

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

CRM-A-542-2021

Date of reserve:24.01.2023

Date of Pronouncement: 01.02.2023

State of Punjab

....Appellant.

Versus

Narinder Singh

...Respondent.

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

.....

Argued by: Mr. Sandeep Vermani, Additional Advocate General,
Punjab, for the appellant.

Mr. Sunny Namdev, Legal Aid Counsel,
for the respondent.

Sukhvinder Kaur, J.

The appellant-State of Haryana has preferred the instant application under Section 378(3) Cr.P.C. seeking leave to appeal against judgment dated 24.11.2020, passed by learned Additional Sessions Judge (Fast Track Court) Amritsar, vide which respondent-accused Narinder Singh has been acquitted.

The facts, as per record, are that in the present case criminal law was set into motion, by B. Singh father of the victim, when he moved an application to the SHO, Police Station Chheharta, on 11.09.2017 stating that, he had given one DVD for repair to accused Narinder Singh, who used to visit his house earlier. On 05.09.2017, accused came to the house of the victim, when the victim was alone in the house. She was studying in 4th

class at that time and was aged about 8/9 years. Accused told the victim that he had already repaired the DVD and she could come and take the same from his shop and when the victim had gone to the shop to take the said DVD, then the accused had shown the victim obscene videos and outraged her modesty and threatened her that if she would disclose the said fact to anybody in the house, he would kill her. The victim had disclosed about the entire facts to her father when he returned. On the basis of said application, the present FIR was registered. The accused was arrested in this case and after the completion of the investigation, the charge sheet against the accused was presented in the Court of Illaqa Magistrate and after finding that the case is exclusively triable by the Sessions Court, the same was committed vide order dated 07.02.2019.

After finding a prima facie case, he was charged with offences under Sections 354-A and 506 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and in alternative with Section 376 (2) (i) of IPC, to which the accused did not plead guilty and claimed trial.

After concluding the trial, the trial Court acquitted the accused Narinder Singh.

Aggrieved by the said decision, the State of Punjab has preferred the present application for seeking leave to file an appeal against acquittal of accused Narinder Singh.

We have heard Mr. Sandeep Vermani, Additional Advocate General, Punjab, for the appellant, Mr. Sunnu Namdev, Legal Aid Counsel, for the respondent and have also perused the record.

Learned counsel for the appellant has strenuously contended

that the trial Court has failed to appreciate the fact that the minor prosecutrix has deposed in categorical terms regarding the occurrence, which duly proves on record the prosecution version rendering it to be truthful. There is also corroborating evidence against the accused as he had produced the repaired DVD before the Investigating Officer. The testimony of the other prosecution witnesses also corroborates the prosecution story. He has argued that the trial Court has also failed to appreciate the fact that as per the provisions of Section 29 of the POCSO Act, a presumption is to be drawn against the accused that he has committed the offence and the burden is upon the accused to prove that no such occurrence has taken place, whereas in the present case, the accused has failed to rebut the same. He has contended that the observations of the learned trial Court are based upon the surmises and conjectures and the testimony of prosecution witnesses have duly established on record the guilt of the accused beyond a shadow of reasonable doubt, which calls for conviction of the accused and has prayed that appellant may be granted leave to appeal against the judgment of acquittal qua the respondent.

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 re-enforced, 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.

Now advertent to the present case, it is to be seen that whether there is any perversity of facts or law. After having heard 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.

Initially the prosecution was to prove that the victim was a child and she was subjected to penetrative sexual assault. In the present case the allegations are that the victim was of the age of 10 years at the time of occurrence and she has specifically submitted that accused had committed the offence of aggravated penetrative sexual assault upon her. So presumption under Section 29 of the POCSO Act is to be drawn against the accused. Section 29 of the POCSO Act reads as under:-

Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

The accused can rebut the presumption raised by the Court either from the evidence of the prosecution or by leading the evidence himself.

After hearing the arguments and going through the record it

transpires that on 11.09.2017 the complainant moved an application to SHO, Police Station Chheharta Amritsar, alleging therein that on 05.09.2017 the accused had gone to his house, when the daughter of complainant was alone and accused told her that the DVD which had been given for repair to him was ready and she could collect the same from his shop. When the victim went to the shop, then accused had shown her obscene movie and committed obscene act with her and threatened her that if she would tell anybody then she would be killed. On returning to the house the victim disclosed regarding the same and then the application was moved by the complainant.

Then during the investigation, he suffered supplementary statement Ex.PW4/B stating therein that the occurrence had taken place on 02.09.2017. But the said statement is undated. ASI Davinder Kumar, while appearing in the witness box as PW-7 is completely silent regarding recording of any supplementary statement of the complainant and no such statement has been proved on record by the prosecution. Even in the statement Ex.DA, which was suffered by the real aunt of the victim before the police no date of occurrence had been given. Thus, initially the date of occurrence was mentioned as 05.09.2017 by the prosecution, but later on the same was changed to 02.09.2017. Trial Court has rightly observed that as supplementary statement has no value in the eyes of law, so date of occurrence is to be taken as 05.09.2017 and this change regarding the date of occurrence by the prosecution, raises doubt about the truthfulness of the prosecution story.

Even PW-5 and PW-6, who allegedly disclosed about the occurrence to complainant, have not clearly deposed about the date of

occurrence. These witnesses have only stated regarding the disclosure made by the victim about the occurrence and have not deposed regarding the date and the manner of occurrence.

Trial Court has rightly observed that even if it is presumed that the above said witnesses and the victim had told about the entire occurrence to the complainant, then it has not been explained by the prosecution that why the detail of the occurrence had not been mentioned in the application Ex.PW4/A and in the said application complainant had mentioned only regarding the harassment and had nowhere mentioned about showing the blue film and putting the penis in the mouth of the victim. When these material contradictions in the prosecution case have not been reconciled, then these contradictions go to the root of the prosecution case.

This fact also cannot be brushed aside, that victim is a child and being a child was vulnerable to being tutored and as such her evidence is to be looked into very carefully. It has been held by the Hon'ble Apex Court in case **Md. Kalam Vs. State of Bihar, 2008 (3) R.C.R.303**, that “evidence of child witness cannot be rejected outright, but the evidence must be evaluated carefully and with greater circumspection, because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The Court has to assess as to whether the statement of victim before the Court is the voluntarily expression of the victim and that she was not under the influence of others.”

The perusal of the record reveals that the victim in the present case has submitted that after the day of occurrence, she told regarding the same to her younger brother, who is the son of her paternal aunt and her said cousin disclosed the same to his mother and then the matter was disclosed to

the police by her father. But when the victim appeared before the Illaqua Magistrate for recording her statement under Section 164 Cr.P.C. on 15.09.2017, then she had not disclosed any date of occurrence, rather she stated that the accused had called her to take medicine from him. But perusal of the application Ex.PW4/A reveals that it is contrary regarding the manner of occurrence from the statement of the victim recorded under Section 164 Cr.P.C. Ex. PW 3/A is thus an improved version. PW-5 and PW-6 have stated that they were disclosed about the occurrence by the victim on 10.09.2017, whereas the victim has stated that she had disclosed about the occurrence on the same day. If the victim has stated that she had disclosed about the occurrence to her cousin and aunt, then it is contradictory to her father who had stated that the victim had disclosed about the occurrence to him. Thus, the possibility of the victim being a tutored witness cannot be ruled out, when it appears from the prosecution evidence, that efforts had been made to improve the version time and again to secure the conviction of the accused.

The plea of alibi has also been taken by the accused in this case and the plea of defence was that the accused was not present in Amritsar on 05.09.2017 and he was in Delhi. It has been held by the Hon'ble Apex Court in case *Sheikh Sattar Vs. State of Maharashtra, AIR, 2010 SC, 3320*, that when accused is taking plea of alibi, then it is for accused to establish alibi by positive evidence it being a question of fact. In another judgment titled as *Subhash Chand Vs. State of Rajasthan 2001 (4) RCR, 496*, the Hon'ble Apex Court has held that the plea taken should be capable of meaning that having regard to the time and place when and where he is alleged to have committed the offence, he could not have been present. The plea of alibi

postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place.

Now adverting to the facts of the present case, in the instant case the accused has taken a specific plea of alibi by stating that on the date of occurrence i.e. 05.09.2017, he had gone to Delhi and was not present in Amritsar. On the intervening night of 05.09.2017 and 06.09.2017, he had stayed at Gurudwara Sheesh Ganj Sahib, Delhi and he was allotted locker No.28 in the Gurudwara, where he kept his belongings and as no room was vacant in the Gurudwara Sahib on that night, so he was made to share room No.10 along with some other person and on the next day i.e. on 06.09.2017, he was allotted room No.216 in the Gurudwara Sahib. He returned on 08.09.2017 and he was called by the police of Police Station Chheharta, on 11.09.2017. When he came to know about the present case against him, regarding the alleged occurrence on 05.09.2017, then the accused immediately explained and disclosed the fact of his being at Delhi on the date of occurrence and thereafter, the date of occurrence was changed from 05.09.2017 to 02.09.2017. This plea of alibi taken by the accused has been proved by examining DW-1 Gurwinder Singh, in the defence who has categorically deposed that he was working as Daftri Clerk at Gurudwara Sri Sheesh Ganj Sahib, Delhi and he also produced relevant register proving the entry Ex.DW1/A regarding allotment of locker No.28 on 05.09.2017 against serial No.19 to Narinder Singh accused. He has also produced on record the entry Ex.DW1/B regarding allotment of room No.216 on 06.09.2017 against serial No.17 to the accused. Even the identity of the accused was verified by his Aadhar Card and the said witness has stated that accused stayed in Guru Gobind Singh Bhawan on 05.09.2017 and 06.09.2017. Thus the trial Court

has rightly observed that sufficient evidence was on record to show that accused was present in Delhi on the date of alleged occurrence and as the distance between Amritsar and Delhi is more than 450 kilometers. So there was no occasion for the accused to be present at the place of alleged occurrence. PW-11 DSP Vishaldeep Singh has also stated during his cross-examination that he was in the knowledge of presence of accused Narinder Singh at Delhi on 05.09.2017 and he had verified the said fact regarding his presence in Delhi on 05.09.2017. So it seems that after it came to the knowledge of Investigating Officer that the accused was in Delhi on 05.09.2017, then the effort was made by the prosecution to change the date of the alleged occurrence from 05.09.2017 to 02.09.2017. Therefore, the plea of alibi taken by the defence has been ably proved in the present case.

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

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

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

01.02.2023

Komal

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