

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-AD No.26 of 2022 (O&M)
Date of Decision:22.08.2023

Terry Saroya

... Appellant

Versus

State of Punjab and another

... Respondent

**CORAM : HON'BLE MR. JUSTICE RAJ MOHAN SINGH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

Present: Mr. Gurmeet Singh, Advocate
for the appellant.

HARPREET SINGH BRAR, J.

CRM No.11106 of 2022

The instant application is filed seeking condonation of delay of 35 days in filing the appeal.

For the reasons stated in the application, the same is allowed and delay of 35 days in filing the appeal is condoned.

CRM No.11107 of 2022

Application is allowed as prayed for.

CRA-AD-26-2022

1. The present appeal is directed against the judgment dated 09.12.2019 passed by the learned Additional Sessions Judge, Hoshiarpur acquitting the accused-respondent No.2 in case bearing FIR No.119 dated 28.07.2018 registered under Sections 363, 366-A, 376, 201 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) at Police Station Sadar, Hoshiarpur.

FACTUAL BACKGROUND

2. Brief facts of the prosecution case are that on 28.7.2018, ASI Paramjit Kaur was present at police station when prosecutrix D/o Harish Kumar resident of Mohalla Shivalik Avenue, Aslamabad, Hoshiarpur, along with her mother Poonam Rani, came present and got recorded her statement before her to the effect that her mother has taken divorce from her father Harish Kumar and now she is residing with her mother. She is studying in 10th class at Gurukul School Aslamabad (Hoshiarpur). In the month of July 2018, one phone call was received from mobile No.7037261068 of some boy on her mother's mobile No.9464930023, but the same was disconnected by saying wrong number. Thereafter, 2-3 more calls were received on the said mobile phone and the caller stated his name to be Sunil Kumar @ Sunny son of Balbir Singh resident of Shergarh, Distt. Hoshiarpur. On 27.07.2018 at about 11:00 PM, the prosecutrix was present in her house and at that time her mother was sleeping. Sunil Kumar @ Sunny made a phone call from Mobile No.7037261068 to the prosecutrix and asked her to come outside. The prosecutrix came out of her house and saw that Sunil Kumar @ Sunny was standing on his motorcycle outside the gate of their house. He forcibly made the prosecutrix to sit on his motorcycle and took her to an under construction house that belonged to his brother at village Shergarh. He forcibly removed all the clothes of prosecutrix and sexually assaulted her. Next day, at about 6:00 AM he left the prosecutrix in a park near bridge of Aslamabad. On reaching her house, prosecutrix told entire story to her mother. The prosecutrix further stated that Sunil Kumar @ Sunny had forcibly raped her and demanded action against the accused.

3. On the basis of above said statement of prosecutrix, the instant case was registered against the accused under Section 376 of IPC and Section 4 of the POCSO Act. The investigation was initiated. Rough site plan of the place of occurrence was prepared. The prosecutrix was medically examined at Civil Hospital, Hoshiarpur. The statement of prosecutrix under Section 164 Cr.PC was recorded by Judicial Magistrate 1st Class, Hoshiarpur. The accused was arrested in this case and was also medically examined. The date of birth certificate of the prosecutrix was verified from the school and the motorcycle of accused was taken into police custody. The call details were also obtained. Vide Rapat No.30 dated 12.11.2018, offence under Section 363,366 IPC were added. During investigation, statements of witnesses were recorded. After completion of necessary formalities of investigation, challan against the accused was presented in the Court.

4. Copies of report under section 173 Cr. PC and documents attached thereto were supplied to the accused free of costs, as required under section 207 Cr. PC.

5. After hearing learned Addl. PP for the State and learned defence counsel and finding a *prima facie* case to have been made out, charges against the accused were framed under Sections 363, 366, 376, 201 IPC and Section 4 of the POCSO Act, which were read over and explained to the accused in simple language. He did not plead guilty to the charges and claimed trial.

6. In order to prove its case, prosecution examined as many as 18 witnesses whereas the accused-respondent No.2 in his defence examined two witnesses. After hearing the rival submissions and perusing the prosecution evidence, the trial Court came to the conclusion that there was no direct evidence against the accused as the prosecutrix and other witnesses have not been able to establish the

prosecution case beyond reasonable doubt, which resulted in acquittal of the accused-respondent No.2. Thus, the present appeal is filed.

CONTENTIONS

7. Learned counsel for the appellant assails the judgment dated 09.12.2019 acquitting the accused-respondent No.2 by contending that PW-1 prosecutrix and PW-2 mother of the prosecutrix fully supported the prosecution case. PW-1, prosecutrix deposed that on 27.07.2018 at 11 PM, accused-respondent No.2 gave a call on mobile number of her mother and when confronted, he revealed his name as Sunny. He asked the prosecutrix to come out of the house. When the prosecutrix came out of the house, accused-respondent No.2 forcibly made her sit on the motorcycle and took her to the house of his brother, which was under construction where he raped her. The prosecutrix during her deposition corroborated the statement given by her under Section 164 Cr.P.C. before the learned Magistrate. PW-2, mother of the prosecutrix, also deposed that once in the month of June, 2018, when she got up during night, she did not find her daughter in the bed. She looked around for her daughter with the help of neighbours but could not find her. On next day morning at about 8-9 AM, prosecutrix telephonically called her mother from Gurkirat Singh Park from where she was brought back home. The prosecutrix narrated entire incident to her mother that she was taken away by two boys on a motorcycle and one of them committed rape with her in a house, which was under construction. The prosecutrix also identified the accused-respondent No.2 in the Court but the trial Court ignored the testimonies of material witnesses and the evidence available on record in an illegal and arbitrary manner.

8. Learned counsel for the appellant further contends that PW-3 Dr. Shagun, Medical Officer, who medically examined the prosecutrix, vide declaration Ex.PW3/F declared that possibility of sexual intercourse in this case cannot be ruled out. Dr. Navneet Saini, Medical Officer, who stood in the witness box as PW-8, deposed that on 30.07.2018, that the prosecutrix was produced by the police for determining her age and according to her opinion, age of the prosecutrix was between 15 to 16 years. Therefore, the official witnesses also supported the prosecution version but the trial Court brushed aside the same and acquitted the accused-respondent No.2 by rendering findings based on conjectures and surmises.

ANALYSIS AND OBSERVATION

9. Before going into the veracity of the evidence of the case, in the light of the arguments of the learned counsel for the appellant, this Court deems it proper to first examine the scope and ambit of the power of this Court in re-appreciating the evidence in an appeal against an order of acquittal. It is an accepted proposition of criminal jurisprudence that this Court has the power to unsettle the order of acquittal on the basis of re-appreciation of the evidence but the power is subject to the settled law that where two views are possible and out of the two, one points towards the innocence of the accused, the view which favours the accused should prevail over the other pointing towards his guilt.

10. The Hon'ble Supreme Court has articulated the above principle in the following decisions:

- a) A three Judge Bench of Hon'ble Supreme Court in **Kali Ram v. State of H.P., 1973 (2) SCC 808**, speaking through Justice H.R. Khanna, held as under:

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted...”

b) A two Judge Bench of Hon’ble Supreme Court in **Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415** has laid down the parameters with regard to the power of appellate Court while dealing with an appeal against an order of acquittal. Speaking through Justice C.K. Thakker, the following was held:

“35. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person

shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) 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.”

11. After examining the record of the case, we find that there are stark and glaring contradictions in the evidence produced by the prosecution. The prosecution has not been able to establish that the prosecutrix was less than 18 years of age on the date of incident in order to fasten the accused with the presumption under Sections 29 and 30 of the POCSO Act. PW-4, Dr. Bhupinder Singh, Radiologist, Civil Hospital, Hoshiarpur, who conducted X-rays examination for age estimation of prosecutrix opined that age of the prosecutrix could be between 16-17 years and the estimated variation of ossification test is 3 years. PW-7, Gurpreet Kaur, Computer Teacher-cum-Clerk has produced relevant document bearing entry of date of birth of the prosecutrix i.e. school leaving certificate (Ex.PW7/B) to prove the date of birth of the prosecutrix as 17.06.2002 but neither relevant entry of birth is produced; nor any explanation is forthcoming as to why the best evidence in the form of primary entry was not produced. PW-7, Gurpreet Kaur in her cross-examination feigned ignorance regarding the kind of document indicating date of birth of the prosecutrix was brought at the time of admission and admitted that she has no knowledge about the certificate Ex.PW7/B as she has not handled or dealt with the admission of the prosecutrix. Recently, a two Judge Bench of the Hon'ble Supreme Court in **P. Yuvaprakash Vs. State rep. by Inspector of Police 2023 SCCOnline SC 846,** has held that whenever a dispute with regard to the age of a person arises in the

context of her or him being a victim under the POCSO Act, Courts have to take recourse to the steps indicated under Section 94 of the Juvenile Justice Act, 2015 and declared that the transfer certificate indicating date of birth of the victim as not credible to conclude that the prosecutrix was a child under the provisions of Section 2 (1) (d) of the POCSO Act. The above conclusion was made on the basis that the witness who produced the transfer certificate conceded that she has no knowledge about the document on the basis of which the date of birth was recorded. Once the prosecution has failed to establish the age of the prosecutrix as below 18 years on the date of incident, the finding of the learned trial Court with regard to the prosecutrix being a consenting party finds favour with this Court. It was observed by the learned trial Court that alleged kidnapping was not performed by the accused-respondent No.2 as the prosecutrix herself opened the lock of the gate of her house, carried mobile phone of her mother with her and sat on the pillion of a motorcycle of her own volition. Learned counsel for the appellant has not been able to controvert that the finding recorded by the trial Court with regard to date of birth of the prosecutrix is perverse or it is not based upon the evidence led by the prosecutrix.

12. PW-1 prosecutrix deposed that she received a call from the accused on 27.07.2018 at about 11 PM in night, who asked her to come out of the house. When the prosecutrix came out of the house, she was forcibly made to sit on the motorcycle by the accused and taken away to the house of his brother where he raped her. However, in her cross-examination, the prosecutrix stated that gate of the house of the prosecutrix is usually locked at 9 PM and therefore, it is strange to believe that on mere asking of the accused, she opened the gate and while she was being forcibly made to sit on the motorcycle by the accused, she did not raise any hue and cry. The mobile number from which the accused made the phone

call on the night of occurrence of alleged incident was not registered in the name of the accused, rather the same was found registered in the name of Rashid Ali s/o Hafiz Ali, resident of District Eatwah (U.P.). Even the mobile number of the mother of the prosecutrix on which the accused gave a call was not registered in her name, rather the same was issued in the name of one Jyoti Thanda.

13. PW-1 prosecutrix has stated in her testimony that she tried to wake her mother up before coming out of the house but she did not get up; whereas her mother in her cross-examination stated that the prosecutrix did not tell her that she received any phone call from an unknown number nor did she wake her up. The prosecutrix said that she was forcibly made to sit on the motorcycle by accused-respondent No.2 whereas mother of the prosecutrix in her testimony stated that on returning home, the prosecutrix told her that she was taken away by two boys, one of whom raped her. On the night of alleged incident, the prosecutrix talked to her mother for five minutes on mobile phone of her mother, which she took with her. She was asked by her mother about her whereabouts; but she did not tell anything and therefore, rightly an inference had been drawn by the trial Court that the prosecutrix was not kidnapped by accused-respondent No.2.

14. PW-3, Dr. Shagun, Medical Officer, who medico legally examined the prosecutrix stated that on examination, no external or internal injury marks were present on the body of prosecutrix and on local examination, there were no injuries on lips and cheeks. DW-1 Gurdip Singh deposed that house of brother of the accused, which is situated at a distance of about four houses from his house, is clearly visible from his house. On the day of occurrence, he was sleeping on the roof of his house and the accused-respondent No.2 never brought any girl in

the house in question. Therefore, the prosecution has not been able to establish before the trial Court that the prosecutrix was sexually harassed.

CONCLUSION

15. In view of the facts and circumstances of the case, we find that the defence has been successful in making serious dent in the prosecution case and that the prosecution miserably failed to establish its version beyond reasonable doubt. Therefore, we find the view taken by the learned trial Court to be reasonable and logical. Learned counsel for the appellant has failed to point out any perversity or illegality in the findings recorded by the learned trial Court, which warrants interference by this Court. As such, there is no merit in the present appeal and consequently, the same is dismissed.

(RAJ MOHAN SINGH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

August 22, 2023
Pankaj*

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