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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1653-SB-2014
Date of decision: 15.03.2024

Gopi @ Kala

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Ms. Sumanjit Kaur, Advocate
Legal Aid counsel for the petitioner.

Mr. Rishabh Singla, AAG, Punjab

HARPREET SINGH BRAR, J. (ORAL)

1. The present revision petition is preferred against judgment dated 14.10.2013 passed by learned Special Judge, Sangrur in FIR No. 41 dated 04.04.2013 registered under Sections 363, 377 of the IPC and Section 3, 4, 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter ‘the POCSO Act’) at Police Station Ahmedgarh whereby the petitioner has been convicted and sentenced as under:

Offence	Sentence
Section 4 of the POCSO Act	Rigorous imprisonment 10 years and a fine of Rs. 10,000/- in default of which, rigorous imprisonment of 1 year

2. Briefly, the facts are that on 03.04.2013, the petitioner-accused visited the *rehri* of the Rati Ram, grandfather of the victim, where the victim was also present. The petitioner took the victim, a 5 years old boy, to a *jhuggi*, removed his pants and sodomised him. The victim was kept there for the whole night and only

returned home in the morning of 04.04.2013. He informed his grandfather of the incident and the matter was reported to the police.

3. The prosecution examined 5 witnesses to establish its case while the accused failed to lead any evidence in his defence. After assessing all the material on record, the learned trial Court convicted the accused vide judgment dated 14.10.2013. Aggrieved by the same, the petitioner has preferred the present appeal before this Court.

4. Learned counsel for the petitioner contends that there is a significant difference between the medical and the ocular evidence as the victim in his statement had claimed that the petitioner took of his clothes, sexually assaulted him and gagged his mouth. However, the medico-legal report as proved by PW1- Dr. Gurdeep Singh, states that no contusion, bleeding or pain was observed in the perianal area, which rules out acute penetration of the anus. In his cross examination, PW1- Dr. Gurdeep Singh had categorically stated that there were no visible signs of carnal intercourse. She further contends that PW-2 victim is a child witness who can easily be tutored. The victim has improved his version to add that he was beaten and gagged by the accused. Moreover, in his statement under Section 164 Cr.P.C., PW2-victim had stated that he did not know the petitioner while his name is duly mentioned in the FIR.

5. Learned counsel further submits that the grandfather of the victim PW3-Rati Ram did not lodge a missing complaint when his 5 years old grandson went missing. The petitioner has only been implicated due to old animosity between him and son of PW3-Rati Ram, as also stated by him in his statement under Section 313 Cr.P.C. Lastly, PW5-Investigating Officer did not verify the ownership of the *jhuggi* where the alleged incident took place.

6. Per *contra* learned State counsel submits that the learned trial Court

has correctly appreciated the facts and the law to arrive at a guilty verdict qua the petitioner and as such the impugned judgement warrants no interference by this Court.

7. Having heard the learned counsel for the parties and after perusing the record of the case with their able assistance, it transpires that the victim was 5 years old at the time of the alleged offence, therefore, Section 29 of the POCSO Act will be attracted, creating a presumption against the petitioner. In spite of his young age, PW2-victim maintained his stance during cross-examination, inspiring confidence in his testimony. While PW1-Dr. Gurdeep Singh has stated that charges of penetrative sexual assault are ruled out, his testimony is in the nature of an opinion. In view of the facts and circumstances of the case, where the petitioner took the victim to a secluded place, kept him there all night, removed his trousers and his own, and the consistent stand of the young victim, no other inference can be drawn. It is settled law that the evidence is not liable to be rejected merely because it has been led by a child witness. A two Judge bench in ***State of Karnataka v. Shantappa Madivalappa Galapuji and Ors. (2009) 12 SCC 731***, speaking through Justice Dr. Arijit Pasayat, made the following observations:

*“6. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in ***Wheeler v. United States, (159 US 523)***. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See ***Suryanarayana v. State of Karnataka, 2001(1) RCR (Criminal)***]*

602 : (2001(9) SCC 129)]

7. In *Dattu Ramrao Sakhare v. State of Maharashtra, 1997(3) RCR (Criminal) 227 : [(1997)5 SCC 341]* it was held as follows : (SCC p. 343, para 5):

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

8. Furthermore, no evidence has been produced on the record to rebut the presumption under Section 29 of the POCSO Act or prove that the complainant party knew the petitioner before hand. As such, the allegation of previous enmity between the petitioner and uncle of the victim remains unsubstantiated.

9. Therefore, in view of the discussion above the present appeal is dismissed and the impugned judgment dated 14.10.2013 passed by learned Special Judge, Sangrur is upheld.

(HARPREET SINGH BRAR)
JUDGE

15.03.2024
Ajay Goswami

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No