

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-D-925-2022 (O&M)
Date of decision : 02.06.2023

SANTU KUMAR**-APPELLANT****VERSUS****STATE OF HARYANA****-RESPONDENT**

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE KULDEEP TIWARI

Present : Mr. Vishal Yadav, Advocate for
Mr. Aditya Pratap Singh Nain, Advocate
for the appellant.

Mr. P.P. Chahar, Sr. DAG, Haryana.

Mr. Ajay Ghangas, Advocate
for the complainant.

SURESHWAR THAKUR, J.

1. The instant appeal is directed against the impugned verdict of conviction drawn on 23.08.2022, upon, Sessions Case No.87 of 2020, by the learned Additional Session Judge/Fast Track Court (POCSO), Panipat, whereby, the learned trial Judge, held the appellant/accused/child in conflict with law, thus guilty for commission of offences punishable under Section 6 of POCSO Act, and, under Sections 363 and 366 of IPC.

2. Through a separate sentencing order drawn on 23.08.2022, the learned trial Judge proceeded to impose upon the convict/child in conflict with law, sentences of imprisonment, and, of fine, but in the hereinafter extracted manner:-

Offence under Sections	Imprisonment awarded	Fine imposed	In default of payment of fine
6 of POCSO Act	Rigorous imprisonment for twenty years.	Rs.25,000/-	Rigorous imprisonment for one year.
363 of IPC	Rigorous imprisonment for three years.	Rs.5,000/-	Rigorous imprisonment for three months.
366 of IPC	Rigorous imprisonment for five years.	Rs.10,000/-	Rigorous imprisonment for six months.

3. All the above substantive sentences of imprisonment, as became imposed upon the convict/child in conflict with law, were ordered to run concurrently. However, the sentence of fine amount imposed upon the convict/ child in conflict with law was directed to, on its realization, become disbursed as compensation to the victim.

4. Moreover, the period spent in custody by the child in conflict with law, during investigation or trial of the case, thus was ordered to be set off, in terms of Section 428 Cr.P.C., from the above imposed term(s) of the substantive sentences of imprisonment, upon, the convict/child in conflict with law. In addition, in terms of the guidelines of NALSA read with Victim Compensation Scheme and after conducting proper inquiry, a compensation of Rs.1,00,000/-, thus for rehabilitation of the victim, was recommended to be disbursed by the District Legal Services Authority, Panipat, to the victim.

5. The convict/child in conflict with law, becomes aggrieved from the above made verdict of conviction, and, also becomes aggrieved from the above made substantive sentences of imprisonment, and of fine, thus is led to make a challenge thereto, through his instituting the instant appeal before this Court.

Factual background

6. The genesis of the prosecution case becomes embodied in the appeal FIR, to which Ex.P29 has been assigned. The narrations carried in Ex.P29 are, that the complainant is working as driver. He has three children, i.e., two sons and one daughter. His elder child is daughter/victim girl 'A' aged 14 years. On 29.01.2017 at about 2:00 p.m., his daughter/victim left the home without disclosing to anyone. The complainant suspected that a boy namely Santu, who was a tenant in Gopal Colony, enticed his daughter with the intention to marry her. Consequently, the complainant got registered the instant appeal FIR.

Investigation Proceedings

7. After registration of case, investigation was conducted by ASI Rajesh Kumar. During investigation, victim girl was recovered from Police Station Mehush, District Shekhpura, Bihar. The accused/child in conflict with law Santu Kumar was detained on 05.02.2017 and was produced before the learned JMIC, Shekhpura, Bihar. The learned Magistrate allowed transit remand of 48 hours. On 07.02.2017, the accused/child-in-conflict with law was produced before the Court. The Investigating Officer concerned moved an application before lady doctor for conducting medico-legal examination of the victim. On such application, the victim made her refusal. On 11.02.2017, victim came in the police station along with her parents for conducting her medical examination. Upon this, the victim was got medico-legally examined and it was found that she was pregnant for the last 12 weeks. Thereupon, Section 6 of the POCSO Act was added in the present case. The statement of the victim under Section 164 Cr.P.C was got recorded. On 20.02.2017, the

accused/child in conflict with law was got medico-legally examined. During investigation, one Sonu was found innocent. On completion of investigation, final report under Section 173 of the Cr.P.C. was prepared and presented before the Juvenile Justice Board, Panipat, for trial.

Preliminary assessment, as stipulated under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the 'Act of 2015'), as conducted by Juvenile Justice Board, Panipat

8. On receipt of the final report, the accused/child-in-conflict with law was supplied its copy(ies) free of costs in terms of Section 207 Cr.P.C. After conducting a preliminary assessment, as stipulated under Section 15 of the Act of 2015, the Juvenile Justice Board, Panipat, vide order dated 08.08.2017, opined that accused/child-in-conflict with law be tried as an adult as per Section 18(3) of the Act of 2015, and accordingly, he was sent to the court of learned trial Judge, for facing trial.

Trial Proceedings

9. On finding a prima facie case, the learned trial Judge concerned, chargesheeted the accused/child in conflict with law, for offences punishable under Section 6 of POCSO Act, and, under Sections 363 and 366 of IPC.

10. The prosecution in support of its case examined as many as 17 witnesses and placed reliance on documents exhibited as Ex. P1 to Ex. P35. Subsequently, the learned public prosecutor closed the prosecution evidence, and thereafter the learned trial Judge drew proceedings under Section 313 Cr.P.C, wherein, the accused/child in conflict with law pleaded innocence and claimed false implication. The accused/child in conflict with law also

chose to adduce defence evidence and also availed the said opportunity, through his tendering Ex.D1 and Mark-A, and, thereafter closed the defence evidence.

Submissions of the learned counsel for appellant

11. The learned counsel appearing for appellant has contended before this court, that the impugned verdict of conviction, and, also the consequent therewith substantive sentences of imprisonment and of fine, as became imposed upon the convict/child in conflict with law, are based on a gross misappreciation and non-appreciation of evidence. Therefore, he has made a submission before this Court that the appeal be allowed, and, the impugned verdict be quashed and set aside.

Submissions of the learned counsel for respondents

12. On the other hand, the learned State counsel, has also made an argument before this Court, that the impugned verdict of conviction and also the consequent therewith sentences of imprisonment and of fine, as became imposed upon the convict/child in conflict with law, thus through the impugned decision, does not suffer from any legal fallacy, and as such, he has argued that the impugned decision be maintained and affirmed.

For the reasons to be assigned hereinafter, this Court finds merit in the instant appeal, and, is constrained to allow it.

13. During the course of investigations being made into the appeal FIR, to which Ex.P29 is assigned, the victim had recorded her statements under Section 164 Cr.P.C. before the jurisdictional Magistrate concerned. To the said statements become assigned Ex.P6 and Ex.P7. Therefore, it becomes

incumbent upon this Court to, ad verbatim extract the said statements, which are as such extracted hereinafter.

“Statement Under Section 164 Cr.PC of Nisha daughter of Rajesh Kumar resident of Gopal Colony, Panipat.

Age 14 years

On S.A.

Stated that I am deposing without any pressure at my own will. Wrong act was done with me in the month of November. A boy whose name is Sonu had done wrong act with me. He lives in our neighbourhood. I had gone to Patna with Santu. Santu hadn't done anything with me. I didn't tell anyone about Sonu because he threatened me that if I tell anyone about incident, it will result in my affront. Then, he had gone from there. Santu had done nothing with me. I only want to tell this much. I have no pressure.

RO&AC

Sd/- in English

Nisha

(Sd/- in English)

(Sonia Sheokand)

D/Judicial Magistrate Ist Class,

Panipat. Dt. 11.02.2017

04:00 PM

Exhibit P15 dated 02.08.2018

It is certified that all the contents of this statement are true and actual version of what has been stated by prosecutrix and she deposed voluntarily.

(Sd/- in English)

(Sonia Sheokand)

D/Judicial Magistrate Ist Class,

Panipat. Dt. 11.02.2017”

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“Statement Under Section 164 Cr.PC of Nisha daughter of Rajesh Kumar resident of Gopal Colony, Panipat.

Age 14 years

On S.A.

Stated that I am deposing at my own will. I am not under any pressure. On dated 29.01.2017, I went out of my home because of the fear of my parents because they use to beat me for studies. I met with my friend Santu at Bharat Nagar. He enquired about reasons of my tension. Then, we boarded the train which stopped at its last station, which was Patna. Where we stayed at the house of Maternal uncle. Then after 2-3 days, Santu took me to the Police Station and advised me to return to my parents. Thereafter, Haryana Police came there and we returned our home. Santu had done nothing wrong act with me. I went with him at my own will. Now, I want to go with my parents. I am deposing at my own will.

RO&AC

Sd/- in English

Nisha Kumari

(Sd/- in English)

(Sonia Sheokand)

D/Judicial Magistrate Ist Class,

Panipat. Dt. 07.02.2017

03:50 PM

Identified by me ASI Rajesh Kumar

Sd/-

ASI Rajesh Kumar

Exhibit P11 dated 02.08.2018

It is certified that all the contents of this statement are true and actual version of what has been stated by prosecutrix and she deposed voluntarily.

(Sd/- in English)

(Sonia Sheokand)

D/Judicial Magistrate Ist Class,

Panipat. Dt. 07.02.2017”

14. A reading of the above extracted statements, make graphic disclosures, that the victim had exculpated the purported incriminatory role, as

became assigned by her in appeal FIR (Ex.P29). Since the learned Magistrate concerned wherebeforewhom, the said statements became recorded, also stepped into the witness box as PW6 and during his examination-in-chief made a testification, whereby, he proved his recording both Ex.P6 and Ex.P7. Moreover, since he also spoke therein, about the prosecutrix making the said statements, thus out of her free volition, and, also made speakings therein, that the signatures as become appended by the prosecutrix, on the statements (supra), were thus appended thereon, only after hers being explained and hers understanding hence the contents thereof. Therefore, and, when at the foot of the said statements, there is a signed certificate made by the learned Magistrate concerned, thus making articulations that the statements were voluntarily signed by the prosecutrix, especially whereby, when she exculpated the incrimination drawn against the convict, in appeal FIR (Ex.P29). Resultantly, when after the making of the above speakings, by the learned Magistrate concerned, but in his examination-in-chief, the learned defence counsel rather did not choose to put him to cross-examination. As but a natural corollary, the exoneration of the guilt of the accused, as made in the statements recorded by the prosecutrix, before the learned Magistrate concerned, under Section 164 Cr.P.C., but obviously leads to an irresistible conclusion, that thereby the prosecutrix had negated the contents of the appeal FIR (Ex.P29), which became lodged at the instance of her father.

15. Be that as it may and irrespective of the above, the testification made in Court by the prosecutrix, thus also requires its incisive and circumspect analysis, as unless the prosecutrix has resiled, from the said statements, and/or, had spoken in her testification, about the said statements

being a result of tutorings being meted to her by the appellant, thereby irrespective of the certificate (supra), as made at the foot of the said statements by the learned Magistrate concerned, rather this Court may become inclined to dispel the authenticity of the statements (supra), as became made by the prosecutrix before the learned Magistrate concerned, under Section 164 Cr.P.C.

16. In other words, if the prosecutrix has, in her testification recorded before the learned trial Judge concerned, has rendered a truthful and inspiring version, in respect of the genesis of the prosecution case, as become embodied in appeal FIR (Ex.P29), thereupon this Court may become inclined to uphold the verdict of conviction. In the above endeavour, a reading of the testification, as made by the prosecutrix before the learned trial Judge concerned, reveals, that she had completely resiled from her previous statement, as was made to the investigating officer concerned. However, on the request of the public prosecutor concerned, the learned trial Judge concerned, thus declared her hostile and also assigned permission to the public prosecutor concerned, to subject the prosecutrix to cross-examination. During the ordeal of the prosecutrix being subjected to cross-examination by the public prosecutor concerned, she completely resiled from her previous statement (Ex.P5), as was made by her to the police officer concerned, on 29.01.2017. Moreover, she has also, during the course of her cross-examination, admitted hers making the statement (supra) before the learned Magistrate concerned under Section 164 Cr.P.C. Apparently, there is no speaking made by the prosecutrix, about the statement(s) (supra) being a sequel of hers being tutored or hers becoming coerced or compelled by the

appellant herein, to make the said statement(s) before the learned Magistrate concerned. Therefore, but obviously, the testification made by the learned Magistrate concerned wherebeforewhom, the said statements were made and with articulations therein, that the prosecutrix had made them voluntarily, and, without exertion of any pressure upon her, thus carries an aura of immense creditworthiness. In consequence, with the prosecutrix failing to support the charge drawn against the appellant herein. Resultantly when obviously the testification as made by her before the learned trial Judge, is also in tandem with the statement (supra), as made by her before the learned Magistrate concerned. Therefore, there was no occasion for the learned trial Judge concerned, to yet record a finding of conviction upon the appellant herein.

17. It appears that the learned trial Judge concerned became led to draw the impugned verdict of conviction against the present appellant, but on the anvil of PW14 Dr. Lipika Bansal, who medico-legally examined, the prosecutrix, proving the apposite MLR, to which Ex.P9 is assigned, and with recitals occurring therein, that the hymen of the prosecutrix was found old torn and healed with epithelium tags. Even if assumingly, the said recitals occur in MLR (Ex.P9), but yet if the prosecutrix has exculpated the guilt of the accused, therefore the recital (supra) in MLR (Ex.P9), but could not be related to the present appellant, thus putting the victim/prosecutrix to coitus. Therefore, there was no occasion for the learned trial Judge concerned, to yet bank upon Ex.P9, to thus conclude, that the charge drawn against the present appellant became invincibly proven. The medical evidence is corroborative to the prime or primary evidence, which but is to be spoken by the prosecutrix. Medical evidence cannot supplant the prime evidence (supra), but can only

corroborate the prime evidence (supra), but subject to the prosecutrix rendering a confident and inspiring version, in respect of the penal occurrence. Since, as stated above, the primary evidence in proof of the charge drawn against the accused, for reason (supra), rather does not support, the charge drawn against the present appellant, therefore, the corroborative thereto, if any medical evidence, but cannot overrule or dispel the validity of the primary evidence (supra), as became testified by the prosecutrix concerned, whereby, she has completely exculpated the guilt of the present appellant.

18. The learned trial Judge concerned also appears to have been misled by the report of the FSL (Ex.P4), wherein rather there is a recital, that semen could not be detected on Ex.1a (slides) & Exhibit-1b (Vaginal swab). As revealed by Ex.P4, exhibit whereof is the report of the FSL. The items as became sent thereto for examination, comprised of sealed cloth parcel containing Ex.1a (glass slides) & Ex.1b (two cottonwool swabs on sticks described as vaginal swab), stated to be of Nisha, and, Ex.2 (underwear) stated to be of the present appellant. On examination being made of the above items, at the FSL concerned, by the scientific officer concerned, though he pronounced, that human semen was detected on the underwear of the accused, but yet also pronounced that semen could not be detected on the vaginal swabs appertaining to the victim/prosecutrix.

19. It appears that despite no semen being detected on the vaginal swabs, as appertaining to the victim/prosecutrix, but only on existence of semen on the underwear of the present appellant, that the learned trial Judge thus concluded, that yet the charge against the accused becoming proven.

20. The above drawn conclusion is completely fallacious, as unless semen provenly related to the present appellant, thus was found on the vaginal swabs, as appertaining to the victim/prosecutrix, may be then this Court, may have assigned credence, to the best scientific evidence, and may have been led to may be, not assign credence to the exculpatory testification, as became made by the prosecutrix, before the learned trial Judge concerned. Since the above pronouncement, does not occur in the report of the FSL (Ex.P4), as such merely, on existence of semen on the underwear of the present appellant, and, which thus could be attributable to some reason other than, the present appellant putting the prosecutrix to coitus, that thereby the verdict of conviction as recorded, but on its plank rather against the present appellant, does become ill founded. Even otherwise, unless there was a categorical spelling in respect of the above in Ex.P4, about the existences of semen, on the underwear of the present appellant, being relatable to the penal incident, that thereby also this Court may have then proceeded, to not assign credence to the exculpatory testification, as becomes made by the prosecutrix before the learned trial Judge concerned. Since there is no categorical spelling (supra) in the report of FSL (Ex.P4), therefore but obviously merely on existence of semen, on the underwear of the present appellant, the learned trial Judge concerned, could not well found any inference, that merely thereby the charge against the accused rather becomes invincibly proven.

21. For all the reasons (supra), this Court finds merit in the instant appeal and is constrained to allow it. Consequently, the impugned verdict of conviction and the consequent therewith sentences (supra), as become

imposed upon the present appellant, by the learned trial Judge concerned, are quashed and set aside.

22. All pending application(s) stand disposed of accordingly.

23. If the present appellant is in jail, and, if he is not required in any other case, thereupon he is ordered to be forthwith released from custody, through the Registry of this Court forthwith drawing his release warrants. Personal and surety bonds, if any furnished by the present appellant, are also ordered to be forthwith cancelled and discharged.

24. Case property, if any, be dealt with in accordance with law after expiry of the period of limitation for filing an appeal. The record be forthwith sent down.

(SURESHWAR THAKUR)
JUDGE

(KULDEEP TIWARI)
JUDGE

02.06.2023
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Whether speaking/reasoned ? Yes/No
Whether reportable ? Yes/No