

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

202

CRM No.8171 of 2020 in/and
CRM-A No.392 of 2020
Date of Decision: 08.05.2023

State of Haryana

... Applicant

Versus

Pawan

... Respondent

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

Present: Mr. Pawan Girdhar, Additional Advocate General, Haryana,
for the applicant-State.

MANISHA BATRA, J.

CRM No.8171 of 2020

This is an application for condonation of delay of 70 days in
filing the application for seeking leave to file the appeal.

For the reasons mentioned in the application, the same is
allowed and the delay of 70 days in filing the application for seeking
leave to file the appeal is condoned.

CRM-A No.392 of 2020

1. The present application has been filed by the applicant-State
for grant of leave to file appeal against the judgment of acquittal dated
03.09.2019 as pronounced in favour of the respondent-accused Pawan in

Neutral Citation No.2023:PHHC:068806-DB

Sessions case No.76 of 2018 titled as *State v. Pawan* registered vide FIR No.384 dated 03.08.2018 at Police Station Pundri under Sections 363, 366-A, 376(3) of IPC and 4 of Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act, 2012”).

2. The criminal law had swung into action in this case on 03.08.2018 when a written complaint was submitted by “C” (name withheld), father of the prosecutrix that on the night of 01.08.2018 at about 9 PM, his minor daughter “K” (name withheld) aged about 14 years, had disappeared from their house. He had made searches and came to know that the accused-Pawan had abducted her by inducing her on the pretext of getting married with her. He alleged that this fact had been informed to him by Ramdiya father of the accused. He prayed for taking penal action against the culprit. On this complaint, initially a case under Section 363 and 366-A of IPC was registered. Investigation proceedings were initiated. During investigation, the prosecutrix was recovered on 04.08.2018. Her custody was handed over to her parents. She was medically examined. Her statement was also got recorded under Section 164 of Cr.P.C. and she disclosed that she had gone along with the accused out of her own will on 01.08.2018 and voluntarily stayed with him. She stated that the accused did not apply any force with her and she voluntarily had sexual relations with him.

3. The accused was arrested on 05.08.2018. He was interrogated and suffered disclosure statement stating that he was having affair with the victim and that on 01.04.2018, he had committed rape upon her and further that on 01.08.2018, he had induced her in the name of performing marriage and by abducting her, had taken her to his house and then to Kaithal and

Neutral Citation No.2023:PHHC:068806-DB

then to Rohtak. He demarcated the place of occurrence. He too was medically examined. After completion of necessary investigation and usual formalities, challan under Section 173 Cr.P.C. was presented in the Court for trial of the accused.

4. Copies of challan were supplied to accused free of cost. The case was committed to the Courts of Sessions. On finding a prima facie case for commission of offences punishable under Sections 363, 366-A, 376 (2) (n) and 376-DA of IPC and Section 4 of POCSO Act, 2012, the accused had been charge-sheeted accordingly. He pleaded not guilty to the charges and claimed trial.

5. To substantiate its case, the prosecution examined 18 witnesses in all, namely, **PW-1** "C", complainant/father of victim, **PW-2** prosecutrix, **PW-3** Dr. Hamita Gupta, **PW-4** HC Sudesh, **PW-5** "S", mother of victim, **PW-6** Rajbir Singh, **PW-7** Dr. Shikher Goyal, **PW-8** Naresh Sharma, **PW-9** HC Sonika, **PW-10** SPO Dalvinder Singh, **PW-11** SPO Azad Singh, **PW-12** Constable Vikram Singh, **PW-13** EASI Laxman Singh, **PW-14** EHC Krishan Kumar, **PW-15** ASI Mahipal, **PW-16** ASI Kuldeep Kaur, **PW-17** HC Amrit Lal and **PW-18** Inspector Subhash Chander, besides placing reliance upon certain documents and thereafter prosecution evidence was closed by learned Public Prosecutor.

6. The statement of accused under Section 313 Cr.P.C. was recorded separately wherein he pleaded false implication and claimed himself to be innocent and also stated that the prosecutrix was a major.

7. After hearing the arguments advanced by both the sides and appraising the evidence produced on record, the learned trial Court vide

Neutral Citation No.2023:PHHC:068806-DB

judgment dated 03.09.2019 acquitted the accused of the charges as framed against him by holding that the prosecution had failed to bring home the guilt of the accused beyond doubt and also failed to prove that the prosecutrix was below the age of 18.

8. Feeling dissatisfied, the prosecution has filed the instant application seeking permission to grant leave to file the appeal against the judgment of acquittal. It is submitted in the application and it has been argued by learned Additional Advocate General, Haryana appearing for the applicant that the impugned judgment of acquittal is liable to be set aside as the findings as given by learned trial Court are not sustainable in the eyes of law and are liable to be set aside. There was overwhelming evidence on record to prove that the prosecutrix was below the age of 18 years and she had been abducted by the respondent-accused and had been enticed by him on the pretext of performing marriage and had been ravished. Human semen was detected on the clothing of the victim. As per the DNA report, the seminal stains found on the clothing of the victim matched with the DNA profile of the accused and were indicative of the fact that the respondent-accused had ravished the victim who was a minor. The consent of the minor was immaterial. Even otherwise, in her sworn deposition, she had fully supported the prosecution case. It has been further argued that the learned trial Court had committed a grave mistake in disbelieving the birth certificate Ex.PW-1/B which proved that the victim was only 14 years old at the time of occurrence. With these broad arguments, it has been urged that the application deserves to be allowed.

9. Since the applicant has sought leave to file appeal against the

Neutral Citation No.2023:PHHC:068806-DB

judgment of acquittal, therefore, before proceeding further and considering the arguments raised by learned State counsel, it would be useful to review the approach to be adopted while deciding the appeal against acquittal by the trial Court. In **Chandrappa and others v. State of Karnataka**, (2007) 4 SCC 415, the Hon'ble Apex Court had observed that it could not be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent Court of Law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial Court. In **Atley v. State of U.P.**, AIR 1955 SC 807, the approach of the Appellate Court while considering a judgment of acquittal was discussed and it was observed that unless the Appellate Court comes to the conclusion that the judgment of acquittal was perverse, it should not set aside the same. In **Aher Raja Khima v. State of Saurashtra**, AIR 1956 SC 217, it was observed that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial Court was wrong". In **Ramesh Babulal Doshi v. State of Gujarat**, 1996 SCC (CrL.) 972, the Hon'ble Apex Court while speaking about the approach of the Appellate Court while considering an appeal against the order of acquittal of accused observed that while speaking in judgment over acquittal, the First Appellate Court is required to seek an answer to the question whether the findings of the trial Court are culpably wrong, manifestly erroneous and demonstrably

Neutral Citation No.2023:PHHC:068806-DB

unsustainable. If the Appellate Court answers the above questions in the negative, the order of acquittal should not be disturbed. In **Chandrappa's case** (Supra) the Hon'ble Apex Court after referring to a catena of judgments, culled out the following general principles regarding the powers of the Appellate Court while dealing with an appeal against an order of acquittal in the following words:-

- i) An Appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
- ii) The Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power and Appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and law.
- iii) An Appellate Court, must bear in mind that in case of acquittal, there is double presumption in favour of the accused.
- iv) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

10. Keeping in view the above mentioned principles of law in mind, let us see as to whether the instant application deserves to be allowed or not? The case of the prosecution was that the respondent-accused had kidnapped the minor daughter of the complainant i.e. the prosecutrix from lawful guardianship of her parents with intent to force or seduce her to illicit intercourse and to ravish her and had repeatedly committed rape upon her during the period from 01.08.2018 to 03.08.2018. The onus of proving

Neutral Citation No.2023:PHHC:068806-DB

that the prosecutrix was minor and below the age of 18 years as on 01.08.2018 and was falling within the definition of “child” as per the provisions of POCSO Act, 2012, was on the prosecution. To discharge the same, the prosecution had placed reliance upon oral testimonies of parents of the prosecutrix, the prosecutrix herself and Ex.PW-1/B certificate shown to be issued by the Principal of Government Girls Senior Secondary School, Village Pharal (Kaithal) showing the date of birth of prosecutrix as 26.09.2004. The learned trial Court had disbelieved the version of the prosecution with regard to the age of the prosecutrix and had held that the prosecution had not succeeded in proving that she was a minor as on 01.08.2018. On assessing the material placed on record of learned trial Court, we are also of the opinion that the prosecution had failed to bring any cogent, convincing and reliable evidence on record to prove this fact. Though the prosecutrix as well as her parents deposed that she was 14 years old as on 01.08.2018. However, their oral evidence in this regard remained unsupported by any legally admissible documentary evidence. The certificate shown to be issued by the Principal of Government School, Pharal (Kaithal) was exhibited as Ex.PW-1/B during the examination-in-chief of PW-1 father of the prosecutrix but during cross-examination, he denied handing over any such certificate to the police at any point of time. The Principal of Government School, Pharal (Kaithal) who was author of this document had not been cited or examined as a witness by the prosecution, neither any other witness was examined by prosecution to prove the authenticity of Ex.PW-1/B and in the absence of the same, certainly no reliance could be placed upon this document to conclude that

Neutral Citation No.2023:PHHC:068806-DB

the prosecutrix was below the age of 18 years as on 01.08.2018. The prosecution had also produced on record Ex.PW15/E unavailability Certificate which showed that there was no record in the office of Registrar, Births & Deaths regarding the date of birth of the prosecutrix. The entries as made in Ex.PW-1/B as to date of birth of the prosecutrix as such could not be acted and relied upon and, therefore, the observations as made by learned trial Court that the prosecution has failed to prove that the prosecutrix was a minor do not deserve to be interfered with.

11. The respondent had been charge-sheeted under Section 363 and 366-A of IPC. The essential ingredients for proving commission of offence punishable under Section 363 of IPC which is an offence of kidnapping a minor from lawful guardianship are:-

- (i) that the age of the minor is less than 18 years, if a female;
- (ii) that the minor was taken or enticed away;
- (iii) that the minor was in the keeping of his or her lawful guardian and
- (iv) that the guardian did not consent to her removal.

12. Further, to establish a charge under Section 366-A of IPC, the prosecution has to prove and establish that a minor girl under the age of 18 years was induced to come from one place to other with the intention that such girl might be forced to have illicit intercourse with another person. This section requires two ingredients viz.:-

- (i) inducing a girl under 18 years to go from any place or to do an act, and

Neutral Citation No.2023:PHHC:068806-DB

- (ii) intention or knowledge that such girl will be forced or seduced to illicit intercourse with a person.

13. It is clear from a bare reading of the above-mentioned sections that the same can have no application to a case where the girl alleged to be kidnapped from the lawful guardianship/induced to come from a place is not proved to be below the age of 18 years. Since, in this case, it has not been proved beyond doubt that the prosecutrix was below the age of 18 years as on 01.08.2018, therefore, the most essential requirement for establishing charges under the aforementioned sections had not been proved in the instant case.

14. Not even this, on a careful appraisal of testimonies of the parents of the prosecutrix as well as the prosecutrix herself, we are of the confirmed opinion that the same too did not inspire any confidence for proving the above-mentioned charges as framed against the respondent beyond doubt. PW-5 mother of the prosecutrix did not utter even a single word to the effect that the prosecutrix was either enticed away/kidnapped by the respondent or the respondent had induced her to leave her parental house to accompany him. She simply stated that her daughter had gone missing on 01.08.2018 and was traced out at Rohtak on 04.08.2018. PW-1 father of the prosecutrix also stated that his daughter was found missing from their house on 01.08.2018 and then he had come to know that the respondent accused had kidnapped her. He further stated that the father of the respondent had told him that the respondent had kidnapped the victim on the pretext of marriage. His statement to this effect cannot be relied upon at all because even if the respondent was proved to have kidnapped the

Neutral Citation No.2023:PHHC:068806-DB

prosecutrix, then his father would not have stated so to the father of the prosecutrix. Moreover, even if the version of PW-1 to this effect is believed, still his statement can be stated to be only hearsay in nature on this point. He did not say that his daughter had told him that she had been enticed away or induced by the respondent-accused or that he had seen the respondent enticing away or inducing his daughter to come with him. Hence, the testimony of PW-1 also did not serve any useful purpose for connecting the respondent for offences punishable under Sections 363 and 366-A of IPC.

15. Let us now assess the testimony of prosecutrix herself. While appearing as PW-2, she stated that on 01.08.2018, the respondent had taken her to his house and committed rape upon her and then he had taken her to Kaithal on a motorcycle and from Kaithal, she had boarded a train with him and had gone to Rohtak. It was not the version of the prosecutrix too that the respondent-accused had enticed her away to leave her parents or had applied any force by compelling her to go with him or had induced her by any deceitful means to leave her parental house. The burden lied heavily on the prosecution to prove that there was any enticement or forcible compulsion on the part of the respondent upon the prosecutrix to leave her house which did not stand discharged from the testimony of prosecutrix or her parents. As such, it emerges that from the oral statements of PW-1, PW-2 and PW-5, nothing could be extracted to show that the respondent had either kidnapped the prosecutrix by enticing her away or had abducted her by any deceitful means by forcing her in any manner whatsoever. As such, the observations made by learned trial Court that the prosecution had

Neutral Citation No.2023:PHHC:068806-DB

failed to bring home the guilt of respondent-accused for commission of offences punishable under Sections 363 and 366-A of IPC do not warrant any interference.

16. Dilating further, at the cost of repetition, it may be mentioned that as per the discussion made above, the prosecution had failed to prove that the prosecutrix was below the age of 18 years as on 01.08.2018 and fell within the definition of a 'child'. As such, the ingredient for commission of offence punishable under Section 4 of the POCSO Act, 2012 can also not be stated to be applicable at all as the prosecutrix did not fall within the definition of a 'child'. The respondent-accused had, however, also been charge-sheeted for commission of offences punishable under Sections 376 (2) (n) and 376-DA of IPC. The learned trial Court had acquitted the accused of the charges under these sections also by holding that the prosecution had failed to prove that it was a case of rape and rather it was proved to be a case of consensual sexual relationship. It is relevant to mention here that Section 376-DA prescribes punishment for commission of offence of gang rape on a woman under 16 years of age. Since it was nowhere the case of the prosecution that the prosecutrix was subjected to gang rape and even it had not been proved beyond doubt that the prosecutrix was under 16 years of age as on 01.08.2018 when she had been alleged to be ravished by the respondent. Therefore the ingredients for commission of offence punishable under Section 376-DA of IPC cannot be stated to have been established.

17. The ingredients for commission of offence punishable under Section 376 (2) (n) are that a person who commits rape repeatedly on same

Neutral Citation No.2023:PHHC:068806-DB

woman is liable to rigorous punishment which shall not be less than 10 years and it may extend to imprisonment for life. As per Section 375 of IPC, offence of rape is said to be committed by a man if he does the acts described in Clauses (a) to (d) of this section against the will of the woman, without her consent, with or without her consent when she is under 18 years of age and certain other circumstances which are not relevant for the purpose of this case.

18. Now it is to be seen as to whether the charge under this section stood established against the respondent-accused or not on the basis of the evidence produced on record? The prosecution had relied upon medical evidence as well as oral statements of prosecutrix and her parents to prove the allegations levelled against the respondents on this point. PW-3 Dr. Hamita Gupta had conducted medico legal examination of the prosecutrix on 04.08.2018 and she proved her medico legal report Ex.PW3/C as per which no marks of external injuries were seen on the person of prosecutrix. There was no laceration, no tears and no marks of injuries on her thighs, pubic region and perineum. Her labia majora and labia minora were found to be normal. There was no evidence of intercourse, sexual abuse or injury or any other immediate sign of sexual assault on her. However, she had opined that the possibility of the prosecutrix being subjected to sexual intercourse could not be ruled out. She had also given vaginal swabs and vaginal slides for forensic examination. As per the FSL report Ex.PA, human semen was detected on the salwar, undershirt, vaginal slides and swabs. The testimony of PW-3 had remained uncontroverted and, therefore, the same being coupled with the medico legal report could certainly be

Neutral Citation No.2023:PHHC:068806-DB

acted and relied upon to prove that the prosecutrix was subjected to sexual intercourse. However, the question that arises for consideration is as to whether it was the respondent accused who had committed act of sexual intercourse with her and further that whether the said act (s) was/were consensual or forceful. As per the FSL Ex.PB, semen was detected on the salwar and undershirt of the prosecutrix and the DNA profiling of the same matched with that of the appellant. The appellant did not produce any evidence to the contrary which shows that the semen detected on the salwar and undershirt of the prosecutrix was of the respondent and he had committed acts of sexual intercourse with her. However, the mother PW-5 mother of the prosecutrix was totally silent on this point and all she had stated was that her daughter had gone missing and had been traced out on 04.08.2018 and further that her medico legal examination was conducted on the next day. So far as PW-1 father of the prosecutrix is concerned, he stated that his daughter had informed him that she had been raped by the accused. His statement to this effect is quite vague as he did not disclose as to when and where his daughter had disclosed about this fact to him nor he could disclose as to where his daughter has been ravished by the respondent. Moreso, his statement to this effect is hearsay in nature and does not fall under the principle of res gestae and, therefore, we feel that the same could certainly not be relied upon beyond doubt to prove that the prosecutrix had been ravished by the respondents. So far as the statement of the prosecutrix is concerned, the same is no better. Though she stated that on 01.08.2018, the respondent had taken her to his house and had committed rape upon her in a room constructed on the roof at about 9 PM and then he took her to

Neutral Citation No.2023:PHHC:068806-DB

Kaithal on a motor bike and had committed rape upon her at Railway Station Kaithal and also stated that from Kaithal, she had been taken to Rohtak where they had stayed at the platform of Railway Station, Rohtak for two days and there also the respondent had deflowered her but during cross-examination it was, admitted by her that in her statement recorded under 164 Cr.P.C. (Ex.PW2/D) before the Magistrate on 05.08.2018, she had stated that she had gone with the respondent with her own willingness. A perusal of her statement Ex.PW2/D reveals that she had stated therein that she had voluntarily and willingly gone with the respondent and whatever sexual activity was done between them was with her consent. This reflects that the statement made by her in the Court was in total contradiction with the statement Ex.PW2/D.

19. Not even this, her entire act and conduct reveals that it was not a case of any force being committed upon her by the respondent accused as per her own saying. The respondent had sexual relations with him in chauraha of his house and then he had taken her to Kaithal on motorcycle and then through train to Rohtak. If she was not a willing party then certainly it would not have been her natural act and conduct to stay quiet when she was involved in sexual activity by the respondent as deposed by her. Rather in that circumstance, she would have raised much hue and cry not even at the time when she had allegedly been taken to the house of the respondent, but also when she had been taken to different places by him on motorcycle and train. The evidence led by her falls short of any allegation that respondent had extended threats to her while taking her along with him or that she had supported him out of fear and continued to permit him to

Neutral Citation No.2023:PHHC:068806-DB

force himself on her and there was no consent. From the evidence produced on record, it is clear that there is total absence of any semblance of a protest or resistance by the prosecutrix when she was always free to have expressed her protest or prevent the accused from tormenting her. From the medico legal report Ex.PW3/C and testimony of evidence of any force or physical violence on the person of the prosecutrix is totally absent. There is also no allegation that any violence was used by the accused or any threat was extended to her while committing the act of sexual intercourse with her by the respondent. All this goes to show that she had voluntarily and willingly accompanied him to his house, to Kaithal as well as Rohtak. Had she not being a willing party, then it would not have been possible for the respondent to commit acts of sexual intercourse with her at platform of railway station Rohtak also as stated by her. The admitted circumstances do not enable the prosecution to allege that it was a case of rape and there was no consent on the part of the prosecution. The position might have been different if the prosecutrix was proved to be below the age of 18 years because in that circumstance, her consent was immaterial but in view of the findings regarding age of the prosecutrix and in view of the backdrop of facts and circumstances when it is explicit that she had sufficient opportunities to offer resistance or protest when she was taken by the respondent-accused on his motorcycle to Kaithal and to Rohtak in a train proves that she herself was a consenting party and had submitted herself while in free and unconstrained position of physical and mental power to act in the manner she wanted. She is not proved to have resisted the overtures of the accused. She could freely exercise a choice between resistance and

Neutral Citation No.2023:PHHC:068806-DB

assent which is not proved to be so exercised. As such, we are inclined to hold that the learned trial Court had rightly concluded that it was a case of consensual relationship and not of forcible sexual intercourse. The learned trial Court had rightly appreciated the evidence produced on record and committed no error in acquitting the respondent. On reading of entire material, we find that there is no perversity in the findings recorded by learned trial Court and there is no compelling reason to interfere with its judgment. Accordingly, it is held that no ground has been made out to grant leave to appeal to the applicant. Finding no merit in the application, the same is dismissed.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

08.05.2023
manju

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