

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

201

CRA-D-136-2021 (O&M)

Date of decision:- 21.02.2023

Sumit

.... Appellant

Vs.

State of Haryana

...Respondent

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

Present: Mr. Keshav Partap Singh, Advocate for the appellant.

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

Manisha Batra, J.

The present appeal has been preferred against the judgment of conviction dated 26.02.2021 and order on quantum of sentence dated 02.03.2021 passed in sessions case No.127 of 2019 titled as ***State Vs. Sumit and another***, whereby the accused, Gaurav had been acquitted of the charges as framed against him whereas the accused Sumit had been acquitted of charge under Section 506 of IPC but was held guilty and convicted for commission of offences punishable under Section 366 of Indian Penal Code, 1860 (for short 'IPC') and Section 6 of Protection of

Children from Sexual Offences Act, 2012 (for short 'POCSO, Act ').

2. For the sake of convenience, the appellant-Sumit shall be referred to as 'the accused' hereinafter.

3. The broad contours of the case as set up by the prosecution in this case are that on 07.12.2018, the prosecutrix 'R' (name withheld) while disclosing herself to be 15 years old, recorded a statement before police that she was studying in 9th class. On 06.12.2018 at about 8:00 a.m., she was going to her school from her home, when she met the accused Sumit and Gaurav on the way. They were having a car. Gaurav told her to sit in the car by representing that they would drop her at the school. The prosecutrix had boarded the car but instead of dropping her at her school, they took her elsewhere and stopped the car near Toll Plaza Hodal. The prosecutrix requested Gaurav to drop her at school and by saying that he had some work to do and thereafter, he would drop her, they took her further and stopped the vehicle in a ground where they served her with cold drink 'Pepsi'. The accused then had secretive conversation with each other and thereafter accused Gaurav alighted from the car whereas accused Sumit boarded in backside of the car where the prosecutrix was sitting and then while threatening her and pushing her, he committed rape upon her by taking off her *salwar*. The prosecutrix started crying and pleaded with accused Sumit to leave him. However, he threatened to kill her if she disclosed about the incident to anyone else. Thereafter, both of them dropped her near the drain. She had managed to reach her house somehow and disclosed about the incident to

her mother.

4. On the basis of this statement, a case under Sections 120-B, 363, 376 of IPC and Section 4 of POCSO Act was initially registered. Investigation proceedings were initiated. Medico-legal examination of the prosecutrix was conducted. Statement of the prosecutrix was recorded under Section 164 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). The offence under Section 17 of the POCSO Act was added against accused Gaurav. Accused were arrested. They were interrogated and suffered disclosure statements admitting their involvement in the subject crime. After completion of necessary investigation and formalities, challan under Section 173 Cr.P.C. was presented in the Court for trial of the accused.

5. Copies of the challan were supplied to the accused free of costs. The case was committed to the court of Sessions. On finding a *prima facie* case for commission of offences punishable under Section 120-B, 366 read with Section 120-B and 506 (II) IPC and Section 6 of POCSO Act, both the accused had been chargesheeted accordingly. They pleaded not guilty to the charges and claimed trial.

6. To substantiate its case, the prosecution examined as many as 17 witnesses, besides placing reliance upon certain documents. These witnesses were PW1-'R' prosecutrix, PW2-'S' mother of the prosecutrix, PW-3-'V' father of the prosecutrix, PW4-Ravinder Singh Dahiya Draftsman, District Court Compound, Palwal, who had prepared scale site plans, PW5-Inspector Kamla Devi, a formal witness, PW6-ASI

Amlesh, Investigation Officer, PW7-HC Bala, Malkhana Moharrar in whose custody the case property was deposited by the Investigating Officer, PW8-Constable Suman, who had deposited the case property at FSL Madhuban, PW9-HC Shobha, under whose charge as Malkhana Moharrar, the case property relating to accused Sumit had been deposited, PW10- Ravi Madan, JBT Incharge, Government Primary School, Village Missa, who produced record regarding admission in and withdrawal of the prosecutrix from the school, PW11-Constable Laxmi, who was a formal witness, PW12 Parkash Chand, registered owner of the Alto car bearing No. HR-30M-6917 and father of accused Sumit, PW-13, Dr. Supriya Krishna who had conducted medico legal examination of the prosecutrix on 07.12.2018, PW-14 HC Dalwanti who had deposited case property at FSL Bhondsi, PW15-Constable Kavita who had also deposited case property at FSL Bhondsi, PW16 Constable Heera Lal who had joined investigation on 04.02.2019 and PW17-Dr. Ashutosh Sharma, who had conducted medico legal examination of the accused Sumit on 04.02.2019.

7. The statements of accused were recorded under Section 313 Cr.P.C. Both the accused claimed themselves to be innocent and pleaded false implication. In defence evidence, the accused Sumit examined two witnesses namely, DW1-Parveen and DW2-Pooja.

8. After appreciating the evidence produced on record and hearing the contentions raised by both the sides, the learned trial Court acquitted the accused Gaurav of the charges as framed against him.

However, the accused Sumit was held guilty for commission of offence punishable under Section 366 of IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years. He was also sentenced to pay fine of a sum of Rs.10,000/- and in default thereof was to undergo simple imprisonment for 6 months. He was further held guilty under Section 6 of POCSO Act and was sentenced to undergo rigorous imprisonment for a period of 20 years and was further sentenced to pay fine of Rs.1 Lac and in default of payment of fine, he was further directed to undergo simple imprisonment for two years. The prosecutrix was also directed to be awarded compensation to the tune of Rs.5 Lacs by District Legal Service Authorities.

9. Feeling aggrieved from the order of his conviction, the instant appeal has been preferred by the appellant-accused, Sumit.

10. Learned counsel for the accused, while assailing the findings as given by learned trial Court vehemently argued that the impugned judgment of conviction and order on quantum of sentence as passed against the accused were liable to be set aside as the findings as given by learned trial Court were perverse and had resulted in material failure of justice. Neither the prosecutrix nor her parents had supported the version of the prosecution at all. No other direct incriminating evidence had come on record as against the accused. The evidence as to the age of the prosecutrix was also not convincing and did not prove that as on the date of the alleged occurrence, she was below the age of 18 years. The medical evidence proved that no external injury either fresh or old was

found on the person of the prosecutrix. Learned trial Court had recorded the finding of guilt of the accused only on the basis of DNA report to the effect that the DNA profile of blood of the accused matched with the DNA of the seminal stains found on the *salwar* Ex.MO/1 though it was not proved that the said *salwar* actually belonged to the prosecutrix. With these broad arguments, it was submitted that the appeal deserved to be allowed and the appellant-accused deserved to be acquitted of the charges for which he had been held guilty and convicted.

11. Per contra, it was argued by learned State counsel that the findings given by learned trial Court being well reasoned did not warrant any interference. The evidence as to the age of the prosecutrix was inspiring and proved that she was below the age of 18 years as on the date of occurrence. The fact that the DNA profile of the blood of accused samples of which were taken from the accused and the semen as detected on the *salwar* of the prosecutrix matched with each other, was itself sufficient to prove that the accused had ravished the prosecutrix. Accordingly, it was submitted that the appeal being devoid of merits, was liable to be dismissed.

12. We have given thoughtful consideration to the contentions as raised by both the sides and the evidence produced on record has been minutely scrutinized. The prosecution had swung into action in this case on the basis of statement Ex.P-1, recorded by the prosecutrix before the police on 07.12.2018. In this statement, she had alleged that the accused Sumit along with accused Gaurav had met her while she was on the way

to her school on 06.12.2018 and accused Gaurav had offered to drop her at her school in the car which they were having with them. She had stated that instead of dropping her at her school, they had taken her near Toll Plaza Hodal, wherein she was ravished by the accused-Sumit. In her statement, Ex.P-1, she had mentioned her age to be 15 years. Learned trial Court had observed that the prosecutrix was proved to be below the age of 18 years as on the day of occurrence. To prove that the prosecutrix was a minor as on 06.12.2018, the prosecution had mainly relied upon the testimony of PW-10, Ravi Madan, JBT Incharge of Government Primary School, Village Missa. This witness had brought the admission form Ex.P-26 and admission and withdrawal register maintained by his school, relevant extract of which is Ex.P-25 and also proved Ex.P-27, certificate issued by him with regard to the date of birth of the prosecutrix. As mentioned in all these three documents, the date of birth of the prosecutrix was 24.06.2004 and she was admitted in the above named school on 25.05.2011 and had left the same on 21.05.2012. PW-10 admitted during cross-examination that neither any birth certificate nor any affidavit had been given by the parents of the prosecutrix at the time of her admission in the above school.

13. Now the question that arises for consideration is as to whether the above said record can be considered to be sufficient to determine the age of the prosecutrix. The well settled proposition of law is that in the light of the statutory rules prevailing for ascertainment of age of the juvenile, the same yardstick can be followed by the Court for

ascertaining the age of the prosecutrix as well. As such the age of the prosecutrix is to be determined as per the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'Act, 2015) as well as the rules framed thereunder. The procedure for determining the age is now part of Section 94 of the Act, 2015, as per which, the age of a child/juvenile in conflict with law may be determined by seeking evidence by obtaining : (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or panchayat; (iii) and in the absence thereof, by conducting ossification test or any other medical age determination test. Undoubtedly, in view of this provision, the age of a child can be determined on the basis of date of birth certificate issued from the school. However, it is also well settled that the date of birth mentioned in the school register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the school register must be shown to be made on the basis of the information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in school register regarding date of birth is made on the basis of information given by the parents, it would have evidentiary value and otherwise it would not have. In this case, PW-10 admitted that no birth certificate or affidavit was given by the parents of the prosecutrix at the time of her admission in the school as

per the record. In application Ex.P-26 moved by mother of prosecutrix on 25.05.2011 also, her date of birth was not mentioned. Further, even the parents of the prosecutrix i.e. PW2 and PW3 did not support the version of the prosecution with regard to her date of birth being 24.06.2004 as mentioned in Ex.P-25 and Ex. P-27. Rather both of them stated during cross-examination that the prosecutrix was born on 01.01.2000. Even the prosecutrix also stated so.

14. Not even this, the prosecutrix as well as her parents deposed that she had never studied at any school in village Missa or in District Palwal. Rather they stated that prosecutrix had studied at Agra from Ist to 9th class. Therefore, the documentary evidence in the form of Ex.P-25 and P-27 containing the date of birth of the prosecutrix cannot be relied upon to determine that she was born on 24.06.2004 in view of the oral statements recorded by the prosecutrix and her parents to the effect that she had been born on 01.01.2000. As such, it could also not be stated beyond doubt that the prosecutrix was below the age of 18 years as on 06.12.2018 when the occurrence had allegedly taken place. Learned trial Court had not considered this aspect of the case and therefore, the observations made by learned trial Court that the prosecutrix was proved to be a minor, have become liable to be reversed.

15. The next question that arises for consideration is as to whether the prosecutrix was proved to have been abducted and ravished by the accused as alleged by the prosecution. The accused had been charge-sheeted under Section 366 of IPC. To bring home the guilt of the

accused under this Section, it was necessary for the prosecution to prove that the accused had induced the prosecutrix or had compelled her by force to go from any place; that such inducement was by deceitful means; that such kidnapping or abduction took place with the intent that the prosecutrix might be seduced to illicit intercourse and/or that the accused knew it to be likely that she might be seduced to illicit intercourse, as a result of her abduction or kidnapping. Further, to prove the charge under Section 6 of the POCSO Act as framed against the accused, it was required to be proved by the prosecution that the prosecutrix had been subjected to act of aggravated penetrative sexual assault by the accused. However, neither the prosecutrix, who was the star witness of the case nor other material witnesses namely her parents PW-2 and PW-3, supported the version of the prosecution on that point. All these three witnesses had deposed in their respective statements recorded before learned trial court that prosecutrix had neither been abducted/kidnapped nor she was raped by anyone. They specifically stated that accused had not abducted or kidnapped the prosecutrix. All these three witnesses had been declared hostile and were subjected to pertinent questions of cross-examination by learned Public Prosecutor. They were confronted with the statements allegedly got recorded by them before the police. The prosecutrix was even confronted with her statement Ex.P-3 as recorded under Section 164 of Cr.P.C. before the Magistrate. However, all of them took a categorical stand that no such statements had ever been made by them before any person. Therefore, by examining these material

witnesses, the prosecution failed to extract any incriminating evidence whatsoever against the accused on record to connect them with charges as framed against them.

16. The prosecution had further rested its case upon the evidence as to suffering of disclosure statement by the accused Sumit vide memo Ex.P-15 in the presence of PW-6 ASI Amlesh, Investigating Officer and PW-16 Constable Heera Lal which had led to demarcation of place of occurrence by the accused vide memo Ex.PW-17. Though both these witnesses supported the case of the prosecution by deposing that the accused had recorded his disclosure statement and then demarcated the place of occurrence. However, in our opinion, even if their statements are believed to be correct, still the same cannot be considered to be relevant evidence in view of the fact that inculpatory part of the disclosure statement being suffered by the accused in the custody of the police and being confessional in nature, was not admissible in evidence in view of the bar contained in Section 25 of the Indian Evidence Act, 1872 (For short 'Evidence Act'). No new or distinct fact which would be considered to be admissible in view of the exception carved out in Section 27 of the Evidence Act can be stated to have been discovered in pursuance of the disclosure statement Ex.P-15, even by demarcation of the place of occurrence as the same was already known to the police and PW-6 had prepared rough site plan Ex.P-12 of the same as on 07.12.2018 itself. Therefore, this piece of evidence in our opinion also, did not help the prosecution in proving its case as against the accused and the learned trial

Court in our opinion had wrongly ignored this fact.

17. Further it is revealed from the record, to arrive at the finding of guilt of the accused, learned trial Court had mainly relied upon the scientific evidence produced on record in the form of FSL reports Ex.PX1 and Ex.PX2. As per the prosecution version, the *salwar* worn by the victim at the time of conducting her medical examination had been taken in custody by PW-13 Dr. Supriya Krishna and she had handed over the same to the police. In her sworn deposition, PW-13 identified the said *salwar* as Ex.MO/1. Now as per the report Ex.PX1, human semen was detected on the *salwar* Ex.MO/1. Further as per report, Ex.PX2, DNA profiling was obtained from the *salwar* Ex.MO/1 by extracting DNA of semen found on the same and it had been compared with the DNA profiling of blood sample of the accused and the allelic pattern of both the DNAs had matched.

18. Learned State counsel strenuously argued that the findings in these reports were conclusive proof of the fact that the semen which was detected on the *salwar* of the prosecutrix, was of the accused and he had committed act of aggravated penetrative sexual assault/rape upon the victim. Learned trial Court had observed that since DNA of semen lifted from the *salwar* of the prosecutrix and blood sample of the accused duly matched therefore, the same were to be taken into consideration and proved that the accused had ravished the prosecutrix. However, we are inclined to hold that the factum of matching of allelic pattern of DNA of semen lifted from the *salwar* Ex.MO/1 and the blood sample of the

accused was in itself not sufficient to connect the accused with the offence of rape upon the prosecutrix. In this regard it may be mentioned that, it is well settled that DNA evidence is in the nature of opinion evidence as envisaged under Section 45 of the Indian Evidence Act and like any other evidence, its probative value varies from case to case. In ***Manoj and others Vs. State of Madhya Pradesh***, 2022(3) RCR (Criminal) 447, the Hon'ble Apex Court while dealing with the issue of DNA profiling methodology as also the collection and preservation of DNA evidence had observed that DNA profile was generated from the body fluid, stains and other biological specimen recovered from evidence and was compared with the results obtained from reference sample so that a link amongst victim and the suspect with one another or with crime can be established. It was observed that if the collection and preservation of DNA evidence is not properly documented, collected, packaged and preserved, the same will not meet the legal and scientific requirement for admissibility in a court of law. Similarly, in a recent case cited as ***Rahul Vs. Delhi Ministry of Home Affairs & others***, AIR 2022 SC 5661, the Hon'ble Apex Court had observed that wherein the authenticity of the DNA samples was not proved in view of the fact that the samples kept on lying in the malkhana for a long time and it was also not proved that the techniques for DNA profiling were reliably applied by the experts, the conviction of the accused could not be held to be sustainable.

19. In this case, the record shows that the blood samples of the accused for the purpose of DNA profiling were taken on 05.02.2019 but

the same had remained in the Malkhana till 14.02.2019 and thereafter, they were deposited with FSL. No evidence had come on record to prove as to when the *salwar* Ex.MO/1 and vaginal swabs etc. of the prosecutrix were deposited in the Malkhana, though PW-13 had stated that she had handed over the same to police on 07.12.2018 itself. PW14 Constable Dalwanti had deposited Ex.MO/1 on 19.12.2018 at RFSL Bhondsi. In this manner, there was delay in submitting samples to FSL for their forensic examination. The possibility of tempering with the samples collected during the intervening period could not be ruled out. Mere exhibition of Ex.PX1 and PX2 itself did not prove the contents of the same specially in the circumstance, when neither the prosecutrix nor her parents supported the version of the prosecution that the *salwar* Ex.MO/1 belonged to her. Rather in their respective sworn depositions, all of them stated that the prosecutrix had not handed over her undergarments or clothing to the police. Further, even if it is believed that Ex.MO/1 was taken off by PW13 from her person at the time of conducting medico legal examination of the prosecutrix but still it was not the prosecution version that this *salwar* was the same which she was wearing at the time when she had been allegedly ravished. As such, the reliance by the prosecution on the semen allegedly detected on this *salwar* and observation made in the FSL report have lost any significance whatsoever and therefore, even if it is assumed that the *salwar* Ex.MO/1 belonged to the prosecutrix and the seminal stains as detected on the same were of the accused, still it cannot be believed that Ex.MO/1 was

worn by the prosecutrix at the time of occurrence, especially because of the reason that the prosecutrix as well as her parents even denied the factum of her being ravished at all. Learned trial Court had not taken all these points into consideration and as such in our considered opinion, the findings given by learned trial Court are not sustainable as neither it had been proved on record that the accused had induced the prosecutrix or had compelled her by force to go from any place by way of any deceitful means with intention to seduce her to illicit intercourse or that he knew it to be likely that she might be seduced to illicit intercourse, as a result of her abduction or kidnapping or that he had ravished her. Further, even it has not been proved beyond doubt that she was below the age of 18 years at the time of the occurrence.

20. Thus, an overall assessment of the facts and circumstances emanating from the evidence available on record, as discussed hereinabove if put together, does not point out towards any inescapable conclusion that the prosecution had succeeded in bringing home the guilt of the appellant-accused for commission of offences punishable under Section 366 of IPC and Section 6 of POCSO Act. As such, by reversing the findings as given by learned trial Court, the impugned judgment of conviction and order on quantum of sentence are set aside, the appeal is allowed and the appellant-accused, Sumit is acquitted of the charges for which he had been held guilty. He be released forthwith if not required in any other case.

21. Criminal miscellaneous application(s), if any, also stands disposed of.

(RITU BAHRI) (MANISHA BATRA)

JUDGE JUDGE

21.02.2023
pooja saini

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No