



IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

749

CRA-S-2057-SB-2014(O&amp;M)

Date of decision: 18.09.2024

Harpreet Handa

...Appellant

versus

State of Punjab

... Respondent

**CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

Present: Ms. Sumanjit Kaur, Advocate  
for the appellant.

Mr. Rishabh Singla, AAG Punjab.

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**HARPREET SINGH BRAR, J.(Oral)****CRM-14425-2014**

The present application is preferred under Section 5 of the Limitation Act, 1963 seeking condonation of delay of 142 days in filing the present appeal.

For the reasons mentioned in the application, the delay of 142 days in filing the present appeal stands condoned.

**CRA-S-2057-SB-2014**

1. The present appeal is preferred against judgment and order of sentence dated 14.10.2013 passed by the learned Special Judge, Sangrur in the case stemming from FIR bearing No. 216 dated 21.07.2013 registered under Sections 120-B, 363, 366-A IPC and Sections 3, 4, 6 of the Protection of Children from Sexual Offences act, 2012 (hereinafter 'POCSO Act') at Police Station City Sangrur. The appellant was sentenced as under:



| Offence under              | Sentence                                                                                                            |
|----------------------------|---------------------------------------------------------------------------------------------------------------------|
| Section 4 of the POCSO Act | Rigorous Imprisonment for 10 years and a fine of Rs. 50,000/-, in default of which rigorous imprisonment of 2 years |

**FACTUAL BACKGROUND**

2. On 21.07.2013, the complainant i.e. the father of the prosecutrix, a minor, woke up around 5:30 AM and found his daughter, the prosecutrix, to be missing from their home. He enquired and discovered that the appellant, along with his brother Gaurav Handa and Pooja (wife of Gaurav Handa), had enticed the prosecutrix away on the pretext of marrying her. On 22.07.2013, the police received a secret information and arrested Gaurav Handa and Pooja from Railway Station, Sangrur. Subsequently, the appellant and the prosecutrix surrendered in Court.

3. On the basis of the material available on the record, the learned trial Court convicted the appellant vide impugned judgment dated 14.10.2013 and was sentenced as mentioned above. Aggrieved by the same, the appellant moved this Court by means of the present appeal.

**CONTENTIONS**

4. Learned counsel for the appellant inter alia contends that the learned trial Court has fallen into grave error by convicting the appellant as the prosecutrix had eloped with him of her own accord. Although the prosecutrix had not attained the age of majority at the time of the incident, the relationship between both of them was consensual and devoid of any *mens rea*. In fact, the appellant and prosecutrix surrendered in the Court once they came to know about the criminal prosecution initiated against the former. The proximity of



the age between the appellant and the prosecutrix must be given due consideration and a compassionate view be taken considering their young age and nature of circumstances. Moreover, co-accused Gaurav Handa, brother of the appellant and Pooja Handa, sister-in-law of the appellant have already been acquitted by the learned Court below. Reliance in this regard can be placed on the judgment rendered by a Division Bench of the Gujrat High Court in ***Koli Trikam Jivraj and another vs. The State of Gujrat 1969 AIR (Gujrat) 69.***

5. Learned State counsel submits that the learned trial Court has passed the impugned judgment based on correct appreciation of the facts and the law. As such, the same does not deserve any interference by this Court.

#### **OBSERVATIONS AND ANALYSIS**

6. Having heard the learned counsel for the petitioner and after perusing the record with his able assistance, it transpires that the appellant was 18 years of age while the prosecutrix was 17.5 years old at the time of the alleged incident. The statement of the prosecutrix recorded under Section 164 Cr.P.C. reveals that the prosecutrix left for Ferozepur, with the appellant, of her own free will. In her cross examination, she further admits that she stayed at International Hotel, Ferozepur, but did not raise any alarm during her four-day stay, in spite of the fact that the hotel staff was around. She further stated that the appellant would leave her at the hotel for a couple of hours daily, yet she did not contact anyone from the hotel or create any commotion to be freed. Furthermore, the appellant and the prosecutrix travelled to Ferozepur by train but she did not do anything to attract attention towards herself. This conduct of the prosecutrix clearly reflects that she was not kept by the appellant against



her will. Further still, no one from the hotel has been examined by the prosecution to establish that the prosecutrix and the appellant stayed there. Reliance in this regard can be placed on the judgments rendered by the Hon'ble Supreme Court in *Mussaaddin Ahmed vs. State of Assam (2010) 1 SCC (Cri) 1445*, *State of Madhya Pradesh vs. Munna @ Shambhoo Nath (2016) 1 SCC(Cri.)536*, *Md. Ali @ Guddu vs. State of U.P.(2015) 3 SCC(Cri.) 82* and *Rajesh Patel vs. State of Jharkhand (2013) 2 SCC(Cri.) 981*.

7. In order to attract the presumption under Section 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. In furtherance of the same, the prosecution has placed on the record the 5<sup>th</sup> class certificate of the prosecutrix, which reflects her date of birth to be 13.04.1996. The admission and withdrawal record and attendance register from Khalsa Girls High School, Sangrur, where the prosecutrix was a student of 10<sup>th</sup> class, was also placed on the record, wherein it was reiterated that her date of birth is 13.04.1996. The birth certificate of the prosecutrix does not form a part of the record. Significantly, the person who made the said entries in the school record was not examined. As such, it remains unproven that the entry qua date of birth of the prosecutrix was made in the school record after looking at a credible source of information in terms of Section 94 of the Juvenile Justice Act, 2015, as stipulated by 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. The 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 the primary entry with regard to her age has not been produced. Therefore, the presumption under Section 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.

10. Pertinently, as per the testimony of PW1-Dr.Ramanbir Kaur Boparai, who conducted the medico-legal examination of the prosecutrix, bruise marks and abrasions were found on both her hands and the hymen was found to be ruptured. Injury on the hands could be explained by a myriad of reasons and, in the facts and circumstances of the case, is not suggestive of sexual assault. Moreover, it is a scientific fact that the hymen can be ruptured by physical exertion. A torn hymen is not conclusive of sexual assault in the same way as an intact one does not negate it.



11. Further, the prosecutrix has herself admitted that she did not want to marry the appellant. Therefore, the question of the appellant kidnapping the prosecutrix, by enticing her with a promise to marry, does not arise. In fact, the appellant and the prosecutrix appeared before the learned Chief Judicial Magistrate, Sangrur of their own vocation, once they found out that a complaint has been moved by the father of the prosecutrix. Jowitt's Dictionary of English Law and Stroud's Judicial Dictionary provide an identical definition of consent which reads as follows:

*“An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side.”*

The Black's Law Dictionary defines consent as:

*“a concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. ”*

It further refers to ***Hallmark vs. State 22 Okl. Cr. 422*** to define consent qua rape wherein it was held that *“consent of the will, and submission under the influence of fear or terror cannot amount to real consent. There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent.”*

12. While Section 90 IPC does not lay down all the necessary ingredients to constitute consent, it elucidates circumstances that would render consent irrelevant, for instance, when consent is given under misconception of fact, the incident cannot be deemed to be consensual. Valid consent necessarily requires due and active consideration of all the relevant circumstances, actions, and consequences that flow from the said act, before assenting. Whatever choice one makes, it must be reasoned and adopted after being alive to all the probable outcomes. In that vein, this Court is of the considered opinion that all surrounding circumstances point towards the



conclusion that the alleged incident occurred with the consent of the prosecutrix.

13. It appears that the prosecution has failed to prove its case beyond the shadow of a reasonable doubt and the conviction is solely based on the factum of age of the prosecutrix. The intention behind creation of the POCSO Act was to protect children from sexual exploitation and by means of special procedure and stringent punishment promote deterrence. However, one cannot turn a blind eye to the fact that teenagers are capable of having consensual relationships. While sincere efforts are made through various legislations and policies to safeguard the interests of children, time and again, the Courts have reiterated that while dealing with minors, their welfare takes precedence over all else, therefore, adjudication of a case without considering the societal and cultural context would be a travesty of justice. The overarching aim of justice is to serve what is deserved and accountability and fairness are identifying features of the same. However, the said purpose would be defeated if justice is viewed in its absolute mechanical form, devoid of context and nuance. While justice in itself is a dynamic concept, directly influenced by the morality of an ever-evolving society, it can be said with certainty that absolute impartiality and lack of compassion often claims fairness as a casualty. Therefore, the POCSO Act should not be misused to target or penalize adolescents involved in sincere romantic relationships.

14. A Co-ordinate Bench of the Delhi High Court in ***Ajay Kumar vs. State Govt. of N.C.T. of Delhi and another*** in BAIL APPLN. 2729/2022 decided on 20.10.2022, speaking through Justice Jasmeet Singh made the following observations, while granting bail to the accused in a similar case:



*“The statement of the victim makes it clear that this is a romantic relationship between the two and that the sexual act involved between them was consensual. Although the victim is minor and hence her consent does not have any legal bearing, I am of the opinion that the factum of a consensual relationship borne out of love should be of consideration while granting bail. To ignore the statement of the victim and let the accused suffer behind jail, in the present case, would otherwise amount to perversity of justice.”*

15. A two Judge bench of the Hon’ble Supreme Court in ***Tameezuddin @ Tammu vs. State of (NCT) of Delhi (2012) 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**

16. In view of the discussion above, the present appeal is allowed. The impugned judgment and order of sentence dated 14.10.2013 passed by the learned Special Judge, Sangrur is hereby set aside and the appellant is acquitted of the charges framed against him.

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

**(HARPREET SINGH BRAR)**  
**JUDGE**

18.09.2024  
manisha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No