

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

**CRR No. 835 of 2021 (O & M)
Date of Decision : 31.5.2023**

Rajpal

..... Petitioner

versus

State of Haryana and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. HPS Sandhu, Advocate and
Mr. Yugank Goyal, Advocate, for the petitioner

Ms. Trishanjali Sharma, DAG, Haryana

Ms. Sehej Sandhawalia, Advocate, for respondent no. 2

TRIBHUVAN DAHIYA J. (ORAL):

This revision petition has been filed against the order dated 15.2.2020 passed by the Additional Sessions Judge, Special Court, Kaithal, whereby the petitioner has been summoned as an additional accused under Section 319 Cr.P.C. to face trial for offences under Sections 450, 376 (3) and 506 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), in case FIR No.95 dated 18.9.2019 under Sections 344, 376-D, 452 and 506 IPC, Section 6 of Protection of Children from Sexual Offences Act, 2012 and Sections 9 & 10 of the Prohibition of Child Marriage Act, 2006, registered at Women Police Station, Kaithal.

2. The said FIR was registered on the statement dated 18.9.2019 made by the complainant/child victim (Ex.PW-1/A), contents whereof are as under:

She (complainant) is daughter of Late 'V' resident of Kxxxx.

Her date of birth is 23.6.2005 at present, she is aged about 14 years 3

months. Her father 'V' expired on 27.12.2012. Her brother 'S' was murdered on 16.3.2017. She is living with her widow mother and brother. Her mother is running a Karyana Shop. Dharambir accused no.1 and Bohti Devi accused no.2 are her neighbourer. She belongs to Mahajan caste. Accused Dharambir and Bohti Devi belong to Jat community. They are of criminal nature. Dharambir was having an evil upon her and used to come at the shop. In the absence of her mother, he used to threatened her. Initially, due to fear, she did not tell her mother.

On 25.1.2019 at 12:00 p.m. while she was alone at her house, Dharambir entered her house and threatened her at knife point to kill her and against her wishes committed rape on her, prepared obscene video of her and extended threat that he will viral the video to all. Thereafter, whenever he got opportunity, he entered her house found her alone and made sexual relations with her. Thereafter, Dharambir shown the video to her mother and threatened to arrange her marriage with him, otherwise he will viral the video and will kill them.

On 27.3.2019, under the compulsion, her mother solemnized her marriage with Dharambir since then he is continuously sexually exploiting her and Dharambir and his mother used to keep her in locked room.

On 10.9.2019 at 3:00 p.m. while, she (child-victim) was lone in matrimonial home, Rajpal, a resident of village Kurar, District Kaithal entered her home, showed her revolver and committed rape upon her as well as extended threat to kill her. She told the entire incident to Dharambir and Bohti Devi. On this they all planned to kill her. She came to know about their design and she had run away and reached at mother's house. She told her mother about the entire incident. Since then the above named accused are threatening them. She is apprehending danger of her life at the hands of accused. She be protected from them a legal action be taken against them.

2.1 After lodging of the FIR, statement of the child-victim, Annexure P-3, was recorded under section 164 Cr.P.C. before the Magistrate on 19.9.2019, wherein she reiterated the allegations against the accused facing trial/Dharambir as well as the petitioner herein. However, during investigation of the case, the petitioner was declared innocent by the investigating agency and

his name was placed in Column 2 in the final report under Section 173 (2) Cr.P.C. (Annexure P-2) on the ground that on the date of commission of the offence, i.e., 10.9.2019 at 3:00 p.m., he was at Gurugram and not at Kaithal, the place of occurrence.

2.2 The relevant extract of the final report declaring the petitioner innocent records as under:

..... On 24.9.2019, the matter was got verified from Shri Baljinder Singh, HPS, Deputy Superintendent of Police, ACE, Kaithal. From my investigation and verification made by Shri Baljinder Singh, HPS, Deputy Superintendent of Police, ACE, Kaithal, accused Rajpal son of Birbal resident of Kurar was found to be in Gurgaon and not at the place of occurrence on 10.9.2019, at 3:00 p.m., as alleged by the victim and complainant Partiksha after marriage was also attending tuition daily and was also visiting her mother and even Vishal brother of victim Partiksha had also been found to be residing in the in-laws house of the victim. The allegations levelled in the FIR against accused, Rajpal and Bohati Devi have been found to be untrue. In the case, Rajpal son of Birbal resident of Kurar and Bohati Devi wife of Maya Ram have been found innocent.

2.3 During trial, the child victim was examined as PW-1 on 12.12.2019. In the testimony also she categorically reiterated her version, including allegations of commission of rape by the petitioner. The relevant part of her testimony reads as under:

.....On 10.9.2019, at about 3:00 p.m., I was alone at the house of accused, at that time accused Rajpal came at house and committed rape with me at the point of revolver. He threatened to kill in case, I did disclose to anyone. I informed about this rape to accused Dharambir and his mother Bohati Devi but all the aforementioned persons made plan to eliminate me. When I observed, I escaped from there and reached with my mother. I disclosed the entire fact to my mother Shakuntla. Dharambir and Rajpal came to out house and threatened to kill me and my mother in case we got the FIR lodged. I got typed my complaint Ex.PW-1/A and moved to SP, Kaithal, which was referred to Women Police Station, Kaithal.

Rough site plan was prepared by the Investigation Officer on my demarcation. My counseling was conducted. Thereafter, I was medically examined by the doctor in General Hospital, Kaithal. I identified my signature at Point A on MLR Mark A.

2.4 Thereupon, an application under Section 319 Cr.P.C. dated 12.12.2019 (Annexure P-4) was filed by the child-victim for summoning the petitioner as an additional accused to face trial. It was stated that there was no basis for the investigating agency to conclude that the petitioner was not present at the time of occurrence at Kaithal on 10.9.2019, and was at Gurugram instead.

2.5 The application was decided by the trial Court, vide impugned order dated 15.2.2020, summoning the petitioner as an additional accused for commission of the alleged offences in the case, and face trial alongwith the already arraigned accused Dharambir. While allowing the application, it was recorded that the child-victim has specifically alleged commission of rape by the petitioner while she was alone at home on 10.9.2019. There was no evidence collected by the investigating agency to declare the petitioner innocent; not a single statement of any person, who said the petitioner was in Gurugram on the said date, or his call details, location chart, etc. are part of the record, nor attached with the final report. Therefore, there was no basis to conclude that the petitioner was at Gurugram on the date of alleged occurrence.

3. Learned counsel for the petitioner has contended that the impugned order has been passed by the trial Court in a mechanical manner, without appreciating the evidence and considering the relevant facts and circumstances of the case. In support of his submissions, he has relied upon the judgment of the Supreme Court in *Labhuji Amratji Thakor and others v. State of Gujarat and another*, 2019 (12) SCC 644. He has further submitted, in case no material

was collected or produced as a part of the final report by the investigating agency to establish that the petitioner was present at Gurugram on the day of alleged incident, the trial Court had ample power to do so; it could have summoned the documents and held an inquiry to establish the fact. Without doing so, the Court had no power to summon the petitioner as an additional accused.

4. Learned counsel for the respondents, on the contrary, contended that the impugned order has been passed after taking into account the material on record. There is ample evidence against the petitioner clearly establishing commission of the alleged offences, viz., statements and testimony of the prosecutrix, corroborated by medical evidence. He has, therefore, been rightly summoned to face trial. She has relied upon the Supreme Court judgment in *Hardeep Singh v. State of Punjab and others*, 2014 (3) SCC 92, to support the contention.

5. Learned State counsel has not disputed that there is no material attached with the final report establishing the petitioner's presence at Gurugram on the date of alleged incident. She further submits that as per the Medico Legal Report (MLR) of the victim dated 19.9.2019, the doctor's opinion is, the possibility of sexual intercourse cannot be ruled out.

6. Learned counsel for the parties have been heard and the case file has been perused.

7. As evident on record, the petitioner was found innocent by the investigating agency on the plea of *alibi*. Before considering the submissions made by learned counsel for the parties, it needs to be mentioned that plea of *alibi* is available to an accused in terms of Section 11 of the Indian Evidence Act, 1872, only when the burden of proving the commission of offence by the

accused has been discharged by the prosecution by leading evidence. It is only to disprove the fact of being present at the site of occurrence, the plea of *alibi* can be taken by the accused to establish that he was present somewhere else at the time of commission of offence. In this manner, he is permitted to prove the fact inconsistent with the fact in issue. This has been laid down by the Supreme Court in *Binay Kumar Singh v. State of Bihar*, 1997 (1) SCC 283 in paras no.22 and 23 of the judgment, which read as under:

22. We must bear in mind that an *alibi* is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

“The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was a Lahore is relevant.”

23. The Latin word *alibi* means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of *alibi*. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of *alibi*, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene

when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of *alibi*. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.*, *State of Maharashtra v. Narsingrao Gangaram Pimple*).

7.1 In the instant case, the investigating agency concluded after investigation that the petitioner was not present at the place of occurrence, and declared him innocent on that ground. In the face of clear enunciation of law on the subject, the agency could not have taken upon itself to disprove the facts alleged by the victim on the ground of petitioner's *alibi*. The investigating agency/officer "is not merely present to strengthen the case of the prosecution with evidence that will enable the Court to record a conviction, but to bring out the real unvarnished version of the truth".¹ The plea of *alibi* is for the accused to take in his defence during trial, and establish it by leading evidence. The investigating agency itself embarking upon the exercise and establishing the plea of *alibi* for the accused cannot be countenanced. It actually shows the agency in bad light, and points towards possibility of its collusion with the accused. Apparently, the agency has misdirected itself in its over-zealousness to disprove the allegations levelled by the victim against the petitioner, though her similar allegations against the accused facing trial were found true. Therefore, the final report under Section 173 Cr.P.C. to the extent it declares the petitioner innocent is not sustainable in law.

8. It is also apparent on record that the victim has been consistent in alleging commission of rape by the petitioner on 10.9.2019. Firstly, on 18.9.2019 the allegations were levelled by her in the statement to the police

after she managed to run away from the accused and reach her mother. Secondly, her statement was recorded by the Magistrate under Section 164 Cr.P.C. on 19.9.2019, wherein she again levelled specific allegations against the petitioner. Thirdly, in her testimony before the trial Court she once more reiterated her version clearly implicating the petitioner in commission of offences against her, alongwith the co-accused facing trial. The victim has herself suffered at the hands of the petitioner, and her own version of the occurrence carries weight. She was medically examined in the Civil Hospital concerned, and the doctor's opinion also corroborates the allegations *prima facie*. At the same time, it cannot be lost sight of that the investigating agency has not been able to place on record any document or statement or any other material to support the conclusion drawn that the petitioner was not present at the place of occurrence. Therefore, clearly more than *prima facie* case is made out against the petitioner that satisfies the test laid down in *Hardeep Singh* case (*supra*).

9. The first argument raised by learned counsel for the petitioner that the impugned order has been passed by the trial Court in a mechanical manner without appreciating the evidence or material on record, has no substance. As discussed above, there is enough evidence on record to establish more than *prima facie* case against the petitioner, as also absence of material to indicate his non-involvement. All these facts have been taken into account by the learned trial Court in passing the impugned order, which is based on sound reasoning. The judgment in *Labhuji Amratji Thakor* case (*supra*) also has no application to the facts and circumstances of this case. In that case, the prosecutrix had not even alleged complicity of the appellants in the offence committed against her. She only stated that the appellants were present in jeep

in which she was taken to Modasa. The statement of her mother was also found to be hearsay. Such situation does not arise in the instant case, as the victim has clearly and consistently alleged commission of the said offence by the petitioner. The second argument raised by learned counsel for the petitioner that in case no material was collected or produced with the final report, the trial Court before summoning the petitioner as additional accused was required to hold an enquiry in that regard, also has not merit. The argument has been raised without comprehending the provisions of law, the role of investigating agency as well as the parameters of exercising jurisdiction under Section 319 Cr.P.C. by the trial Court. There is no provision of law, nor could any be pointed out by the learned counsel, that requires the trial Court to conduct any such enquiry. Both the arguments raised by learned counsel for the petitioner are, therefore, rejected.

10. In these circumstances, there is no ground to interfere with the impugned order, which does not suffer from any illegality or irregularity.

11. Dismissed.

12. Pending miscellaneous application(s), if any, stands disposed of accordingly.

(TRIBHUVAN DAHIYA)
JUDGE

31.5.2023

Ashwani

Whether speaking/reasoned:
Whether reportable:

Yes/No
Yes/No