

2024:PHHC:169890-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-AD-107-2023

Date of Decision: 18.12.2024

IXXX

... Appellant

Versus

MAHESH @ VINAY PHOGAT & ANOTHER

...Respondents

CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH

HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. P.R. Yadav, Advocate
for the appellant.

Mr. Arnav Ghai, Advocate/Amicus Curiae and
Mr. Anand Kumar Bishnoi, Advocate
for the respondent No.1.

Mr. A.S. Chaudhary, Addl. A.G., Haryana
for respondent No.2-State.

JASJIT SINGH BEDI, J.

The present appeal has been filed against the judgment of acquittal dated 06.12.2022 passed by the Additional Sessions Judge, (Fast Track Special Court for the offences under POCSO Act, 2012) Gurugram.

2. The FIR was registered on 30.11.2018, the judgment of acquittal passed by the Additional Sessions Judge, (Fast Track Special Court for the offences under POCSO Act, 2012) Gurugram is dated 06.12.2022, the appeal was filed on 14.02.2023 and the matter is being taken up for hearing now after 06 years of the registration of the FIR.

3. In brief, the case of prosecution is that on 30.11.2018 the complainant/mother of the girl child moved a complaint to the police alleging

therein that she was a resident of Gurugram. She had been blessed with two daughters. She alleged that her elder daughter, aged 17 years (hereinafter referred to as victim) had been studying in 12th Class and in the preceeding few days she kept to herself and on asking she did not reveal the reason for her sadness. She alleged that on that day, i.e. on 30.11.2018 she had again asked her daughter (victim) with love and affection on which her daughter started crying very loudly and disclosed to her that Mahesh @ Vinay Phogat (hereinafter referred to as the accused) resident of H. No.E-2145A, Palam Vihar, Gurugram had been exploiting her. She alleged that whenever the victim went for a walk or for tuition, he used to follow her in his car. She alleged that on the morning of 24th March, the accused had taken her daughter (victim) at an EWS Flat, Palam Vihar and established forcible physical relations with her and threatened to defame her if she disclosed the incident to anyone. She alleged that the accused had committed repeated rape upon her daughter and had also performed oral sex with her several times while criminally intimidating her. She alleged that on 26.11.2018, at about 12.30 p.m. he had made her daughter sit in his car near Mcdonalds, Palam Vihar and got her to perform oral sex upon him. She prayed for legal action to be taken against the accused.

4. Upon the complaint (Ex.P4), a formal FIR (Ex.P13), was got registered and investigation commenced. During investigation, the Investigating Officer inspected the place of occurrence and prepared a rough site plan of the site of crime (Ex.P15). The Investigating Officer produced the victim before the Magistrate whereby the statement of the victim was recorded under Section 164 Cr.P.C. (Ex.P4). The Investigating Officer produced the victim before the Lady Medical Officer, Government Hospital,

Gurugram whereby the victim was medico-legally examined vide M.L.R. (Ex.P6). The accused was arrested and interrogated. During interrogation, he suffered his disclosure statement (Ex.P10) admitting his guilt. In pursuance of his disclosure statement, he demarcated the place of occurrence vide demarcation memo (Ex.P11). The Investigating Officer got him medico-legally examined. The car make Corola bearing Registration No.HR-26AD-4248 used in the commission of the offence was taken into police possession vide recovery memo (Ex.P12). Scaled site plan (Ex.P1) was got prepared. Statements of witnesses were recorded. After completion of necessary formalities and investigation, final report under Section 173 Cr.P.C. was presented before the Court.

5. The case was committed to the Court of Sessions. Arguments on charge were heard. Finding a prima facie case against accused, he was charge-sheeted for the commission of offences under Section 506 IPC and 6 POCSO Act, 2012 (in alternative U/s 376(2)(n) of IPC) vide order dated 21.01.2019 by the then Additional Sessions Judge, Gurugram to which he pleaded not guilty and claimed trial.

6. To prove its case, prosecution examined the following witnesses:-

PW1	ASI Girish Kumar, Draftsman
PW2	Dr. Yogender, M.O., G.H., Gurugram
PW3	Victim
PW4	Mother of victim/complainant
PW5	Rohit Yadav, registered owner of the car in question
PW6	Dr. Shalki Sharma, M.O., Civil Hospital Gurugram
PW7	Constable Suman Kumar No.5305/GGM
PW8	L/S.I. Amandeep Kaur No.1/GGM
PW9	Kishore Kumar, Sub-Registrar, Births and Deaths, Rohini Zone North Delhi Municipal Corporation.

7. The prosecution also relied upon the following documents:-

Ex.P1 Scaled site plan

Ex.P2	MLR of accused
Ex.P3	Application seeking medico-legal examination of accused
Ex.P4	Statement of victim U/s 164 Cr.P.C.
Ex.P4	Complaint
Ex.P5	Recovery memo of Aadhar Card and Birth Certificate of Victim.
Ex.P6	MLR of Victim
Ex.P7	Application seeking medico-legal examination of victim
Ex.P8	Arrest memo
Ex.P9	Search memo
Ex.P10	Disclosure statement
Ex.P11	Demarcation memo
Ex.P12	Recovery memo of Car bearing Registration No.HR-26AD-4248
Ex.P13	FIR
Ex.P14	Endorsement on Ex.P4
Ex.P15	Rough site plan of the site of crime
Ex.P16	Photocopy of Birth Certificate of victim
Ex.P17	Photocopy of Aadhar Card of victim
Ex.P18	Application seeking recording of victim U/s 164 Cr.P.C.
Ex.P19	Certified copy of statement of victim
Ex.P20	Application seeking certified copy of statement of victim recorded U/s 164 Cr.P.C.
Ex.P21	Certified copy of Birth Report of victim

8. The statement of the accused was recorded under Section 313 Cr.P.C. in which he denied all the allegations levelled against him. He pleaded that he was innocent and had been falsely implicated in the present case. He stated that he was in a relationship with PW4/Anita Aggarwal, mother of the victim and when the affair was discovered the husband through his wife PW4/Anita Aggarwal and by using their daughter got registered the FIR in question. He placed on record CDRs to show that he was in constant contact with the mother of the victim PW4/Anita Aggarwal.

9. In defence evidence, he examined Maninder Singh, Nodal Officer Vodafone-Idea as DW1, Raj Rana as DW2, Parveen Kumar, Alternate Nodal Officer, Reliance Jio as DW3, H.C. Baljeet No.1212/GGM as DW4,

D.S.P. Surender Kumar, Special Task Force, Gurugram as DW5 and Nityanand (retired S.I.) as DW6.

10. Based on the evidence led, accused/respondent No.1 was acquitted by the Court of Additional Sessions Judge, (Fast Track Special Court) Gurugram vide judgment dated 06.12.2022.

11. It is the aforementioned judgment of acquittal which is under challenge in the present appeal.

12. The learned counsel for the appellant contends that the Trial Court has acquitted the accused mainly on the ground that the victim was not proved to be a juvenile and discarded the birth certificate and hospital certificate pertaining to the victim. All the four points for consideration framed by the Trial Court have been decided against the victim only on the ground that the victim was not proved to be juvenile.

During investigation and trial the appellant was never questioned about her date of birth. Even while appearing as PW3 the appellant had categorically stated her date of birth as 17.03.2021 and also stated that she was studying in Amity University, Jaipur and doing the course of BJMC-1. No cross-examination was done regarding her date of birth. However, the Trial Court in the impugned judgment gave a finding that the date of birth of the appellant was not proved.

The Trial Court has referred to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 to infer that for proving age of a child, the date of birth certificate from the school or matriculation certificate of birth certificate issued by a Corporation of Municipal Authority of Panchayat was to be produced. Though the Aadhar Card was produced but

the same was discarded on the ground that it is not mentioned in the Act. As far as an Aadhar Card is concerned, the same is now an authentic proof of age and address. Moreover, it was for the Investigating Agency to take any document from the victim or complainant as the victim was a student at that time. However, the police has left a lacuna for extraneous consideration and due to this the appellant has suffered.

The next wrong and improbable assumption raised by the Trial Court is that the complainant, who is the mother of the appellant had intimacy with the accused and she had also got an F.I.R registered against the accused which ended in cancellation and thus, it was observed that the complainant falsely roped in her daughter to take revenge. Such an observation would shock the conscience as no mother would ever do such things especially of the social norms of this country. Moreover another F.I.R got registered by the mother of the victim against the accused was F.I.R No.266/2019 and the present F.I.R is dated 30.11.2018 and thus, the observation of the Trial Court is like putting the cart before the house and registration of any subsequent FIR cannot be ground for false implication of the accused in the previous FIR. He, therefore, contends that the judgment of acquittal of accused/respondents no.1 be set aside and the accused be convicted of the offence for which he has been charge-sheeted.

13. The learned counsel for the State while supporting the case of the appellant contends that the impugned judgment was not based on proper appreciation of the evidence on record and, therefore, judgment of acquittal was liable to be set aside.

14. The learned Amicus Curiae and the learned counsel for respondent No.1, on the other hand, contend that the statement of the victim

was discrepant in material particulars. There were no injuries on the victim to establish repeated penetrative assault. It was not a case where the Trial Court had acquitted the accused on account of a finding that sexual relationship between the couple was consensual in nature and therefore, the argument of the appellant that she was a minor as per her birth certificate (Annexure A-1) showing her date of birth 17.03.2021 has little relevance. In fact, quite apparently, the complainant i.e. the mother of the victim and the accused were in an affair as was borne out from call records and certain admissions made by the mother. When they got found out, the FIR came to be registered at the instance of the father of the victim i.e the husband of the complainant. This was the ground of acquittal. They, therefore contend that no fault could be found with the impugned judgment and the appeal was liable to be dismissed.

15. We have heard the learned counsel for the parties and gone through the record.

16. A perusal of the statement of the prosecutrix/PW3 would show that the alleged relationship began in January, 2018 and the accused started touching her inappropriately. No complaint was made by her. She continued to meet him and the first occurrence of sexual intercourse took place on 24.03.2018 and continued till November, 2018. It is strange that all this happened allegedly under threat/duress but instead of informing anyone, the victim kept on indulging in the said acts. This highly unnatural conduct makes the prosecution case doubtful. Substantial improvements have been made by the victim when she deposed as PW3 as against her statement under Section 164 Cr.P.C. (Ex.P4) inasmuch as specific dates and instances have

been mentioned which apparently seems to be an afterthought. There is absolutely no evidence of the victim being a member of the gym where she allegedly came in contact with the accused. In fact, it was the mother of the victim who was a member of the said gym. There is no evidence of any phone calls/chats between the victim and the accused despite the fact that as per the victim, they were in touch with each other. This also creates a doubt in the prosecution case. Interestingly, the victim admitted in her cross-examination that since January, 2008 till even after the registration of the FIR, she had uploaded multiple dance videos on the TikTok App which is certainly not the conduct of an unhappy person who has been subjected to rape.

17. As regards the deposition of the complainant/Anita Aggarwal (PW4) mother of the victim, her evidence regarding the commission of rape upon daughter would amount to 'hearsay' evidence. However, she has categorically admitted that she along with the accused went to the Reform Gym at Palam Vihar for the preceding 2 ½-3 years and that she was in touch with the accused on the telephone on daily basis up until January/February, 2018. She also admitted that she had spoken to the accused on the date of the registration of the FIR. She admitted that in December, 2017 she had booked a trip to Nainital through the accused. Pertinently, the fact that she was well-known to the accused has not been mentioned by her in the FIR which shows that there is an attempt to hide her connection with the accused. Further, the cross-examination of this PW would show that it was suggested to her that she had an affair with the accused but as her husband came to know about the illicit relationship this case was foisted upon the accused using the daughter.

It may be relevant to mention here that the case of the accused under Section 313 Cr.P.C. is identical inasmuch as he stated that he had an affair with the accused which is evident from multiple phone calls between the accused on the one hand and the PW4/Anita Aggarwal on the other. The all details were brought on record by the defence.

18. PW5/Rohit Yadav, the registered owner of the Toyoto Corola car bearing Registration No.HR-26AD-4248 admittedly being used by the accused and recovered from him admitted in his cross-examination that he had seen the accused and PW4/Anita Aggarwal together in the car and that they were both in relationship. His evidence substantiates the defence version of the false implication of the accused on account of his relationship with the mother of the prosecutrix PW4/Anita Aggarwal.

19. PW8-L/SI Amandeep Kaur admitted that the family members of the accused had moved an application seeking the CDRs of the complainant and the accused. As per her investigation the accused was well-known to the PW4/Anita Aggarwal and her husband and that both went to the same Gym.

20. Thus, apparently, from the testimony of the PWs referred to it transpires that the accused was well-known to the complainant prior to the registration of the FIR and this fact creates a serious doubt in the prosecution version.

21. Further with regard to the allegations of repeated aggravated penetrative sexual assault against accused except the bald statement of the victim, there is no medical and scientific evidence available on the record to hold that the victim was subjected to aggravated penetrative sexual assault repeatedly by the accused. Vide M.L.R. (Ex. P6) the victim was medico-

legally examined by the Lady Medical Officer Dr. Shalki Sharma (PW6) and during her medical examination, no mark of injury was found on the labia majora and labia minora of the victim. No clothes of the victim or oral swab/samples were taken by the Lady Medical Officer. On general physical examination of the victim also no opinion was given by the Lady Medical Officer regarding child sexual abuse and it is merely opined that as per history the occurrence is old so no samples were taken.

22. The accused has also been medico-legally examined vide M.L.R. (Ex.P2) but his samples were neither taken nor samples were taken from the spot/place of occurrence and therefore in these circumstances the allegations of aggravated penetrative sexual assault committed upon the victim is not proved against the accused.

23. It may be reiterated here that a bare perusal of the testimony of the complainant before the Court and her statement made before the Magistrate reveals that there are several variations and improvements made by the victim time and again. Therefore, she cannot be held to a witness of sterling quality to be relied upon in the present case.

24. As far as allegations of commission of the offence under Section 506 IPC is concerned, once allegations of rape are not proved beyond reasonable doubt, allegations of criminal intimidation against the accused levelled by the victim and complainant also cannot be said to be truthful.

25. We may also add here that the arguments of the learned counsel for the appellant that the victim whose date of birth was 17.03.2021 and therefore, was less than 18 years of age on the date of the first occurrence has

little significance in view of our finding that the victim was never subjected to sexual intercourse.

26. As to how an appeal against a judgment of acquittal is to be dealt with, the Hon’ble Supreme Court in **Kallu @ Masih & Ors. Vs. State of Madhya Pradesh 2006(1) RCR (Criminal) 427** has held as under:-

“ 8. While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial court.”

27. In view of the aforementioned discussion and keeping in view the law laid down in **Kallu @ Masih & Ors.** Case (supra), we find no reason to interfere with the well reasoned judgment of acquittal passed by the Court of Additional Sessions Judge, (Fast Track Special Court for the offences under POCSO Act, 2012) Gurugram. Therefore, the present appeal stands dismissed.

28. Pending application(s) if any, shall also stand disposed off.

(JASJIT SINGH BEDI)
JUDGE

(SUDHIR SINGH)
JUDGE

18.12.2024
JITESH

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