

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-31271-2018 in/and
CRM-A-1848-MA-2018
Reserved on :28.02.2023
Date of Pronouncement: 14.03.2023

State of Haryana

....Appellant.

Versus

Sharwan

...Respondent.

CORAM: HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MRS. JUSTICE SUKHVINDER KAUR

.....

Argued by: Ms. Tanisha Peshawaria, Deputy Advocate General
Haryana.

Sukhvinder Kaur, J.

CRM-31271-2018

Prayer made in the application is for condonation of delay of 75
days in filing the appeal.

For the reasons mentioned in the application, delay of 75 days
in filing the appeal is condoned.

Application is allowed.

CRM-A-1848-MA-2018

1. The appellant-State of Haryana has preferred the instant
application under Section 378(3) Cr.P.C. seeking leave to appeal against
judgment dated 05.03.2018, passed by learned Additional Sessions Judge-
cum-Special Court for the cases of Heinous Crimes against Women, Karnal,
vide which respondent-accused Sharwan has been acquitted.

2. The brief facts, as per record, are that 03.02.2017, complainant 'A', father of a girl child (name withheld to conceal the identity of girl child and to be referred as complainant hereinafter) moved a complaint to the police alleging therein that on the night of 01.02.2017, his daughter 'K' aged 16 years (name withheld to conceal the identity of girl child and to be referred as victim hereinafter) had been enticed away by Sharwan son of Deshan, resident of Nalvipar, with an intention to solemnize marriage with her. He made best efforts to trace his daughter, but she could not be traced. The request was made to register the matter and investigate further to trace his minor daughter. On the basis of this complaint of the complainant, FIR No.44 dated 14.11.2016, under Sections 363, 366-A, 506 of IPC was registered at Police Station Kunjpura, District Karnal. During investigation, the girl was produced before the police by her father/ complainant on 07.02.2017 and she was subjected to medico-legal examination and counselling. Her statement under Section 164 Cr.P.C. was also got recorded, wherein she stated that on the night of 05.02.2017 she had been sleeping alongwith her family members in the same room, when Sharwan, who was their neighbour and was residing at the backside of their house, entered in their house and put his hand on her mouth. As the lights of the room were on, she identified him as and when he put his hand on her mouth, thereafter she became unconscious and when she regained consciousness, she found herself in the fields, where Sharwan had committed wrong act with her. About two years earlier also, Sharwan had committed wrong act with her, but she had not disclosed the said fact to her parents due to the fear that they would rebuke her. After the occurrence in question, she had returned to her house. Sharwan had extended a threat to kill her if she would disclose about

the said occurrence to anyone. When she arrived at her house, she found that her parents were searching for her. She disclosed the entire occurrence to her mother and she had returned to her house on the same night itself. On the basis of this statement of victim recorded under Section 164 Cr.P.C., offences punishable under Section 4 of POCSO Act, 2012 and section 506 of IPC were added in the present case. Her date of birth as per Aadhar Card was disclosed as 22.07.2001. Accused was arrested on 08.02.2017 and was subjected to medico-legal examination. During interrogation, he suffered the disclosure statement and in pursuance thereof, he got the site of crime demarcated and the scaled site plan was got prepared from the Halqa Patwari. The sealed parcels containing the belongings of the victim and the accused which had been handed over by the respective Medical Officers to the Investigating Officer after their medico-legal examinations, were got deposited in the FSL, Madhuban. Statements of the witnesses under Section 161 Cr.P.C. were recorded. After completion of the investigation, final report under Section 173 Cr.P.C. was prepared against the accused and submitted before the Court of learned Additional Sessions Judge-cum-Special Court for the cases of Heinous Crimes against Women, Karnal.

3. After finding a prima facie case, the accused was charged with offences under Sections 363, 366, 506 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in alternative under Section 376 IPC), to which the accused did not plead guilty and claimed trial.

4. After concluding the trial, the trial Court acquitted accused-Sharwan.

5. Aggrieved by the said decision, the State of Haryana has preferred the present application seeking leave to file an appeal against

acquittal of accused-Sharwan.

6. We have heard Ms. Tanisha Peshawaria, Deputy Advocate General, Haryana, for the appellant and have also perused the record.

7. Learned counsel for the State has opened up her arguments with the contention that the trial Court has erred in not considering the proposition of law that the prosecution has proved its case with respect to the date of birth of the prosecutrix, by examining the official from the school and in her evidence she has stated that the date of birth entry in the school was at the time of her admission in school and the parents of the victim had also stated in their evidence that the prosecutrix was minor at the time of the occurrence. Nothing controverting the same has been brought on record by the accused.

8. Learned counsel for the appellant has further strenuously contended that the law provides for a reverse burden upon the accused in a prosecution under Sections 3, 5, 7 and 9 of the POCSO Act. The statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial and puts the onus on the accused to rebut such presumption and establish his innocence. Section 29 of the POCSO Act is species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of the prosecution witnesses in a trial under the POCSO Act. In a prosecution under the POCSO Act, an accused is to prove 'the contrary' i.e., he has to prove that he has not committed the offence and he is innocent. In the present case, no evidence either direct or circumstantial to rebut such presumption raised under Section 29 of the POCSO Act is available on the record. She has contended that therefore the unrebutted presumption raised

under Section 29 of the POCSO Act, also conclusively goes to prove that the accused had committed the offence punishable under Section 4 of the POCSO Act. She has also argued that the trial Court has erred in not considering the fact that the evidence of the victim being consistent thereby inspires confidence and needs no further corroboration. The trial Court has erred in not considering the fact that it is trite law that conviction can be based on the sole testimony of the prosecutrix without any corroboration. Even in the absence of medical evidence, the accused is liable to be convicted since the evidence of the prosecutrix is reliable. She has also contended that evidence of the victim about sexual assault stands almost at par with the evidence of an injured witness and to an extent even more reliable and she is least likely to shield the real culprit. She has contended that in the present case statement of the prosecutrix is more or less similar with the statement which she had got recorded before the Magistrate under Section 164 Cr.P.C., She has submitted that the delay in lodging the FIR is also not fatal to the prosecution and the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are the factors which the Courts should not over-look.

9. She has urged that as such the trial Court has wrongly ignored all the settled principles of law while appreciating the evidence of the prosecution which is trustworthy, cogent and concrete and has wrongly given the benefit of the reasonable doubt to the accused and has prayed that the applicant may be granted leave to appeal against the judgment of acquittal qua the respondent.

10. It is well settled law that while hearing appeals against acquittal, the judgments of acquittal should not be interfered with lightly

and Courts have to be extremely careful while hearing such appeals. In the case of *Sadhu Saran Singh Vs. State of U.P. and others, 2016 (2) RCR (Criminal) 319*, the Hon'ble Apex Court reiterated that generally an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against the conviction. It was held that in an appeal against acquittal, where the presumption of innocence in favour of the accused is re-enforced, the Appellate Court would interfere with the order of acquittal only when there was perversity of fact and law. A word of "caution" was also added by the Hon'ble Apex Court that the paramount consideration of the Court was to do substantial justice and avoid miscarriage of justice, which could arise by acquitting the accused, who is guilty of an offence.

11. Now adverting to the present case, it is to be seen that whether there is any perversity of facts or law. After having heard learned counsel for the appellant at length and having perused the impugned judgment as well as the other relevant record, we are of the considered opinion that the prosecution was unable to prove its case against the accused beyond the reasonable doubt.

12. Initially, the burden was upon the prosecution to prove that the victim was a child and she was subjected to penetrative sexual assault.

13. To prove the age of the victim, the prosecution has relied upon the photocopy of her Aadhar Card Ex.P6, as per which her date of birth is 22.07.2001. But no document on the basis of which, her above said date of birth had been entered in her Aadhar Card, has been proved on record by the prosecution. The perusal of testimonies of victim's father PW-6 and her mother PW-8 reveal that they are completely silent regarding the above said date of birth of their daughter 'K' and have stated that she is about 16 years

old, but no such record has been produced, on the basis of which, the age of the victim has been alleged to be 16 years.

14. While referring to her statement under Section 164 Cr.P.C. Ex.P22, she (victim) has stated that she had carried out her studies till 6th standard, so the prosecution could have easily obtained the entry regarding her date of birth as has been reflected in her Aadhar Card from the academic record of her first attended school. When a specific question was put to her by learned Magistrate regarding her date of birth then she feigned ignorance to the above said question. But strange enough when she appeared in the Court as PW-9, then in the very opening line of her testimony, she has stated that her date of birth is 22.07.2001. Trial Court has rightly observed that it has not been explained that how the victim came to know about her date of birth within 10/11 months of the recording of her statement under Section 164 Cr.P.C. (Ex.P22), wherein she had stated that she was ignorant regarding the same. So it has been rightly observed that the ocular testimony of the victim regarding her date of birth is liable to be ignored being a tutored version.

15. So far as the certificate of the victim Ex.P15 allegedly issued by the Headmaster, Government High School, Nalvipur is concerned, the same is also not supported by the birth certificate etc. of the victim, which would have been furnished by her parents at the time of her admission in the above said school. More so, when the parents of the victim are completely silent regarding the date of birth of their daughter then this document is of not much significance. PW11-Narender Kumar, Headmaster has stated that the victim had carried out her studies till 8th class in that school and her name had been stuck off when she was in 8th class whereas, the victim herself has

stated that she had carried out her studies till 6th class. So when the certificate of the victim's first attended school regarding her date of birth has been withheld, then this evidence cannot be relied upon.

16. Trial Court has rightly pointed out that during his cross-examination, the complainant has stated that he had got engaged her daughter 'K', which is strong indication that she must have been engaged by her father only, after the crossing the age of minority. However, the said fact has been denied by the victim and when she is contrary even to her parents, then she is not trustworthy witness. So it has been rightly held by the trial Court that the prosecution has not been able to prove the victim to be a child as on the alleged date of occurrence by leading the clinching evidence.

17. As per the case of the prosecution, the victim had gone missing on the intervening night of 1/2.02.2017 and the complaint (Ex.P17) had been moved by her father before the police on 03.02.2017. The victim had returned to her house on 07.02.2017 as per memo Ex.P10 and then the complainant had produced his daughter 'K' before the police on that date. The FIR in the present case was got registered by the complainant against the accused by specifically naming him, but no plausible explanation has been rendered by the complainant for the delay caused on his part, in moving the complaint before the police when he was well aware about the name of the culprit. Even if this delay of two days in registration of the FIR is ignored, it is to be taken note of, that, as per the statement of the victim recorded before the Magistrate under Section 164 Cr.P.C., that she had been enticed away by the accused on 05.02.2017 and she had returned to her house on the same night. Meaning thereby that the victim had returned to her house on the night of the alleged occurrence itself, be that 01.02.2017

as alleged by her father or 05.02.2017 as alleged by the complainant.

18. Otherwise also, the story of the prosecution does not appear to be believable that accused had taken away the victim, when she was sleeping in the same room alongwith her other family members. She has stated that accused has lifted her in his arms and had taken her away to the fields on foot and he was not having any vehicle at that time. She has also stated that the distance between her house and the above said field is about 2-3 kms and she regained the consciousness when she had reached at the above said agricultural land. It is not believable that the accused could have dared to lift her in his arms from the place where she had been sleeping along with her other family members. The victim has also stated that the house of the accused is situated at the backside of their house and earlier to the present occurrence also, the accused had ravished her. Trial Court has rightly observed that the aforesaid fact suggests that the victim might be having some inclination or a liking for the accused and the possibility of her accompanying the accused willingly on the alleged date of occurrence could not be ruled out. The victim had disclosed the date of occurrence before the learned Magistrate as 05.02.2017, but this reasoning given by her is not acceptable that the said lapse regarding uttering the date of occurrence was due to her being under fear at that time. Perusal of her statement recorded under Section 164 Cr.P.C. (Ex.P22) shows that she was being accompanied by her mother which is suggested from the certificate of learned Magistrate (Ex.P28) appended underneath the statement Ex.P22 read with RTI of mother of the victim appended underneath the above said statement. So there was no occasion for the victim to be under any kind of fear at the time of making the statement Ex.P22, when she was being accompanied by her

mother.

19. While appearing in the witness-box, the victim has stated that she had been kept in a room constructed in the agricultural land by the accused for 5-6 days after enticing her away in the intervening night of 1/2.02.2017, but perusal of the site plan Ex.P27, which had been prepared by the Investigating Officer, at the demarcation of the victim, shows that no such room in the said agricultural land had been depicted therein. The victim has further stated that it was a Dera, where she had been confined by the accused, when she was subjected to penetrative sexual assault. But again the above said site-plan Ex.P27 does not show any such Dera, which belies the statement of the prosecutrix regarding the existence of any such Dera.

20. Admittedly, the victim was sleeping along with her other family members in the same room when the accused had allegedly taken her away, but strange enough she did not raise any hue and cry at that time. She has also stated in her statement that accused had carried her in his arms from her house up to the fields which were at distance of 2-3 kms and he was not having any vehicle. So the victim was having every opportunity to raise hue and cry when she was being carried away forcibly by the accused without her consent. It is also not the case of the prosecution that accused was armed with any kind of weapon and he had put her under any kind of threat, so it seems that she was a willing a party.

21. Reliance in this regard can be placed upon **Sham and another Vs. State of Maharashtra 1995 AIR (SC) 2169**, wherein it has been held by the Hon'ble Apex Court that where the prosecutrix did not put any struggle, nor raised any alarm while allegedly being taken away by the accused, it is suggested that she was a willing party to go with the accused and the

culpability of the accused is not established. Applying the ratio of law laid down in case supra to the present case, it appears that prosecutrix had willingly accompanied the accused.

22. Once it has not been proved by the prosecution that the victim 'K' was below 18 years of age as on 01.02.2017 when she had been allegedly enticed away by the accused, then her slipping away alongwith the accused can in no manner be taken as her kidnapping by the accused. Reliance in this respect can be placed upon *S. Varadarajan Vs. State of Madras AIR 1965 (SC) 942*, wherein the Hon'ble Apex Court has held that the slipping out of a minor girl out of the keeping of her lawful guardian does not tantamount of "taking away" to constitute the kidnapping.

23. Perusal of the MLR of the victim Ex.P5 reveals that there were no injury marks on the person of the victim when she was subjected to the medico-legal examination on 07.02.2017. Had she been subjected to rape from 01.02.2017 to 07.02.2017, then some struggling marks etc must have been observed by the Medical Officer on the body of the victim, so in this situation, the testimony of the victim is be scrutinized more carefully.

24. Report of FSL has been proved on record as Ex.PX, vide which semen had been detected on the belongings of the victim. In her cross-examination, she has categorically stated that she was not wearing the same clothes at the time of her medico legal examination which she had been wearing when she was subjected to rape by the accused. So obviously the semen that was detected on her clothes, cannot link the accused with the commission of crime in question.

25. Trial Court has further rightly observed that no clinching evidence in the shape of DNA report has been brought on record by the

prosecution to connect the accused with the crime in the present case. It has also not been disclosed by the prosecution that why that very dress of victim which she was wearing at the time of the alleged raped was not produced before the Medical Officer at the time of her medico-legal examination on 07.02.2017.

26. Trial Court has thus rightly reached at the conclusion that in the case in hand, the testimony of the victim does not inspire confidence and she does not appear to be a trustworthy and sterling witness, to warrant the conviction of accused on the basis of her sole uncorroborated testimony.

27. The trial Court has thus rightly held that the prosecution could not prove its case beyond shadow of reasonable doubt against the accused Sharwan and the accused has been rightly acquitted by the trial Court.

28. In view of the above, no case is made out for grant of leave to appeal against acquittal of Sharwan. The application without having any merits stands dismissed and the leave to appeal is declined.

**(M.S. RAMACHANDRA RAO)
JUDGE**

**(SUKHVINDER KAUR)
JUDGE**

14.03.2023

Komal

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