

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-AD-27-2022

Reserved on: 22.02.2023

Date of decision: 28.02.2023

Savitri Devi

...Appellant

Versus

State of Haryana & anr.

...Respondents

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

Present : Mr. Ajit Singh, Advocate, for
Mr. Arun Sharma, Advocate,
for the appellant.

SUKHVINDER KAUR J.

1. The appellant-Savitri Devi has preferred the instant appeal against judgment dated 28.01.2020, passed by learned Additional Sessions Judge (Exclusive Court for Heinous Crime Against Women) Kurukshetra, vide which respondent No.2-accused Krishan has been acquitted.

2. The facts, as per record, are that Savitri Devi PW-3 complainant/mother of victim moved the complaint dated 17.04.2018 (Ex.P6) to the Superintendent of Police, which was received by PW-4 SI Satyawanti in Police Station Women, Kurukshetra, whereupon she recorded the FIR Ex.P-8 and made her endorsement Ex.P-9 upon the complaint itself.

3. As per version in the above-said complaint, the daughter of the complainant victim PW-1 'K' (name deliberately withheld) was born in the year 2003 and was aged about 15 years and as such a minor and she was studying in 8th class and that accused Krishan used to follow her and tease her. She and her husband had tried to make him understand, but he did not mend his ways even after admitting his mistake and assuring that he would

not repeat the same again and that she had also complained to the family of accused in this regard. According to her in January 2018, accused Krishan allured her daughter and enticed her away and had committed rape with her repeatedly. Her daughter was in the custody of accused Krishan and she was pregnant for the last 1½-2 months and the accused was threatening her and her family members and he had kept her daughter/victim in his custody after alluring her and threatening her and her daughter be saved from the accused.

4. During the investigation, PW-I4 ASI Suman, investigating officer, along with complainant-mother of the victim reached at Kirti Nagar on 18.04.2018, where accused Krishan met them and he got recovered the victim from his house. Rough site plan of place of occurrence on the demarcation of victim was prepared. Accused Krishan was sent to the police station. Statement of victim under Section 164 Cr.P.C was got recorded from the learned Judicial Magistrate in Court Complex, Kurukshetra. As per her statement under Section 164 Cr.P.C, the victim refused to accompany her mother to her home upon which she was sent to Child Welfare Committee. Thereafter, an application for conducting medical examination of victim was moved. After her medical examination, Dr. Kanika handed over copy of MLR, sample seal, sealed envelopes and sealed parcels containing two slides, swabs, pubic hair samples, which were taken into possession vide separate recovery memo. The victim was left at Udyan Care, Sector 7, Kurukshetra. Then the accused was interrogated, who suffered the disclosure statement in pursuance of which he got demarcated the place of occurrence vide separate demarcation memo. On 19.04.2018, the accused was got medically examined. After his medical examination, Dr. Surender Kumar handed over copy of MLR, sealed parcel containing

underwear, sealed envelope, a forwarding letter and sample seals, which were taken into possession. Blood samples of accused for DNA examination were also taken by Dr. Vinod Kumar and the samples in a sealed parcel and sample impression sheet were taken into possession vide separate recovery memo. The accused was produced in the Court, from where he was sent to judicial custody. Thereafter, ossification test of the victim was got conducted from LNJP Hospital, Kurukshetra and as per opinion, the age of victim was about 15 years. On 20.04.2018, the victim was taken to LNJP Hospital, Kurukshetra, regarding opinion as to whether due to pregnancy, there was any danger to the life of the victim or the child and the Board of Doctors gave their opinion on 21.04.2018 in this regard. The statements of witnesses were recorded under Section 161 Cr.P.C during the investigation.

5. After completion of the investigation, on 18.05.2018 PW-13 SI Parveen Kaur, SHO in Police Station Women, Kurukshetra, prepared the report under Section 173 Cr.P.C. against the accused and presented the same in the Court for trial.

6. A *prima facie* case punishable under Section 366-A of IPC and Section 5 (1) of POCSO Act, which is punishable under Section 6 of the said Act, was found to be made out against the accused and he was chargesheeted accordingly to which he pleaded not guilty and claimed trial.

7. In order to prove its case, the prosecution has examined as many as 17 witnesses.

PW1: Victim

PW-2: Dr. Surender, Medical Officer, LNJP Hospital,
Kurukshetra, who on police application medically examined

the accused and proved his MLR Ex.P5,

PW-3: Complainant/mother of victim,

PW-4: SI Satyawanti, who recorded the FIR and proved the computerized copy of the same as Ex.P8 and her endorsement Ex.P9 on the complaint Ex.P6.

PW5 : SI Mukesh Kumar, who prepared the scaled site plan of place of occurrence Ex.P10.

PW6: EHC Sushil Kumar, who deposited the case property in FSL , Madhuban

PW7: Rakhi, Counselor, who on police application Ex.P12, conducted the counselling of victim and proved her report Ex.P13

PW-8 Dr. Lajya Ram, SMO/Radiologist, LNJP Hospital, Kurukshetra, who on police application for ossification test of victim Ex.P14, conducted xray and ultrasound of the victim and proved ultrasound report Ex.P15, ultrasound film Ex.P16, x-ray films Ex.P17 and Ex.P18 and opinion Ex.P19

PW-9: Dr. Vinod, Medical Officer, LNJP Hospital, Kurukshetra, who on police application Ex.P20 took the blood sample of accused for DNA examination.

PW-10: Dr. Karuna Dhingra, Medical Officer, LNJP Hospital, Kurukshetra, who proved police application for ossification test of victim Ex.P14, opinion Ex.P19 and x-ray film Ex.P21.

PW-11: HC Nirmala, with whom the case property remained deposited.

PW-12 EASI Dinesh Kumar, who proved disclosure statement of accused Ex.P23, demarcation memo of place of occurrence Ex.P24, recovery memos of parcels of accused Ex.P25 and Ex.P26.

PW-13: SI Parveen Kaur, who after completion of investigation, prepared report under Section 173 Cr.P.C.

PW-14: ASI Suman, Investigating Officer

PW-15: Dr. S.S. Arora, Medical Officer, LNJP Hospital, Kurukshetra, who brought the concerned record relating to medical examination of victim and proved her MLR to Ex.P35 conducted by Dr. Kanika

PW-16: Dr Rajni Gupta, Medical Officer, Harsh Hospital, Kurukshetra, who proved the opinion Ex.P36 regarding termination of pregnancy

PW-17: Dr. Surbhi Tiwari, Medical Officer, LNJP Hospital, Kurukshetra, who proved opinion Ex.P37 regarding termination of pregnancy of victim.

8. Then statement of the accused under Section 313 of Cr.P.C was recorded, wherein he has denied the facts and circumstances appearing against him in the prosecution evidence. He has pleaded innocence and claimed that he has been falsely implicated. However, the accused did not lead any evidence in defence.

9. After concluding the trial, the trial Court acquitted accused Krishan.

10. Aggrieved by the said decision, the complainant-Savitri Devi mother of the victim has preferred the present appeal against acquittal of

respondent No.2-Krishan.

11. We have heard learned counsel for the appellant and have also perused the record.

12. Learned counsel for the appellant has vehemently contended that the trial Court has failed to consider the evidence on record that the victim girl was just 15 years old at the time of incident, which fact is duly proved from the photocopy of the school leaving certificate Mark-A. The trial Court has also ignored the clear evidence on record regarding the ossification test report of victim girl with the opinion that the age of the victim was 15 years. He has contended that it has been duly proved on record that in the month of January 2018, the respondent no.2-accused enticed away the victim, aged about 15 years out of the lawful guardianship of her parents, with a promise to marry her and with an intent to compel her to have illicit intercourse with him and from the month of January 2018 till 17.04.2018, the accused committed penetrative sexual assault repeatedly upon the minor victim. The complainant has fully supported the prosecution case and it is also corroborated by the medical evidence proving that the victim was subjected to sexual intercourse due to which she became pregnant. He has contended that view taken by learned lower court is unsustainable in the eyes of law as the trial Court has ignored the true facts and evidence on record and has wrongly acquitted the accused and has prayed that the present appeal may be accepted and the accused be punished as per law.

13. 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 reinforced, 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.

14. Now adverting to the present case, after hearing learned counsel for the appellant at length and having perused the 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.

15. It was incumbent upon the prosecution to prove that in the month of January 2018, the accused enticed away the victim, aged about 15 years out of the custody of her lawful guardians, with a promise to marry her and with an intent to compel her to have illicit intercourse with him and from the month January 2018 till 17.04.2018, the accused respondent no.2 committed penetrative sexual assault repeatedly upon the minor victim.

16. Out of the 17 witnesses that have been examined by the prosecution, PW-1 the victim, PW-3 complainant-mother of the victim and PW-14 ASI Suman, investigating officer, are the most material witnesses. The testimonies of PW-15 Dr. S.S. Arora, who proved the MLR of the victim conducted by Dr. Kanika, PW-8 Dr. Lajya Ram and PW-10 Dr.

Karuna Dhingra, who conducted the ossification test of victim and PW16 Dr. Rajni Gupta as well as PW-17 Dr. Surbhi Tiwari, who are the witnesses of abortion of the victim, have the corroborative value. Now it is to be seen that whether from the testimonies of all these prosecution witnesses, the prosecution has been able to prove its case against the accused beyond the reasonable doubt or not.

17. From the evidence on record, it transpires that the most material witnesses of the prosecution i.e. PW-1 victim and PW-3 mother of the victim are completely contradictory to each other, in their stand against the accused. PW-3 mother of victim has alleged that her daughter/victim was aged 15 years and the accused Krishan followed her and harassed her and when she and her husband had tried to make him understand, he did not mend his ways. When accused Krishan kidnapped her daughter after alluring her on 17.04.2018, she moved the complaint Ex.P6 to the police. She has also stated that the accused Krishan committed penetrative sexual assault upon her daughter, due to which she became pregnant and her abortion was done in LNJP Hospital, Kurukshetra.

18. On the other hand, victim PW-1 has reiterated her stand as taken in the statement under Section 164 Cr.P.C, by stating that she is 18 years old and she was having friendship with the accused. When her parents came to know about it, they scolded them and gave beatings to her and thereafter, her parents took her to Bihar on the pretext of attending some marriage and when she reached there, she came to know that her parents wanted to sell her at the hands of some old man aged 50 years and when she refused to go along with that old man, then her parents abused her and she was also tortured by them. She has further stated that she hired a

phone from Bihar and made a call to Krishan accused and informed him that she was coming to him and thereafter, she came from Bihar all alone and started living with Krishan. But her parents also returned from Bihar, who convened a Panchayat and demanded a room for her in her name in the Panchayat and then the parents of Krishan got registered a room in her name. Then she lived with accused for about five months and she herself insisted for getting pregnant, as her mother used to taunt her that she would remain without child forever. When her mother came to know about her pregnancy, she started scolding her and started demanding Rs.50,000/- and also forced her to get the plot/room registered in her name for sparing the accused and when she refused, she lodged a false complaint against the accused Krishan. She has also claimed that the accused is innocent and she had made physical relations with him with her consent and became pregnant and her abortion was got done in Government hospital with her consent.

19. With these contradictory allegations of the complainant on the one hand and counter allegations of the victim on the other, the age of the victim is most crucial for the decision of the present case. The victim PW-1 has claimed her age to be 18 years in her statement recorded under Section 164 Cr.P.C Ex. P1 and has also stated that she had solemnized marriage when she was aged 18 years and she had also disclosed her age to the accused and his mother as 18 years; whereas the complainant PW-3 mother of victim in her complaint dated 17.04.2018 Ex.P6 has claimed the age of the victim to be 15 years. She has stated that her daughter was studying in 8th class and she has placed on record the photocopy of her school leaving certificate Mark A. The trial Court has rightly observed that as it was just a photocopy of the certificate which has not been properly proved on record,

as such the same cannot be taken into consideration for considering the age of the victim. PW-14 ASI investigating officer has not made any efforts to collect the documents of date of birth of victim from her school and straightway the investigating officer got conducted the ossification test of the victim from PW-8 Dr. Lajya Ram and PW-10 Dr. Karuna Dhingra, who in their report gave the opinion that the age of the victim was about 15 years. However, PW-10 Dr. Karuna Dhingra has admitted in her cross examination that OPG x-ray was not done in Government hospital as such facility was not available in their hospital. It is not disputed that the age of any person cannot be exactly ascertained by the Medical Officers and even otherwise admittedly, the report/opinion Ex.P19 has been given without conducting OPG x-ray by the doctors concerned. As such, the trial Court has rightly held that there is no cogent evidence on record to prove the age of victim.

20. The Honble Supreme Court of India in **Madhya Pradesh Vs. Anoop Singh, Criminal Appeal No.442 of 2010, decided on 03.07.2015,** has settled the controversy involving the issue regarding of the age of prosecutrix by observing as under:-

“12. This Court in the case of Mahadeo So Kerba Maske Vs. State of Maharashtra and Anr., 2013 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape Rule 12(3) reads as under:-

“Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or as the case may be the Committee by seeking evidence by

obtaining-

(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (I), (ii) or (iii) of clause (a) above the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be the, Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and while passing orders in such case shall after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or juvenile in conflict with law.”

13. *This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under:-*

“Under rule 12(3) (b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3) (a) (i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the

same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.”

21. By placing reliance upon the case supra, the trial court has rightly observed that in view of the alternative methods described under Rule 12 (3) (b) of the Juvenile Justice (Care and Protection of Children) Rules 2007, medical opinion can be sought from a duly constituted Medical Board to declare the age of victim only, when his/her matriculation or certificate in the first place; secondly the date of birth certificate from the school first attended; thirdly the birth certificate given by a corporation or a municipal authority or a panchayat is not available. As observed above, in the present case, the investigating officer without making any effort to collect the available documents regarding age of the victim in the school directly adverted to seek the medical opinion of the Board regarding the age of victim, which is quite contrary to the procedure established by law and reiterated by the Honble Apex Court in the case (supra) referred above. The trial Court has, thus, rightly reached at the conclusion that in such a situation, there is no cogent or trustworthy evidence on record regarding the age of victim, who claims herself to be more than the age of 18 years at the time of alleged occurrence and as such, the victim is not proved to be less than the age of 18 years.

22. The trial Court has further rightly held that when the victim was not proved to be less than the age of 18 years, the presumption under Section 29 of the POCSO Act, shall not be applicable to the present case. Therefore, the allegations of complainant PW-3 mother of the victim that her daughter was kidnapped by the accused after alluring cannot constitute any offence. This fact cannot be brushed aside that no plausible explanation

has been given by the complainant regarding the delay of more than three months in reporting the matter to the police, which has rendered the prosecution version highly doubtful. It is also pertinent to note, that victim has categorically stated that she was having friendship with accused and when her parents came to know about it they scolded them and gave beatings to her and thereafter, her parents took her to Bihar on the pretext of attending some marriage and when she reached there she came to know that her parents wanted to sell her at the hands of some old man aged 50 years. On her refusal, they tortured her and thereafter, she made a phone call to the accused and informed him that she was coming to him and thereafter, she came from Bihar all alone and started living with the accused. Keeping in view the testimony of PW-1 victim in this respect, the charge of kidnapping of victim by accused cannot be held to be proved by any cogent evidence on record. So far as the allegations of PW-3 complainant-mother of the victim that the accused committed penetrative sexual assault upon her daughter due to which, she became pregnant, has been admitted by PW-1 victim. However, the same cannot be held to be amounting to any offence, in view of the claim of victim that she herself was interested for getting pregnant, as her mother used to taunt her that she would remain without child for ever. She has also claimed that the accused is innocent and she had made physical relations with him with her own consent. The trial Court has thus rightly observed that the relationship between the accused and victim appears to be consensual as categorically claimed by the victim herself and therefore, the same cannot amount to any offence against the accused.

23. Thus, the trial Court has rightly reached at the conclusion that the prosecution has failed to prove any of the offences alleged against the

accused beyond shadow of reasonable doubt and the accused has been rightly acquitted by the trial Court.

24. In view of the above, the impugned judgment does not call for any interference and the appeal being bereft of any merits stands dismissed.

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

28.02.2023
monika

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