

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-364-2021

Reserved on: 31.01.2023

Date of decision: 07.02.2023

State of Haryana

...Appellant

Versus

Chander Pal

...Respondent

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

Present : Mr. Arun Benwial, DAG, Haryana,
for the appellant.

SUKHVINDER KAUR J.

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 16.12.2020, passed by learned Additional Sessions Judge, Fast Track Court, Sirsa, vide which respondent-accused Chander Pal has been acquitted.

2. The facts, as per record, are that the complainant is resident of Village Bakerianwali, District Sirsa. The age of his daughter i.e. prosecutrix/victim is 16 years. On 01.07.2018 at about 12 midnight, she went away somewhere without telling anybody. The complainant suspected that his daughter had hidden herself somewhere or someone had hidden her. The complainant and his family members searched for the prosecutrix/victim upto 02.07.2018 but could not find her. The details regarding appearance of the prosecutrix and the clothes worn by her were also detailed in the complaint. During the investigation, the prosecutrix was recovered on 02.07.2018 from Jaipur Hospital, Sirsa.

3. On basis of the aforesaid complaint Ex.P-16, formal FIR Ex.P22 was registered. SI Mahan Singh PW-9 collected documents regarding date of birth of the victim from the Head Master of the Government Primary School, Bakerianwali and took school certificate Ex.P-2 and thereafter, investigation of this case was conducted by PW-7 ASI Rohtash Kumar. The accused was arrested and interrogated and he suffered the disclosure statement Ex.P-18 vide which he got demarcated the place of occurrence vide memo Ex.P-19 and also got demarcated the place, where he had consumed poison vide memo Ex.P-20. During investigation, he also suffered the disclosure statement Ex.P-24. The accused was medico-legally examined vide MLR Ex.P-35. Rough site plan and Ex. P-50 and scaled site plan of the place of occurrence Ex.P-8 were prepared and statements of prosecution witnesses under Section 161 Cr.P.C were recorded. Victim was got medico-legally examined vide MLR Ex.P-53. The statement of the prosecutrix under Section 164 Cr.P.C Ex.P-11 was also got recorded. After completion of all other formalities of investigation, the final report under Section 173 Cr.P.C. was prepared.

4. After finding a prima-facie case, the accused was chargesheeted under Sections 363, 366-A IPC and Section 6 of the POCSO Act, to which he pleaded not guilty and claimed trial.

5. After concluding the trial, the trial Court acquitted the accused.

6. Aggrieved by the said decision, State of Haryana has preferred the present application for seeking leave to file an appeal against the acquittal of accused-Chander Pal.

7. We have heard Mr. Arun Beniwal, DAG, Haryana and have also perused the record.

8. Learned counsel for the State-appellant has vehemently contended that the trial Court has erred in acquitting the accused and has wrongly held that victim was not a child on the date of occurrence as required under the POCSO Act. The trial Court has wrongly not relied upon the documents Ex.P-2, P-3 and P-4 i.e. admission and withdrawal register copies, wherein date of birth of the victim was recorded as 03.04.2003 vide which she was enrolled in the first standard of the school as deposed by PW-1 Pala Ram i.e. Head Teacher of the school. He has further contended that the trial Court has not taken into consideration that accused had kidnapped the minor victim in the wee hours from her house. If the victim was on talking terms with him, it does not mean that she was not kidnapped or raped by the accused. The accused misguided the victim by his sweet talks and gifts like mobile phone for his sinister designs. It shows that the accused intended to sexually exploit the victim, from the beginning, under the guise of friendship. He has contended that the victim was under the age of eighteen years on the day of occurrence, so she was a child as per provisions of Section 2 (d) of POCSO Act. The victim could not reveal the truth in her statement recorded under Section 164 Cr.P.C before the Magistrate, as she was terrified by the act of the accused. As medical of the prosecutrix was done after gap of 21 days, so no injury could be found on her person. He has contended that the trial Court has wrongly given undue weightage to the deposition of DW-3 and the trial Court has wrongly held that the ration card is sufficient to dispute the date of birth of the victim, as mentioned in the school certificate. He has contended that in case, an entry of date of birth is available, then the date of birth depicted therein, is liable to be treated as final and conclusive and it is admissible under Section 35 of

the Evidence Act. The prosecutrix has also stated in her cross-examination that her younger sister is 2½ years younger to her and the minor contradictions and discrepancies in her statement is not a ground to discard her testimony. He has urged that evidence of the victim of sexual assault, is enough for the conviction and does not require any corroboration, so the guilt of the accused has been established in the present case beyond the reasonable doubt. He has prayed that the appellant may be granted leave to appeal against the judgment of acquittal qua the respondent.

9. As charge under Section 6 of the POCSO Act was framed against the accused, so the core issue is that whether the victim was below the age of 18 years on the date of the alleged incident or not. The prosecution was under bounden duty to prove that the victim was a child as per provisions of Section 2(d) of the POCSO Act. The Hon'ble Apex Court in *Jarnail Singh Vs. State of Haryana, 2013 (7) SCC 263*, has followed the procedure provided under Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules 2007, for the purpose of determination of age of a child victim and held that in the scheme of Rule 12 (3), matriculation or equivalent certificate of the concerned child is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate Rule 12(3) envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive and no other material is to be relied upon. Only in the absence of such entry, Rule 12 (3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. It is only in the absence of any of the

aforesaid, that Rule 12 (3) postulates the determination of age of the concerned child on the basis of medical opinion.

10. So as per the ratio of law laid down in the Jarnail Singh's case (supra), the matriculation or equivalent certificate of a child carries higher value than the other options available under Rule 12 (3).

11. Now adverting to the present case, the prosecutrix while appearing in the witness box as PW-5 has admitted in her statement that she has studied upto fourth standard. So there is no question of availability of her matriculation certification. The prosecution has relied upon school certificate of victim purportedly issued by the school first attended by her. PW1 Pala Ram, Head Teacher of Govt Primary School Bakrianwali, Sirsa, has deposed that the prosecutrix was enrolled in first grade of this school on 01.05.2009 against entry No.900 of School Admission and Withdrawal Register Ex.P-3, wherein her date of birth was recorded as 03.04.2003. He further proved the birth certificate Ex.P-2 of the victim, which was issued by him. This witness has clearly admitted that the date of birth of victim was made on the basis of the information furnished by her parents and no age certificate of the victim was furnished by her parents. It has been held by the Apex Court in **Birad Mal Singhvi Vs. Anand Purohit 1988 AIR 1796**, that an entry of date of birth, in school register is relevant and admissible under Section 35 of the Evidence Act. But that entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person, in the absence of the material on which the age was recorded.

12. Now the other evidence is to be analyzed, as to ascertain that whether this entry in school register is based on some material or not and what is the source of its information and its probative value. As already

observed, PW1 Pala Ram has admitted that no age certificate of the victim was produced by her parents and the date of birth of the victim was entered on the basis of information furnished by her parents. As such this entry is not based on any other material except the information furnished by parents of the victim.

13. Oral testimony of the father of the prosecutrix made before JJ Board Sirsa arising out of same FIR has been placed on record as Ex.PW-1/A, wherein the father of victim testified that he got recorded date of birth of the prosecutrix at the time of her admission in the school on the basis of guess work. As no contrary evidence in rebuttal has been produced on record so it is to be inferred that the father of the prosecutrix has given the date of birth in the school on the basis of guess work only and it was not based on any specific material, so this entry is not of much evidentiary value to prove the age of the prosecutrix.

14. Father of the prosecutrix has stepped into the witness box as PW6 and in his cross examination he has stated that he has six children out whom four are daughters and two are sons. The eldest among them is his daughter i.e. prosecutrix. His daughter Pooja is younger than the victim, who was 13 years old at the time of his deposition. Likewise the other daughter Jyoti is younger than Pooja who was aged about 11 years and younger to her is his son Arjun, who was 10 years old and his other son Bhim was aged 4 years and the youngest to them is his daughter Babbu, who was aged about 2 years.

15. Prosecutrix while appearing as PW5 has also stated in her cross examination that her younger sister Pooja is 2½ years younger than her while another sibling Jyoti is 2½ years younger than Pooja. In the defence

the ration card Ex.DW-3/B has been produced on record. DW-2 Subash Depot Holder of village Bakriyawali has proved the entry of ration card bearing serial 28286 of victim's father in his register Ex DW2/A against entry no.81.

16. DW-3 Ranbir Singh, the Inspector of Food and Supply, Sirsa, brought original register D4 containing the names of ration card holders of village Bakrianwali. He has stated that the ration card bearing serial no. 28286 pertains to father of the victim as per the summoned record. He has placed on record summoned record as Ex.DW3/A and Ex.DW3/B. In his cross-examination, he has stated that the applicant had filled the age of his family members at his own and Ex.DW3/B was prepared on the basis of D1 form, which pertains to the year 2005. This witness also brought a copy of memo of form D1, which was retained in the office.

17. The trial Court has rightly observed that a bare perusal of Form D4 Ex. DW3/A reveals that there were five members in the family of victim, whose names are incorporated against entry no.13 of the form and it pertains to the year 2005. Ration Card Ex.DW3/B also reveals the names of victim's parents besides her name and name of her younger sisters Pooja and Jyoti. The age of the victim is stated in the ration card as 5 years while the age of her above said younger sisters has been shown as 3 years and 1/6 years. This ration card was issued in year 2005 on the application of victim's father. So if the age of these children is calculated from the year 2005 then it is made out that the victim's immediate younger sister was born in the year 2002, whereas the victim was born in the year 2000. It shows the falsity of the statement of PW-6, the victim's father, as he has stated that victim was born in the year 2003 while her younger sister was born in 2006. If he is to

be believed then it means the said younger sister of the victim was not even born at the time of issuing of ration card Ex. DW3/B in the year 2005, whereas her name has been reflected in the ration card. So, as per this ration card, the victim was 5 years old while her younger sister was about 3½ years old in the year 2005. Obviously, as the victim and her younger sister were born in the year 2000 and 2002 respectively, so their names were incorporated in the ration card. It is not the case of the prosecution that the entries in the said ration card are fictitious. The trial Court has rightly observed that though the copy of the ration card in respect of birth of other children is not relevant for determining the age of the victim, but this document is sufficient to counter the date of birth of the victim as mentioned in her school certificate and has rightly reached at the conclusion that father of victim had given the false date of birth of the victim at the time of her admission in the school, as generally there is tendency of many persons to record lesser age in school. The falsity of date of birth of victim in her school certificate is also proved by her own cross-examination. While appearing in the witness box as PW5 she has admitted that she was born in the year 2000, whereas her parents got recorded her date of birth at the time of admission in the school in the year 2003.

18. Trial Court has rightly held that in view of the evidence placed on record, the year of date of birth of the prosecutrix is to be taken as 2000. As the alleged incident in question took place on 01.07.2018, so, the prosecutrix was more than eighteen years of age at the time of alleged incident and therefore, she was not a child as defined in Section 2(d) of the POCSO Act. So, the presumption under Sections 29 and 30 of the Act is not attracted in the present case and the accused does not need to prove his

innocence. It is for the prosecution to prove the case against the accused beyond the shadow of reasonable doubt.

19. Once it has been proved that the prosecutrix was more than 18 years of age at the time of alleged date of the incident, then the question of kidnapping the prosecutrix out of the custody of lawful guardians/parents without their consent, becomes insignificant. Now it is to be evaluated and determined that whether there was any element of force in order to take the prosecutrix against her consent and without her will and raping her at sandhills.

20. PW-27 Dr. Meenal, who had conducted medico legal examination of the prosecutrix on 02.07.2018 at General Hospital, Sirsa, vide MLR Ex. P-56 has stated in her cross-examination that the prosecutrix had herself written at Point-A to A of MLR Ex.P-56 that she was not raped and therefore, she did not want to conduct her internal medical examination. Thus, the prosecutrix admittedly refused for her medical examination on the day she was recovered and then after lapse of 21 days, obviously on the asking of her family members, she was medico legally examined by PW-19 Dr Nisha Goyal on 23.07.2018 vide MLR Ex.P-53. As per the MLR no external mark of injury was seen over whole body of the victim. However, her hymen was found not intact. The prosecutrix had denied commission of rape as well as refused for her medical examination at first point of time. So, the best evidence which could have been collected has been probably destroyed. The broken hymen of the victim could be result of various factors and it is not helpful to determine the sexual assault upon the prosecutrix as alleged. As per the FSL report Ex.P-55, no human semen was detected on the articles/exhibits of the prosecutrix.

21. The criminal law was set into motion by PW6 father of the prosecutrix by producing the complaint Ex.P-16 for searching of his missing daughter. As per Ex.P-16, he did not suspect any person for elopement of his daughter/victim. Except the prosecutrix, there is no other eyewitness of the alleged incident. The prosecutrix has stepped into the witness box as PW-5. She has proved her statement as Ex.P-11 recorded under Section 164 Cr.P.C before the Magistrate. She has also admitted her both statements Ex.DA and Ex.DB dated 02.07.2018. The trial Court has rightly observed, that a comparative study of these statements Ex.P11, Ex. DA and Ex.DB show that the prosecutrix did not attribute any role to the accused Chander Pal for kidnapping or raping her. In her statement Ex.P11 before learned Magistrate, she has stated that on previous night at 12.00 AM she had voluntarily gone with accused at bus stand and reached at Nathu Sarai. The accused procured a spray from somewhere and drank a little bit near temple of Randhawa. Another boy accompanied with them took the spray from him and threw it. After that the accused was admitted at Hisar Hospital. The fellow boy telephonically informed at the house of the accused and then the father and brother of the accused came at the hospital. Her uncle, brother and grand father also arrived there. She was sitting at the back of the hospital. Her family members brought her in the police station. So far as the statment Ex.P11 is concerned, there is no incriminating material therein, at all, against the accused. The same is the sum and substance of statements of the prosecutrix Ex.DA and DB and she further clarified that the accused did no wrong with her. As already observed, in MLR Ex.P-56 she herself had written that no forcible act committed with her and she did not want to get conducted her internal medical examination. It was only on 02.07.2018 i.e.

after lapse of 21 days, the application Ex.DC was moved by prosecutrix before the police, wherein for the first time she had levelled the allegations of kidnapping and raping against the accused. When she was confronted with her statements Ex.DA, DB and P11, she voluntarily offered explanation in her examination-in-chief that as she was terrified by the act of accused, so she could not reveal the truth before learned Magistrate while recording her statement Ex.P11. But in her cross-examination, she made altogether different statement and stated that she had suffered statement Ex.P11 on the asking of ASI Raj Bala. It clearly shows that the prosecutrix had been changing her stand and had been furnishing false explanations for justifying herself. The trial Court has rightly held that the change of the stand of the prosecutrix firstly going on her volition with accused and then alleging kidnapping and rape by accused, is a material contradiction.

22. The law on this point is well settled that in case of rape the testimony of a prosecutrix stands at par with that of an injured witness. The corroboration is not necessary, if the statement of the prosecutrix inspires confidence and appears to be credible. But if there appears to be glaring discrepancies in the statement of the prosecutrix, then in such situation, the Court may look for the evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The Courts are rather put on guard to make efforts as to find the truth by removing chaff from the grain. It is the duty of the Court that no innocent man should be punished but at the same time to see that no person committing an offence should get scot free. The Court has to observe totality of facts and the circumstances as brought before the Court through the evidence, depending upon the facts of each case by ascertaining the trustworthiness of the

witnesses, after excluding vague and uncertain part of the evidence.

23. Now adverting to the present case, the explanation offered by the prosecutrix to exonerate the accused initially and then implicating him for kidnapping and raping her is a grave suspicious circumstance to render her an unreliable and undependable witness. There is nothing on record that the accused had threatened the prosecutrix in any manner. Moreover, if the accused had consumed the poison, then the accused was not in the position to extend threat to the prosecutrix. In this context, the evidence of PW12 Dr. Raj Kumar Bhukaris is important. He has categorically stated that the accused Chander Pal was brought in his hospital on 02.07.2018 by one boy. He provided first aid and prepared prescription slip Ex.P36 and notes Ex.P37. A bare perusal of Ex.P37 reveals that the accused was brought with history of consuming poison and this witness further declared the accused unfit to make statement on the application of the police. Moreover, if the prosecution version is believed that the accused had forcibly taken the victim, in wee hours, from her house and raped her at an isolated sandhill, then there seems to be no occasion for him to consume poison, instead of escaping after raping the victim. Otherwise, the conduct of the prosecutrix speaks volume that she befriended the accused Chander Pal and had voluntarily left with him from her house. During her cross-examination, the prosecutrix was not truthful about her relation with the accused. She denied that she often talked with the accused over mobile phone number 9896867519. She even denied the knowledge that to whom the mobile phone no.99965-43302 belonged. On the other hand, in her examination-in-chief she has stated that she had handed over a mobile phone to police vide seizure memo Ex.P13 and this mobile phone was given by the accused

Chander Pal to her. Ex. P13 reveals that the said phone given to police was having SIM No.9896867519.

24. PW23 Rohit Kumar, Nodal Officer, Bharti Airtel Ltd, Chandigarh, has duly proved the CAF Ex.P59 and CDR Ex.P60 of mobile no.9896867519 for the period of 01.07.2018 to 02.07.2018. A bare perusal of the same reveals that the said mobile belonged to the accused Chander Pal and same was given to the victim and later on handed over to the police by her. The accused claimed to be user of another mobile no. 9996543302. The CDR Ex.P60 on the record shows that more than 20 calls were exchanged between these phone numbers during period of 01.07.2018 to 02.07.2018. So, it falsified the victim's stand that she did not know to whom mobile no.9996543302 belonged and she was not conversing with the accused over this mobile phone. Rather it supports the defence version that they used to talk with each other on these mobile phones and had talked even before their elopement. Trial Court has further rightly observed that the story of kidnapping projected by the victim is highly improbable. If as per the allegations, the accused along with another boy took her on a motorcycle, when she went for urinating in the mid-night of 01.07.2018, then it has not been explained that how accused and that other boy expected arrival of the victim in the street at that time. It is also quite strange that admittedly she did not make any outcry at the time of alleged kidnapping. She also did not raise alarm either on the way or when they reached near to temple from sandhills. She took a complete u-turn, when she stated during her cross-examination that she was unconscious when she was taken from her house and she regained her consciousness when ASI Raj Bala met her.

25. Thus, from the evidence on record especially the call details

record, it transpires that the prosecutrix went along with accused at her own and there was no pressure, coercion or threat upon her. She has further improved her version, while deposing in the Court, with regard to the allegations of rape. So keeping in view the totality of the circumstances and evidence on record, the testimony of the prosecutrix about commission of rape needs corroboration and cannot be solely relied upon to convict the accused for commission of rape.

26. The trial Court has thus, rightly reached at the conclusion that the prosecution could not prove its case beyond the shadow of reasonable doubt against the accused and the accused has been rightly acquitted by the trial Court.

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

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

07.02.2023
monika

Whether reasoned/speaking: Yes/No

Whether reportable: Yes/No