the house of the complainant and giving her threat. Apart from this, the trial Court also disbelieved the prosecution case that the respondent had committed penetrative sexual assault upon the victim/committed her rape

on 08.11.2018.

3.2 The trial Court observed that the version given by the mother of the victim is not acceptable that instead of reporting the matter to the police, she went to the house of the accused to complain to his family members regarding the offence of rape having been committed upon her daughter. Since she did not take any action against the accused and she did not report the matter anywhere, therefore, her version cannot be believed. The trial Court observed that as per the prosecution story when the mother of the victim reported the matter to the parents of the accused, they assured her that their son will not indulge in such immoral act again. The version of the mother of the victim was found surprising that in such circumstances instead of lodging an FIR against the respondent, she merely reported the matter to the parents of the accused. It also weighed in the mind of the trial Court that no parent of a minor girl would be satisfied by such explanation given by the parents of any person who had committed rape upon their minor daughter. It was also observed by the trial Court that the language used by the complainant that the respondent was 'naughty' does not give any indication of rape having committed upon the victim.

3.3 The trial Court has also observed that there are contradictions in the prosecution case. The following contradictions were recorded:-

(a) Firstly, in the statement recorded under Section 164 of the Cr.P.C. the victim has not disclosed the fact that she had informed about the occurrence to her mother or that her mother had put up a protest with the parents of the accused after the accused committed rape upon her on

08.11.2018. Whereas, the victim when appeared as PW-2 has stated that the accused committed rape upon her on 08.11.2018 but due to fear, she did not disclose anything to her mother rather her teacher had told her mother regarding the victim remaining silent and not taking interest in her studies after which her parents went to the house of the accused to lodge a protest.

(b) Secondly, PW-2 has stated that on 25.11.2018 accused jumped into their house and her mother came out as such, the accused ran away. However, in the statement of the victim recorded under Section 164 of the Cr.P.C., the reference to the said date is missing. In the said statement, victim has stated that on 08.11.2018 when she returned to her house, her mother inquired regarding the reasons for redness on her face, she stated that her brother had slapped her. After 02-04 days, the respondent again jumped into her house, her mother switched on the light and he ran away from the spot.

(c) The 3rd contradiction was noticed by the trial Court that the victim PW-2 has claimed that the first occurrence took place on 08.11.2018 after that her teacher made a telephonic call to her mother and she narrated the occurrence to her mother and then her mother lodged the protest to the family of the respondent and thereafter, the respondent again entered the house of the victim on 25.11.2018. Whereas in her statement recorded under the provisions of Section 164 of the Cr.P.C., the victim has claimed that the first occurrence took place on 08.11.2018, then the accused had jumped into her house, then her mother lodged a protest with the parents of the respondent and thereafter, her teacher made a telephonic call to her

mother regarding the disclosure of the occurrence dated 08.11.2018.

3.4 The trial Court also observed that as per the version of the complainant, her daughter had gone to the school for playing on 08.11.2018 and it was a holiday. However, DW-1 Mandeep, Clerk from the Senior Secondary School, Kathleri, brought the attendance register of the school staff and testified that the school remained open from 08:00 a.m. to 02:30 p.m. on that day. Reference to the testimony of the said witness was also made that no outsider was allowed to enter the school during the school hours and the main gate of the school remains closed.

3.5 Another contradiction was noticed by the trial Court that as per the version of the complainant (PW-3), the teacher of the victim had telephonically informed her that the victim remains quiet and she was not showing any interest in her studies. However, this fact was not mentioned in the complaint given to the police (Ex. P-4). However, it has been mentioned in the said complaint (Ex. P-4) that after few days of the occurrence, dated 08.11.2018, her teacher, Harpreet, had asked her mother to find out the reason as to why she used to remain silent and was not taking interest in studies. Whereas the said teacher when appeared as PW-4 has stated that in fact the victim used to remain silent since the starting of the Session of VIII Class, she did not use to indulge/interact with other students. When the mother of the victim was called during Parents Teacher Meeting conducted after the summer vacations, she had apprised her about this fact to her mother.

3.6 With regard to the occurrence dated 25.11.2018, the trial Court observed that there is a contradiction in the version given to the

police and the statement made when she appeared as the complainant PW-3, as well as the statement of the victim PW-2. It was noticed that as per the prosecution case, the accused entered into the house of the complainant and knocked the door of the inner room. The mother of the victim woke up and saw the accused and on seeing her, accused fled away from the spot. Whereas the mother of the victim when appeared as PW-3, has stated in the cross-examination that when she noticed the accused in her house, she was sleeping in the lobby. She could not confirm the time as to when the accused fled away from her house. Whereas the victim PW-2 has stated that she sleeps outside her house in a 'Varanda' and when she heard the noise, her mother along with her father woke up. Whereas she (victim) kept on sleeping and she was not woken up by her mother. The trial Court has also taken a notice of the fact that no site plan of the house of the complainant was prepared reflecting the place from where the accused jumped into the house of the complainant and from where did he knock the door, as such, the allegations are vague in nature and this aspect has not been properly investigated by the investigating officer.

3.7 The trial Court also took into consideration the statement of the investigating officer (PW-13) as she stated in her cross-examination that it surfaced during the investigation that the father of the victim was not in talking terms with his neighbourers for the last 20 years due to a land dispute of their forefathers. The parents of Simran and Sanjana who were friends of the victim were also not in talking terms with the father of the victim. None of the neighbourer came forward to join the investigation. The defence counsel submitted that nature of the parents of the victim was

quarrelsome. As such, the trial Court concluded that the act and conduct of the parents of the victim shows that the complainant is false witness.

3.8 The trial Court also observed that though it had been reported in the medico-legal report (P-2) that hymen of the victim was found ruptured, but it is not sufficient to infer that the accused had committed the rape upon the victim since rupture of hymen can be due to many other external factors, like running or playing. It was also noticed that no external injury or marks on the abdomen or on the body of the victim were found.

Giving the aforesaid reasons, the trial Court granted benefit of doubt to the respondent-accused and acquitted him.

4. Learned counsel for the appellant submitted that the learned trial Court has wrongly ignored the testimony of the victim. The statement of the victim is corroborated by her mother and by the medical evidence. The testimony of the victim is also corroborated by PW-6 Raman Malhotra, Legal Aid Counsel, who had done the counseling of the victim on 29.11.2019. Even the school teacher of the prosecutrix corroborates the testimony of the prosecutrix on material point. Hence, in such circumstances, the version of the prosecutrix could not have been ignored. However, the trial Court has passed the order of acquittal on conjunctures and surmises while disbelieving the testimony of a minor victim, as such, the impugned judgment is liable to be set aside.

5. On the other hand, Sh. Vikram Singh, Advocate, for Mr. Ishnoor, Advocate, counsel for respondent No. 1-accused submitted that the story of the prosecution is highly improbable. There are major

discrepancies in the testimony of the prosecutrix and other witnesses which have been thoroughly examined by the trial Court and detailed in the impugned judgment. The respondent was falsely implicated in the present case and has been rightly acquitted by the trial Court. Referring to the testimony of DW-1 Mandeep, it was submitted that there was no holiday on the day as alleged by the mother of the victim. It was submitted that the mother of the victim has concocted a story which is highly improbable that she had gone to the house of the accused to make a complaint regarding the occurrence. In case, such an occurrence had actually happened, she would have reported the matter to the police immediately. Since the story of the prosecutrix was baseless and concocted, therefore, respondent No. 1 was rightly acquitted.

6. We have considered the aforesaid submissions. Firstly, it is observed that the appeal filed by the victim is maintainable without seeking a leave to appeal in view of the recent decision by the Hon'ble Supreme Court of India in Joseph Stephen and others Versus Santhanasamy and others, 2022 AIR (SC) 670, wherein it was held that the right provided to the victim to prefer an appeal against the order of acquittal is an absolute right. The victim is not to pray for grant of special leave to appeal. The victim has a statutory right to appeal under the proviso to Section 372 of Cr.P.C and the proviso to Section 372 of the Cr.P.C does not stipulate any condition of obtaining special leave to appeal like sub-section 4 of Section 378 Cr.P.C. in a case wherein an order of acquittal is passed in case instituted upon complaint.

7. As per the case of the prosecution and the defence raised by

the respondent, the present case requires determination of the following points:-

1. Whether the prosecutrix was under 18 years of age at the time of the crime ?
2. Whether on 08.11.2018 the respondent-accused had committed penetrative sexual assault upon the prosecutrix? OR whether the respondent-accused has committed the offence of rape?
3. Whether on 25.11.2018, in the midnight, the respondent-accused had committed house trespass after having made preparation for causing hurt to the prosecutrix or for assaulting her or for wrongfully restraining her or for putting her in fear of hurt or assault or wrongful restrain ?
4. Whether the respondent-accused had committed criminal intimidation by threatening the complainant and the victim with an intent to cause alarm to their mind that they would be done to death ?

FIRST POINT FOR DETERMINATION (AGE)

8. Birth certificate Ex.P-7 which has been issued by Registrar Birth and Death, Department of Health, Government of Haryana has been rightly believed by the trial Court. The date of birth of the victim has been recorded as 19.02.2004 and the entry in the said records was registered on 12.03.2004. Since the entry was promptly made in the said records as such there is nothing on record to suggest any manipulation in the said entry. Keeping in view the date of birth of the prosecutrix as 19.02.2004, and the first date of occurrence i.e. 08.11.2018, the age of the prosecutrix is determined as 14 years 08 months and 29 days on the day of occurrence. As such victim was a “child” as defined under the POCSO Act.

APPRECIATION OF THE PROSECUTION EVIDENCE

9. In the present case, charge was framed under Section 4 of the POCSO Act. The offence of penetrative sexual assault has been defined under Section 3 of the Act which is punishable under Section 4 of the Act.

Section 3 reads as under:-

“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 do so with him or any other person; or
- (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 legal provisions as articulated in the POCSO Act provides for raising presumptions in such cases. The relevant provisions are reproduced as under for ready reference:-

“Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and Section 9 of said Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit offence, as the case may be unless the contrary is proved.

Presumption of culpable mental state. – (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purpose of this section, a fact is said to be proved

only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation. – In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason.”

As per Section 29 where the person is prosecuted for violating any provision under Section 3 and other offences mentioned therein and where the victim is a child below the age of 14 years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved. As per Provisions of Section 30 of the Act ‘culpable mental state’ is presumed against the accused, unless it is reverted by the accused in defence.

10. Keeping in view the said presumptions, we have examined the facts of the present case.

11. As per the case of the prosecution, it was not a single act which is alleged to have been committed by the respondent-accused. The prosecutrix has categorically alleged that the first occurrence took place on 08.11.2018 and thereafter the second occurrence of house trespass and criminal intimidation took place on 25.11.2018.

12. With regard to the first occurrence dated 08.11.2018, when the prosecutrix appeared as PW-2, she has categorically stated that she is a student of 8th class in MM Public School, Jundla. On 08.11.2018, she along with her friends Simran and Sanjana went to Govt. High School for playing. At about 02.00 PM, when they were returning to their home after

playing, her brother and her friends proceeded ahead and she remained alone. When she reached near the gate of the school inside the school, Sahil (respondent-accused) came there and caught hold of her. He pressed her mouth with his hand and took her behind the rooms of the school while dragging her. He threatened to kill her if she raised alarm. He removed her 'pyjama' and pushed her and made her to lie on the ground. He also removed his trouser and laid down upon her. He committed rape upon her. He continued with the said activity for some time and due to pain, she raised shrieks. He gagged her mouth and thereafter, he left that place. He also threatened to kill her and her family members if she discloses anything to anyone.

13. The prosecutrix had taken this stand when her statement was recorded under Section 164 Cr.P.C. before the Judicial Magistrate, which has been proved as Ex.P-3.

14. The ocular version of the prosecutrix was sought to be corroborated by medical evidence, which has been proved in the testimony of Dr. Diksha Thakur, MO, CHC Kalka, PW-12. As per her affidavit Ex.PW-12/A, which was tendered in the shape of her examination-in-chief, she conducted the medico legal examination of the victim on 29.11.2018. There was alleged history of sexual assault on 08.11.2018 and upon examination, she found that the hymen of the prosecutrix was ruptured and she gave an opinion that a possibility of sexual assault upon the victim cannot be ruled out.

15. As per the sequence of events as stated by the victim (PW-2) she remained silent out of fear and did not disclose the same to her mother

on reaching home, however, after few days her teacher Harpreet told her mother telephonically to find out the reason as to why she remains silent and does not take interest in studies. When she returned home, her mother enquired about the matter and then she disclosed about the said incident to her mother. After that her parents had gone to the house of the accused to lodge a protest but his family members threatened her parents.

16. The matter did not end here, it is in evidence of the prosecutrix that on 25.11.2018, the respondent-accused entered her house by jumping the gate of her house. After hearing the noise, her mother came out and he ran away. Thereafter, her mother got registered a case against the respondent-accused on 29.11.2018.

17. The testimony of the prosecutrix is further sought to be corroborated by the testimony of her teacher Harpreet who appeared as PW-4. As per her statement, she was in-charge of 8th class and the prosecutrix was studying in her section. She used to remain to herself and did not interact with the other students. She called her mother in the school and apprised her about the said conduct of the child. We are of the considered opinion that though PW-4 is an independent witness, neither related to the prosecutrix nor having any grudge against the respondent-accused. Her testimony however did not corroborate this fact that the prosecutrix was not vocal in the class after 08.11.2018 and she was not interacting with the other students. The prosecutrix has also stated that she was afraid due to the threat as she was threatened by the accused. The testimony of the said witness is very material in nature being from an independent source. She is also a natural witness interacting with her

students everyday and in a position to notice their behaviour everyday but she has stated that the behaviour was on joining Class-VIII and there was no reference that her behaviour changed after the incident of 08.11.2018. Rather a closer perusal of the statement would go on to show that the teacher had deposed that she was In-charge of Class-VIII and the victim was studying in her section and she had observed that she used to remain with herself and not interact with other students since she was promoted to the said class. Her mother had been called in school and apprised of the above-said conduct of the child who had not apprised the teacher anything and nor was she aware of the fact as to what had happened to her. In cross-examination, she admitted that the session of the said class started in April, 2018 and she had observed that the said child used to remain with herself and did not indulge in interaction with the other students of the class. She did not recall the date or month when she had called the mother but it might be during the PTM conducted after the summer vacations when she called the mother and apprised her in the school in this regard. She further deposed that during the entire academic session of the said class, the temperament of the student remained the same and even after apprising her mother regarding her behaviour, no material change had been observed. Thus, counsel for the respondent-accused is well justified to hold out that the Trial Court had rightly noticed this fact since the incident is of November, 2018 and the case put up by the prosecution that the mother had only came to know regarding the incident after the teacher had told her, was not correct since the said teacher had interacted with the mother only in July, 2018 and it had nothing to do with the incident of November,

2018.

18. No doubt the conduct and change in nature of a child is usually noticed by the parents or by the teachers apart from friends and siblings but the testimony of the class teacher (PW-4) was rightly discarded by the trial Court being discrepant from the testimony of the prosecutrix on material points.

19. When the mother of the prosecutrix reported the matter to the Police, the victim had interacted by a Legal Aid Counsel. A counselling session was also done by the said counsel and this fact has been proved by the testimony of PW-6, Raman Malhotra, Legal Aid Counsel, who has stated that on 29.11.2018, he had counselled the victim and recorded her statement as Ex.P-2. Even at the time of her counselling session, before the Legal Aid Counsel, the prosecutrix has made a statement with regard to the occurrence in which initially she stated that a boy whom she did not name had caught her on 08.11.2018. In the later part, she explained that he used to frequent her neighbourhood and she knew him from school and when her parents enquired she came to know his name then. As such, the statement made by the prosecutrix during trial is the improved version of her previous statement (Ex.P-2).

20. Reasons recorded by the trial Court for disbelieving the testimony of the prosecutrix can thus be accepted, keeping in view the peculiar facts and circumstances of this case which *inter alia* includes the fact that prosecutrix is a child of tender age. She is a “Child Witness” and her statement is to be examined with extra care and caution and the fact that she might have been tutored keeping in mind the delay period. Her

testimony though cannot be ignored on account of contradictions which have been taken note by the trial Court. Keeping in view her tender age and the fact that she is a victim of sexual assault, it cannot be expected from a child witness to narrate the event in a parrot like manner. However, we cannot ignore the additions and omissions as well as contradictions which have occurred regarding the incident of 08.11.2018. Though we are aware that a Child victim of a sexual assault who had suffered a mental trauma on account of the said act cannot be expected to narrate the event as such without making minor omissions here and there, however, the contradictions noticed by the trial Court are not trivial in nature and are such which cannot be discarded outrightly. By accepting the sole testimony of the prosecutrix which is not further fully corroborated by medical evidence as well as by the testimony of her mother and the testimony of her teacher and reversing the finding on point No.2 would lead to causing injustice by reversing the finding of acquittal by the trial Court regarding the offence of penetrative sexual assault.

21. The trial Court has rightly taken into consideration that delay in reporting the case was not natural. The prosecutrix and the accused are residents of the same village. In such circumstances, though a victim of a sexual crime may take time to muster the courage for reporting such matters but she had apparently told her mother immediately after the incident who further followed it up with the accused parents but did not lodge the complaint with the police and as such the delay can be made a ground to disbelieve the testimony of a Child Victim of a Sexual Offence. It is sought to be brought about that after the occurrence, the victim used to

remain silent however the evidence of the teacher does not corroborate this fact. In the examination-in-chief, the victim (PW-2) has stated that the accused has threatened to kill her and her family members if she would disclose anything to anyone and due to fear she did not disclose anything to her mother which is contrary to her statement made in Court. She was inconsistent on this point even in her cross-examination and further clarified that when her mother enquired from her after receiving an input from her teacher, she disclosed the reasons as to why she started remaining to herself and as to why she was unable to concentrate on her studies. Apparently, the school is also more than 20-30 minutes from her house on foot and therefore, to go there to play on a alleged day of holiday is a factor to be kept in mind.

22. Resultantly, we are of the considered opinion that regarding point No.2 as to the penetrative sexual assault on the findings of rape committed on 08.11.2018 is not conclusively proved beyond the shadow of doubt even though there is a presumption under the provisions of Sections 29 & 30 of the POCSO Act. The reasons we have already highlighted above regarding the unnatural conduct in as much as on being informed of the incident of 08.11.2018, the mother did not go to the Police Station initially but went to the parents of the accused who had stated that they would counsel their son accordingly and he would not repeat the same. It is highly strange that a serious offence which was committed upon a child of 14 years old and studying in Class-VIII, the mother would also condone the said act. The delay which has taken place is one which cannot be brushed aside and the incident of house trespass did take place on

25.11.2018 that may be a factor also to falsely implicate the accused to bring him within the ambit of more serious prosecution. It has also come in evidence of the Investigating Officer, Geeta, PW-13 that the parents of the complainant did not enjoy a very good relationship overall as they were not in talking terms with the neighbours. Similarly, the girlfriends who were accompanying the victim on 08.11.2018, their statements were also not recorded as the parents were not willing to get their statements recorded as they were also not in talking terms with the father of the victim though the children used to play with each other.

23. It was also put to the said Investigating Officer that there were 6 complaints under Section 354 IPC against the father of the victim and he had also many fights in the village which had been settled by the villagers. Mainly because the hymen was ruptured would not go on to show that the same had happened because of the incident of 08.11.2018 and there was no such complaint immediately and neither it has come in her statement that she had bled after the said incident. The case of the prosecution was clear that the school was closed on the said date whereas sufficient material has been brought on record that it was a working day, in the form of the statement of the Clerk of the said school who proved that the students from 6-12 classes and the staff had attended the school which was open from 8 AM to 2.30 PM. Thus, the place of occurrence which has been put-forth also and the incident having taken place during the school time would be hard to swallow as in the presence of so many children and staff members, the accused could not have dragged her behind the room and committed the offence of rape. It is also a matter of fact that she was not student of

the said school and was studying in the M.M.Public School, Jhunjhula and therefore, her presence in the said Government School at that occasion would also not arise. The Trial Court was well justified while keeping these factors in mind.

24. Even otherwise, it is settled principle that if evidence has been well scanned and there is no perversity in the reasoning, the Appellate Court would not convert the acquittal into a conviction, as such. Another aspect which is to be kept in mind is that the complaint (Ex.P-4) which was given to the SHO in the Police Station, Karnal was a typed version in which the mother had stated that her daughter had narrated the incident of 08.11.2018 on returning home whereas in her statement before the Court, she had stated that her daughter had not disclosed about that incident to her and about the accused. Only on account of the teacher telling her that her daughter was keeping quite she had enquired from her daughter and then had gone to the family of the accused which is in contradiction again to the daughter's statement in Court that when she had returned on that day her mother had enquired from her and she had disclosed about the said incident to her mother.

Discussion on point Nos.3 & 4 :

25. The said points were clubbed together for discussion under the second point of determination which included the issue of penetrative sexual assault on 08.11.2018 in which the Trial Court, while noticing the facts and circumstances also gave the benefit of doubt regarding the charge framed of house trespass on 25.11.2018 punishable under Section 452 and

of criminal intimidation under Section 506 IPC. It is the categorical case that on 25.11.2018 at 12 PM, the accused had entered the house and had knocked at the doors on which the mother had got up on which he had run away after giving a threat to her that he would lift the victim and he would kill anybody who came in his way. He also threatened that in future he would lift the victim. The complaint was made on 29.11.2018 and the FIR was also accordingly lodged. In the said complaint also, it has been mentioned that the parents had stated that their son was being unnecessarily defamed and finding no alternative and relief in the village, she had approached the police authorities on which the FIR had been lodged. The Trial Court has unnecessarily ignored this aspect by clubbing the discussion with the earlier incident of 08.11.2018, which in our considered opinion was a separate incident altogether. Even if the benefit has to be given of the said incident, which has rightly been done due to the delay and the contradictions in the statements of the witnesses as discussed above, there was no plausible reason to ignore the subsequent act of the accused. The best witness at that point of time of the incident which happened in the night was the mother of the complainant and merely because the site-plan had not been produced or drawn up by the Investigating Officer would not prejudice the case of the complainant on account of the faulty investigation conducted. Merely because the victim was not woken up and was in deep sleep being a child who was not privy to the incident of trespass and threat which had happened would not take away the statement of the mother who was confronted with the intrusion by respondent No.1 in her own house late at night and who had openly

threatened that he would pick up the daughter.

26. The conduct of the accused is to be gauged from the fact that he entered the house of the prosecutrix in the midnight of 25.11.2018. The mother of the prosecutrix has proved the said fact which indicate that the accused was harassing the victim. The trial Court fell in error while ignoring the fact that harassment of a child victim was there by the respondent.

27. A perusal of the statement of PW-3 the mother would go on to show that they would retire around 9.30 PM and that her daughter did not have any mobile phone and neither she had allowed her children to use the phone. She had noticed that the accused entered her house when she was sleeping in the lobby of her house and he had fled away from her house when he had seen her. She had volunteered that there was no question of doubt about the incident and she had herself seen him in his house and he had threatened her while fleeing. The said factum was also stated by the victim when she gave her statement that the accused had entered into the house and when the mother had put the light on he had run away and the mother had identified him. Similar mention has also been made before Raman Malhotra, the Legal-Aid-Counsel, who had counselled her as per the statement recorded by him (Ex.P-2) which has been duly proved. The Investigating Officer also explained that there was no other independent witness for proving the occurrence of 25.11.2018 and it is in such circumstances, apparently she did not feel it necessary to draw the site-plan of the house though she had gone on to draw the site-plan where the incident of 08.11.2018 had taken place. It was also stated that she had

investigated from different neighbours but no-one was willing to join investigation. It can be kept in mind that both the accused and the victim belong to the same village and therefore, apparently there would not be many people coming forward to depose about the incident between the parties and to get branded as partisan witnesses.

28. In such circumstances, we are of the considered opinion that the Trial Court should not have brushed aside the version of the complainant regarding the charge of house trespass and raising a threat which was serious enough to cause an alarm in the mind of the complainant that her minor daughter would be abducted. The intrusion at the midnight of a cold winter and the threat that if anybody would come in the way would also be done away could not be lightly brushed aside. The maxim of “falsus in uno falsus in omnibus” is not applicable in such cases. Disbelieving a part of version of the prosecutrix and her mother regarding incident dated 08.11.2018 cannot be made a ground to disbelieve entire statement of said witnesses. Therefore, we are of the considered opinion that the Trial Court has wrongly ignored this aspect while clubbing both these points altogether for which there was independent evidence and pertained to different incidents.

29. Thus, we are of the considered opinion that there is a perversity in the findings recorded by the Trial Court regarding the finding of charge of Sections 452 and 506 IPC as there was sufficient material for recording conviction on that count. Resultantly, we are of the opinion that there was no considerable delay in lodging of the FIR regarding the incident of 25.11.2018 and therefore, point Nos.3 & 4 have to be decided

against respondent No.1 as the offence committed by the said respondent stands duly proved.

30. Accordingly, the present appeal is partly allowed and the judgment of the Trial Court dated 06.12.2019 is modified and respondent No.1 is held guilty of the charge framed under Sections 452 & 506 IPC whereas the acquittal under Section 4 of the POCSO Act stands upheld.

(G.S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

13.04.2023

nitin/sangeeta/sailesh

Whether speaking	Yes
Whether reportable	Yes

CRA-AD-79-2020

REENA V/S SAHIL AND ANR

Present:- Mr.Chand Ram Olla, Advocate for the appellant.

Mr. Vikram Singh, Advocate, for
Mr. Ishnoor, Advocate, for respondent No.1.

Mr.Ankur Mittal, Addl.AG, Haryana with
Mr.Saurabh Mago, AAG, Haryana.

1. The matter was fixed on 13.03.2023 for presence of respondent No.1 on the orders of appeal against acquittal of the judgment of the Trial Court dated 06.12.2019. The said respondent did not surrender and appear before the CJM, Karnal as had been directed on 23.02.202. Resultantly, on 13.03.2023, non-bailable warrants were issued for his arrest directing the Superintendent of Police to ensure that the same were executed and he is brought forth before this Court so that he could be heard on quantum of sentence. He did not come forth to be heard. It has now been reported in pursuance of the last order that non-bailable warrants could not be executed as he is stated to have gone abroad, reportedly to Spain, as per the affidavit filed of Shri Gaurav Phogat, HPS, DSP-II Karnal today.

2. Accordingly, having no option, keeping in view the fact that he was a little over 18 years of age when the incident had occurred, we are of the considered opinion that it would serve the ends of justice if we sentence him to undergo sentence for 5 years each under Sections 452 & 506 IPC along with a payment of Rs.5000/- as fine each. In default of the payment, he will undergo further imprisonment for 2 months. Both the

sentences shall run concurrently, after adjusting the period already undergone during the trial.

3. The CJM, Karnal shall take appropriate steps to ensure that the said order is complied with by issuing necessary warrants of arrest to secure his presence for completion of his sentence.

(G.S. SANDHAWALIA)
JUDGE

April 13, 2023
Sailesh

(HARPREET KAUR JEEWAN)
JUDGE