

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

**CRREF-1-2021 (O&M)  
Date of Decision: 17.04.2023**

Court on its own motion

...Petitioner

Versus

State of Haryana

...Respondent

**CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present: Ms Geeta Sharma, DAG, Haryana.

Mr. Saransh Sabharwal, Advocate, for the applicant/accused  
in CRM-41796-2022.

**GURVINDER SINGH GILL, J.**

1. This order shall dispose of reference made by learned Judge, Special Court, POCSO Act -cum- Additional Sessions Judge, Panchkula in terms of Section 318 Cr.P.C.
2. A few facts necessary to notice are that FIR No.03 dated 10.01.2017, Police Station Women, Panchkula under Sections 4 of Protection of Children from Sexual Offences Act, 2012 and Section 506 IPC came to be lodged against Udayveer (accused), wherein the allegations are broadly to the effect that he had committed rape upon the victim, aged about 9 years, on 09.01.2017. The matter was investigated by the police and upon conclusion of investigation, challan was presented against the accused on 03.04.2017 in the Court of learned Additional Sessions Judge, Panchkula.
3. When the matter was listed to consider framing of charges on 03.07.2017, it came to the notice of the learned Additional Sessions

- Judge that the accused Udayveer is deaf and dumb. Accordingly, an interpreter, namely, Mr. Rajesh Kumar (Special Teacher), Raipur Rani was summoned to explain about the proceedings to the accused. Initially, Mr. Sunil Kundu, Advocate, appeared on behalf of the accused, but later on the accused was represented by Legal Aid Counsel, namely, Ms. Kiran Mishra, Advocate and thereafter by Mr. Suneel Sharma, Advocate. Arguments were heard and charges for an offence under Section 6 of the POCSO Act were framed against the accused, which were explained to the accused with the help of the interpreter Mr. Rajesh Kumar and upon understanding the charges, the accused affixed his signatures, but pleaded not guilty and claimed trial. The aforesaid proceedings were conducted on 17.07.2017.
4. Thereafter, the matter was fixed for recording evidence on 11.08.2017 and from the said date i.e. 11.08.2017 upto 04.03.2020, the matter was adjourned several times and as many as 19 PWs were examined by the prosecution, who were duly cross-examined by the counsel, who was representing the accused. Thereafter, on account of spread of pandemic Covid-19, the matter was adjourned on several occasions and no proceedings were conducted. Ultimately, the statement of the accused in terms of Section 313 Cr.P.C. was recorded on 12.11.2020 with the assistance of Mr. Rajesh Kumar, Special Educator (Hearing Impairment), who conversed with the accused with the help of sign language. Although the accused in his statement recorded under Section 313 Cr.P.C. had taken a stand that he has been falsely implicated and that he would lead defence evidence, but no evidence was led by him in his defence despite several opportunities having been afforded to him.

Ultimately, the accused closed his evidence on 08.01.2021 when his father was present in the Court and the defence counsel, namely, Mr. Suneel Sharma, Advocate, on instructions from the father of accused, made a statement that no evidence is to be led in defence and closed his evidence.

5. Upon hearing arguments, the trial Court came to a conclusion that the evidence led by the prosecution fully substantiates the charges framed against him for an offence under Section 6 of the POCSO Act and held the accused guilty for the same. Consequently, the accused was convicted for offence under Section 6 of the POCSO Act. However, the trial Court while taking note of Section 318 Cr.P.C. referred the matter to this Court vide judgment/order dated 18.01.2021. Accordingly, the matter is before this Court.
6. It may here also be mentioned that during the pendency of this reference, an application has been filed on behalf of the accused seeking suspension of sentence during the pendency of instant reference, as the accused is stated to have already undergone custody of about 6 years.
7. Learned State counsel as well as learned counsel representing the accused have rendered assistance to this Court. The lower Court record, which had been summoned, has also been perused.
8. Before proceeding further, it is apposite to refer to Section 318 Cr.P.C., which reads as under:

**“318. Procedure where accused does not understand proceedings –**

If the Accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and in the case of a Court other than a High Court, if such

proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

9. A perusal of the aforesaid Section indicates that the same would be applicable where the person, though not of unsound mind, is unable to understand the proceedings undertaken in the Court and in which case the trial Court may proceed with the trial. However, in case any finding of guilt is recorded, the matter is required to be referred to High Court for passing any further appropriate order. The emphasis of the Section would be on words 'cannot be made to understand the proceedings'.
10. A Division Bench of Calcutta High Court, in State Vs. Jamal S.K. 2007(31) RCR(Criminal) 624 (Calcutta DB), wherein also allegations of rape had been leveled against an accused and the trial Court had made a reference under section 318 Cr.P.C., it was held that recording a finding to the effect that the accused was unable to understand the proceedings of trial was sine-qua-non for making a reference in terms of section 318 Cr.P.C. The relevant extracts are reproduced herein-under:

"23 For this purpose, we have to travel far and wide. In course of our travelogue we could lay our hands on several decisions. We rely on the decision of the First Bench of Kerala High Court ***In re: Peethambaran reported in AIR 1959 Kerala 165***. The First Bench of the Kerala High Court (K.T. Koshi, C.J. and M.S. Menon, J.) after discussing decisions of various High Courts held that the "provisions of Section 341 (new Section 318) can be invoked only when an Accused person is absolutely unable to follow the proceedings and the Court making such Reference should record a finding to that effect."

24. We also find that the view taken by the Sind Chief Court in ***Issa S/o Gaman & Anr. v. Emperor reported in AIR 1943 Sind, 237***

Sir Godfrey Davis, CJ. and Weston, J. had held that "Court has to be satisfied that the accused cannot be made to understand the proceeding" to be a correct view.

25. Similarly, Sir Shadi Lal, Chief Justice of the Lahore High Court in ***King Emperor v. Gunga reported in AIR 1927 Lahore, 799(1)*** had held that sine qua non of application of Section 341 (new Section 318) is that the "Accused must be unable to understand the proceeding then only the Reference under this section can be made."
26. Nearer home, we have the decision of Allahabad High Court in ***King Emperor v. Ulfat Singh, AIR 1947 Allahabad 301*** where Bidhu Bhushan Malik (As the learned Chief Justice then was) also came to the similar finding.
27. After we had made a foray in the entire issue, we find that the legal principle culminated on the basis of the assessment of the statute and perception of the Authorities, which we could lay our hands on, the following picture emerges Sine qua non of the application of Section 318 is that the accused cannot understand the proceedings which is brought against him even though he is not of unsound mind so as to preclude him to answer the charge brought against him and to take a proper defence. It is only in such a situation first, the learned trial Court record a finding to that effect and then make a Reference. Pursuant to such Reference, the High Court "shall pass" thereon such order as it thinks fit.
28. In other words, Section 318, even though it empowers the trial Court to convict the Accused, it forecloses the later from passing an order of sentence and after recording its finding to the effect that the accused is unable to understand the proceedings against him to submit the Reference to the High Court whereupon the High Court would be entitled to examine the proceedings of the trial Court in the light of the findings of the learned Magistrate to the effect that the accused is unable to understand the proceedings. The order proposed to be passed in a Reference shall always depend upon the circumstances in each case. We have wide powers

vested by virtue of the Section 318 of the new Code. We can impose a sentence, order a re-trial or even discharge the Accused.

29. In fact, the High Court has a very sweeping power to impose straightway the sentence while answering a Reference.
30. We would now proceed to answer the Reference in the following manner and sum up the entire issue.
31. It cannot be said that the accused did not understand the proceeding as we have seen he has participated in the trial and taken a proper defence and cross-examined various witnesses. He also took a specific defence during his examination under Section 313, Cr. P. C. He was represented by Shri Debanjan Majumdar, an Audio Logist and Speech Teacher in Ananda Asram who interpreted the entire evidence to the Accused - his defence to the Court.
32. Since our appraisal of the entire records of Sessions Trial No.3(2) of 2006 shows that even for a moment the accused was not in the dark with regard to the entire proceedings brought against him, in our view, after convicting the accused in respect of the charge-the Reference made by the learned Fast Track Second Court, Lalbagh under Section 318, Cr. P.C. was not appropriate. It seems, that more out of the plea raised at the Bar than on the basis of his own judgment the learned trial Court made the Reference. The conclusion of the learned Fast Track Second Court, which we quote :-

"..... At the time of examination of the Accused under Section 313, Cr.P.C. the help of an expert from Berhampore was taken and he interpreted the entire evidence against the convict to the convict. The convict was also defended by Advocate on legal aid. But still then there may be doubt whether the proceedings could be fully made to understand to the convict or not as this Court is not an expert on this field. "
33. In our view, the aforesaid conclusion is not paripasu with the factual position reflected from the order sheet and as from the legal

aspect we have seen that unless the Accused is unable to understand the proceeding, which is not the case in the present trial, there cannot be any application of Section 318, Cr. P. C.

34. Accordingly, the answer is returned in the negative.

35. Learned Registrar, is requested to send down the Lower Court Records with certification of this answer to the Fast Track Second Court, Lalbagh by a Special Messenger. Thereafter the Fast Track Second Court, Lalbagh would pass appropriate sentence as stipulated under the law for the charge in respect of Section 376(2)(f) of the Indian Penal Code.

Reference is answered.

11. In the present case, although the accused being deaf and dumb would normally be not expected to understand the proceedings conducted in the Court, but the trial Court had called an expert interpreter (sign language) to explain about the proceedings when the matter was to be considered for framing of charges. The charges were duly read over to the accused with the help of the interpreter and the accused being aware of the charges and having understood the contents of the same, signed on the charge-sheet, but claimed trial. Even when statement of the accused was recorded in terms of Section 313 Cr.P.C., it was the interpreter, who explained everything to the accused. The accused was duly represented by his counsel, who has cross-examined all the PWs. Apparently, the counsel representing the accused had some instructions either from the interpreter or from the father of the accused. It may be mentioned that the accused despite having been afforded several opportunities did not lead any defence evidence and ultimately his counsel upon instructions from the father of the accused closed his evidence.

12. It is, thus, *prima facie* borne out that neither the accused is of unsound mind nor it can be said that he was unable to understand the proceedings of trial inasmuch as the interpreter was present when the charges were framed and also when statement under Section 313 Cr.P.C. was recorded and all the statements of the witnesses were recorded in the presence of counsel for the accused and the witnesses were duly cross-examined by him. The accused cannot be said to have been prejudiced in any manner.
13. The ratio of judgment in *Jamal S.K.'s case* (supra) is to the effect that *sine qua non* for having resort to Section 318 Cr.P.C. is for the inability of the accused to understand the proceedings. However, as already held in the preceding paragraph, it cannot be said that the accused was unable to understand the proceedings of the Court. As such, the trial Court would be fully competent to proceed further in accordance with law. The instant reference seems to have been made as a matter of abundant caution and was not required to be made as the pre-requisite i.e. inability of accused to understand proceedings is not there.
14. Accordingly, the instant reference is disposed of with a direction to the Registrar General to return back the lower Court record to the trial Court, which shall proceed further with the trial so as to consider passing of appropriate order on the question of sentence after hearing the accused in accordance with provisions of Section 248(2) Cr.P.C.
15. It is, however, clarified that the aforesaid order shall not be taken to be as any expression on merits of the case and that appeal, if any, filed by accused against the judgment of conviction as recorded by trial Court

shall be considered and decided independently without being influenced  
in any manner by the aforesaid order.

16. Pending applications, if any, stand disposed of as well.

17.04.2023  
Vimal

(GURVINDER SINGH GILL)  
JUDGE

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