





It was ordered that all sentences shall run concurrently.

FACTUAL BACKGROUND

2. Succinctly, the facts, as per the prosecution, are that on 11.12.2017, the prosecutrix, a 16 years old girl, went to her school where she is a student of 9th grade, but did not return home. The complainant, the mother of the prosecutrix, registered the FIR(supra) to trace the prosecutrix as she believed that she had been enticed away by some unknown person. On 28.12.2017, the investigating officer was informed by the complainant that the prosecutrix has returned home. The appellant was arrayed as an accused and consequently, arrested.

3. The prosecution examined as many as 14 witnesses to establish its case. Subsequently, the statement of the appellant under Section 313 Cr.P.C. was recorded wherein he pleaded not guilty and claimed trial. In his defence, the appellant examined one witness. On assessing all the material available on the record, the learned trial Court convicted the appellant vide impugned judgment dated 29.11.2019. Aggrieved by the same, the appellant has preferred the present appeal before this Court.

CONTENTIONS

4. Learned counsel for the appellant *inter alia* contends that the learned trial Court has erred in passing a guilty verdict against the appellant as he was not even named in the FIR(supra). Even during preliminary investigation, only the names of Malkiyat and Sohan came up on the basis of the call records of the complainant. Moreover, material improvements have been made by PW1-prosecutrix and PW2- complainant in their respective testimonies. The prosecutrix and the appellant had gone to visit Shri Bhramri Devi Jan Kalyan Sansthan for solemnization of marriage on 12.12.2017, as



corroborated by DW1-Deepak Kaushik. The couple had also appeared before this Court in the case bearing No. CRM-M-47903-2017, seeking protection of their life and liberty. However, the investigating agency failed to verify the factum of marriage. Furthermore, the complainant had filed a written complaint dated 17.11.2018 against uncle (*chacha*) of the prosecutrix, namely Balbir alleging that he had compelled the prosecutrix to meet the appellant.

5. Learned State counsel submitted that the learned trial Court has convicted the appellant based on correct appreciation of facts and evidence. As such, no interference is warranted by this Court.

OBSERVATIONS AND ANALYSIS

6. Having heard the learned counsel for the parties and after perusing the record of the case, it transpires that the appellant and the prosecutrix were student of 9th grade at the time of the alleged incident i.e. 11.12.2017. In order to attract the presumption under Sections 29 and 30 of the POCSO Act, it is of the utmost importance that the victim is proved to be a child in terms of Section 2(d) of the POCSO Act. The Principal of the Government Senior Secondary School, namely, Ram Rai issued a hand written certificate (Ex.P-9) in vernacular, stating that the prosecutrix is a student there and her date of birth is 10.12.2001. The prosecution also examined Satyapal, Lecturer, Political Science at the said school as PW6 who corroborated that the date of birth of the prosecutrix, as per records of the school, is 10.12.2001. In his cross examination, PW6- Satyapal stated that the said date was entered into the school records based on the School Leaving Certificate from her previous school, however the same has not been made a part of the record. He also stated that the birth certificate of the prosecutrix was not looked at while making the entry with respect to her date of birth as such primary entry remains unproven



as well.

7. As such, it cannot be said that date of birth of the prosecutrix was made in the school record after looking at a credible source of information. A two Judge bench of the Hon'ble Supreme Court in ***P. Yuvaprakash vs. State rep. by Inspector of Police 2023 AIR SC 3525***. Speaking through Justice S. Ravindra Bhatt the following was observed:

"12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

"94. Presumption and determination of age. –

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:



"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. **Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.**" (emphasis added)

Reliance in this regard can also be placed on the judgment rendered by a Division Bench of this Court in ***Terry Saroya vs. State of Punjab and another*** 2023 (4) R.C.R. (Criminal) 176.

8. Pertinently, the Hon'ble Supreme Court has dealt with the issue of determination of age of the prosecutrix from school records in ***Birad Mal Singhvi vs. Anand Purohit***, (1988) Supp SCC 604, wherein it was observed that the date of birth in the register of a school would not have any evidentiary value without the testimony of the person making the entry or the person who



gave the date of birth.

“14. ...The date of birth mentioned in the scholar’s register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar’s register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar’s register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.”

9. In view of the discussion above, it is evident that the minority of the prosecutrix remains unproven. As such, the presumption under Sections 29 and 30 of the POCSO Act cannot be attracted. Consequently, it is on the prosecution to establish its case beyond reasonable doubt, which it has failed to accomplish. The prosecutrix in her statement under Section 164 Cr.P.C.(Ex.P-1) stated that she was taken into a room by the appellant where he raped her. However, in her cross-examination as PW1, she stated that they also went to Chandigarh. She denied ever seeing the marriage certificate (Ex. D1) and refused the suggestion that they had visited the Shri Brahamari Devi Jan Sansthan, Panchkula. However, subsequently, she deposed that she was pressurized to sign the marriage certificate.

10. A perusal of the marriage certificate (Ex. D-1) states the name of the bride to be ‘Reena.’ Pertinently, Reena is the name of the elder sister of the prosecutrix, who is already married and has a child out of the said wedlock. DW1-Deepak Kaushik, has admitted in his testimony that he married the prosecutrix and appellant. He stated that the couple had produced their respective Aadhar cards, depicting them to be majors. The Aadhar card of the bride depicted her name to be ‘Reena’ as well. However, DW1- Deepak



Kaushik also took a photograph of the couple (Ex.D4), who also affixed their thumb impressions on the photocopies of their respective Aadhar cards (Ex. D-3). Curiously, the prosecutrix signed her name as 'Reena' on the photocopy of her Aadhar card. Moreover, the prosecutrix and the appellant approached this Court in CRM-M-47903-2017 seeking protection from the family members of the prosecutrix as they had gotten married against their wishes. Pertinently, the said petition was filed by the prosecutrix portraying herself to be Reena.

11. It is evident that the prosecutrix procured the Aadhar card of her sister and nowhere has it been pleaded that the appellant forced her to do the same. Further, admittedly, the prosecutrix (PW1) had left with the appellant of her own accord as he had promised to perform marriage with her. A perusal of the record shows that the couple performed marriage on 12.12.2007, the very next day of the alleged abduction. As such, logic and reason dictates that the prosecutrix was not kidnapped by the appellant, in fact, she went and resided with him of her own volition.

12. The prosecutrix and her mother had also alleged that Balbir, her uncle (*chacha*), had raped the prosecutrix at an earlier occasion. However, they did not mention this factum to the police at any point while moving an application stating that he had introduced the prosecutrix to the appellant. In her testimony as PW1, the prosecutrix categorically mentioned that Balbir visited them regularly at their accommodation in Shiv Colony, Jind. Curiously, she did not mention the same in her statement under Section 164 Cr.P.C. Subsequently, the application moved under Section 319 Cr.P.C. to implead Balbir as an additional accused was dismissed vide order dated 27.09.2019 by the learned trial Court.



13. While it is trite law that conviction in cases of sexual assault can be made solely on the basis of the testimony of the prosecutrix, however, it is of the utmost importance that the prosecutrix is a sterling witness. A two Judge bench of the Hon'ble Supreme Court in ***Krishan Kumar Malik vs. State of Haryana 2011(3) R.C.R(Criminal) 539***, speaking through Justice Deepak Verma, made the following observations:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Criminal Procedure Code), FIR and deposition in Court.”

14. Further, a two Judge bench of the Hon'ble Supreme Court in ***Rai Sandeep @ Deepu vs. State of NCT of Delhi (2012) 8 SCC 21***, speaking through Justice Fakkir Mohammed Ibrahim Kalifulla, opined as follows:

“15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances



to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

A two Judge bench of the Hon’ble Supreme Court in **Tameezuddin @**

Tammu vs. State of (NCT) of Delhi (2009) 15 SCC 566 has held as follows:

“7. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

CONCLUSION

15. In view of the discussion above, this Court finds that the prosecution has failed to prove its case beyond reasonable doubt. Accordingly, the present appeal is allowed and the appellant is acquitted of the charges framed against him.

16. Pending miscellaneous application(s), if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

06.11.2024
Neha

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