

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

2024:PHHC:091955-DB



Criminal Appeal-D-436 of 2019 (O&M)

Reserved on : 01.07.2024

Pronounced on: 19.07.2024

Neeraj and another

.....Appellants

versus

State of Haryana

.....Respondent

**CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JUSTICE VIKAS SURI**

Present : Mr. RS Dhull, Advocate, for the appellants.

Mr. Naveen Bhardwaj, Addl. Advocate General, Haryana.

G.S.SANDHAWALIA, J.

The appellants have laid challenge to the judgment dated 19.01.2019/24.01.2019 passed by the Court of Additional Sessions Judge-cum-Fast Track Court, Faridabad whereby against the charges framed on 23.12.2016, they were convicted under Sections 363, 366, 506, 376-D of the Indian Penal Code in FIR No. 140 dated 07.10.2016, Police Station Women, Sector 16-A, Faridabad. They were sentenced to undergo rigorous imprisonment for a period of 5 years, along with fine of Rs.1000/- each under Section 363 of the Indian Penal Code; for a period of 10 years along with fine of Rs.3000/- each under Section 366 of the Indian Penal Code; for a period of one year along with fine of Rs.1000/- each under Section 506 of the Indian Penal Code and for a period of 20 years along with fine of Rs.10000/- each under Section 376-D of the Indian Penal Code whereas appellant No.1 Neeraj was additionally sentenced to undergo imprisonment for a period of one year under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') along with fine of Rs.1000/- and all the

sentences were ordered to run concurrently and the period of imprisonment already undergone by the appellants under trial was ordered to be set off towards the sentence of imprisonment. While awarding the quantum of punishment, the case was also recommended to the District Legal Services Authority for grant of compensation under Section 357-A sub section (3) of the Code of Criminal Procedure under the Haryana Victims Compensation Scheme, 2013 to the prosecutrix.

2. The trial Court had determined the following questions for determination:-

- 1) *Whether prosecutrix was minor at the time of commission of the offence, if any;*
- 2) *Whether accused kidnapped the prosecutrix out of lawful guardianship of her father;*
- 3) *Whether accused kidnapped the prosecutrix on the allurement of marriage with an intent that she will be compelled or seduced to illicit intercourse;*
- 4) *Whether accused criminally intimidated the prosecutrix to kill her;*
- 5) *Whether accused committed gang rape upon prosecutrix;*
- 6) *Whether accused committed sexual assault upon prosecutrix;*
- 7) *Whether accused committed aggravated penetrative sexual assault upon prosecutrix.*

3. While discussing the issue of the minority of the prosecutrix, a 10th class examination form showing her date of birth as 06.06.2001 was kept in mind while taking into consideration the statement of the teacher who had appeared as PW13 and noting that the admission form Ex.PI/1 was signed by her brother Pawan. The certificate Ex.DW3/B issued by Municipal Corporation, showing the name of prosecutrix, parent's name, address of

village, gender along with date of birth 28.10.1998 was also taken into consideration and keeping in view the fact that the incident had taken place on 05.10.2016, a finding was recorded by the trial Court that even if the date of birth of the prosecutrix was to be considered as 28.10.1998 as per the certificate issued by the Municipal Corporation, even then the prosecutrix was less than 18 years of age on the date of occurrence and therefore, falling back upon the requirement of Section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015, the first preference was given to the birth certificate issued by the School and therefore, it was held that the prosecutrix was covered under the definition of Section 2(d) of the Protection of Children from Sexual Offences Act, 2015 (for short 'POCSO').

REASONING FOR CONVICTION:-

4. Regarding the issues of kidnapping the prosecutrix out of the lawful guardianship of her father and the incident of gang rape, the statements of the prosecutrix recorded before the Investigating Agency as Ex.PA and also the statement Ex.PB recorded before the Magistrate under Section 164 of the Code of Criminal Procedure were taken into consideration. The same read in conjunction with the statement rendered by the victim as such before the trial Court as PW1 was kept in consideration and the statements being in consonance with each other and while also falling back upon the oral statement of the father of victim PW2, it was held that the delay as such of not narrating the said incident on the same date to her parents but a day later was due to the depression on account of gang rape and also on account of the threat to kill her and her family members by the appellants.

5. The factum that thereafter the brother of appellant No.1 had also set on fire the shop of the victim's father and threatened him to withdraw the case on 27.12.2016, to which an FIR had also been lodged and brought on

record as Mark PA, was kept in mind that the victim had been threatened not only in the beginning but also at the time of commission of offence and further continued even after lodging of the FIR.

6. The argument that there was one sided love by appellant No.1 Neeraj and that the FIR had been lodged just to save the reputation, was met by the trial Court on the ground that it was never put to the prosecutrix nor was the defence of the accused and during the course of recording the statement under Section 313 of the Code of Criminal Procedure the appellant No.2 had also taken the said plea but the same had never been put to the prosecutrix or her father. The fact that the room on the first floor, which was used, where the appellant No.1 was working as helper, was kept in mind considering that it had access from the back portion of the shop and the fact that due to the knife being in possession of the appellant, she could not raise any hue and cry. The fact that on an earlier occasion too there was an incident of eve teasing by both the appellants and they had ill intention towards the victim was also kept in mind and in the absence of any material brought on record, they were identified for such act of heinous crime which a normal person would not allege as the honour of the prosecutrix was also at stake. Resultantly, while invoking the provisions of Sections 29 and 30 of the POCSO Act regarding presumption, the conviction had been recorded by the trial Court.

ARGUMENTS OF COUNSELS:-

7. As noticed above, Mr. Dhull, learned counsel for the appellants argued that the victim was going to complete the age of 18 years in the same month when the incident had taken place as per the birth certificate issued by the Additional District Registrar, Birth & Deaths (Ex.DW3/B) and therefore, the prosecutrix having been involved with appellant No.1 falsely implicated the appellant No.2 as he being close to him had advised the appellant No.1 not

to marry with the prosecutrix as she belongs to the same caste, Gotra and the village. The charge was framed under Section 12 of the POCSO Act and therefore, the conviction was non application of mind by the trial Court.

8. It has been further submitted that the DNA report as such was also not conclusive and therefore, the benefit of doubt should have been extended as it was a case of consent and that the incident which had happened at the room above the shoe shop, which was a work place of appellant No.1, was at a considerable distance from the house of the victim. The allegation that she had been brought at a knife point from her village in a running auto-rickshaw, thus, was not liable to be accepted. It has been accordingly submitted that she had ample opportunity as such to raise hue and cry as the shop was situated in a congested area and also that the employer was present on the ground floor and that there was delay of 2 days in lodging of the FIR. The benefit of doubt as such should have been given to the appellants, especially the appellant No.2 who had nothing to do with the incident except working in the neighbourhood and being close to appellant No.1.

9. Learned State counsel has defended the conviction and submitted that there is no plausible explanation as such for the prosecutrix to falsely implicate the accused and secondly it has been proved beyond shadow of doubt that the age of the prosecutrix was below 18 years on the date of commission of offence. It is submitted that even if both the dates of birth i.e. 06.06.2001 and 28.10.1998 are taken into consideration, still she would remain below the age of 18 years, which fact is also noticed by the trial Court and therefore, the conviction which is recorded under the POCSO Act is liable to be sustained.

10. It is accordingly argued by the learned State counsel that the place of occurrence is also connected with the work place of appellant No.1 and

during evidence it has come on record that the prosecutrix knew the appellant No.1 well as he belongs to the same village.

Sequence of Events:-

11. We have examined the record which would go on to show that the statement of the victim, who is stated to be around 16 years of age, pursuing 10th standard from Haryana Open Board, was recorded on 07.10.2016 (Ex.PA) at Police Station (Woman) Faridabad at 2.55 PM. The allegations are that on 05.10.2016 at 8.00 A.M. when she was going to school, the bus had already left at the bus stand and therefore, she was standing at the bus stand of the village when the accused-appellants had accosted her at knife point and threatened to kill her and thereafter, put her in an Auto and took her to a room near Ballabgarh bus stand. Thereafter at 11.00 A.M. both of them committed rape upon her against her wishes turn by turn and thereafter at 2.00 PM they had dropped the victim at the bus stop of her village in an auto. It has been specifically alleged by the victim that appellant No.1 Neeraj used to harass her on her way to the school and used abusive language and she narrated the whole incident to her parents and thereafter her father and brother had got her statement recorded before the police station. The legal aid counsel as such was also present when the said statement as such was recorded by the police. Necessary report was accordingly sent to the Illaqa Magistrate and the S.H.O. of the concerned police station was also informed.

12. On the very next day i.e. 08.10.2016 the statement of the victim under Section 164 of the Cr.P.C. (Ex.PB) was also got recorded before the Judicial Magistrate Ist Class, Faridabad and a perusal of the same would go on to show that certain questions of general nature like school, family, education were put to the prosecutrix and the Judicial Magistrate observed that the victim was confident, untutored and gave answers promptly in a reasonable manner

and she was fit to make her statement. The concise statement mentioned the fact that she was taken to shoe shop by the appellants where appellant No.1 Neeraj was working and thereafter they took her inside the room built over it and both committed rape upon her by locking the room from inside and thereafter they left her in an auto at the bus stand of village Garkhera to which she belongs.

13. It is pertinent to note that the victim and the appellants-accused belong to a scheduled caste category. The necessary medical examination had also been conducted upon the prosecutrix on 07.10.2016 which would go on to show that the victim had a torn hymen and had also multiple reddish abrasions of variable sizes over the back of left hip which were result of blunt injuries probably within 48 hours as per the medico-legal report which was signed by her brother. In pursuance to the same, the appellants were arrested and got medico-legally examined to find out whether they were capable to perform sex or not and it is a matter of record that there is nothing to show that they were not capable to perform sex.

14. The crime scene visit report Ex.PH was also prepared on 08.10.2016 wherein the room of Sai Foot Wear shop was duly examined and it was noticed that there were blood stains present on the cartoon and the black/white check shirt and dusty light pink saree which were used by the accused-appellants and the same were accordingly taken into custody and sent to the FSL for semen examination. Demarcations were also done from the accused-appellants after their arrest and it was noticed that there was a cot lying in the room built on Sai Foot Wear as per the memos of demarcations Ex.PN and Ex.PO. The blood samples were taken for DNA test vide Ex.PP and the salwar worn by the prosecutrix at the time of commission of offence was also taken into possession as Ex. PR/1. A rough site plan was accordingly

prepared as Ex.PS. Recovery memo of the clothes i.e. shirt of black & white colour, reddish colour half Saree and card boards with blood were recovered from the place of occurrence vide memo Ex.PT. School certificate as such of the victim was taken into possession by the investigating agency vide recovery memo as Ex.PU.

15. On the arrest of the appellants-accused from Ballabgarh, the disclosure statements Ex.PL and Ex.PM had been taken and the police party had left for the place of occurrence and demarcated the same vide Ex.PM, Ex.PN and Ex. PO. It was thereafter that they had been medico-legally examined on 08.10.2016 itself and even the blood samples were taken for DNA profiling. They were produced before the Court of Judicial Magistrate Ist Class on 09.10.2016 and were remanded to judicial custody. The scaled site plan was prepared on 18.10.2016 by draftsman Anoj Kumar. On 12.11.2016, a school certificate Ex.PK of the prosecutrix regarding her date of birth was taken from Navyug Senior Secondary School, Sector 68, Faridabad vide recovery memo Ex.PU. These facts would be clear from the statement of Asha Rani, Investigating Officer, PW19 and also from the above mentioned documents.

16. Upon completion of the investigation, charges under Sections 363, 366, 506, 376-D of the Indian Penal Code and under Section 12 of the Protection of Children from Sexual Offences Act, 2012 were duly framed against the appellants by the trial Court on 23.12.2016, to which they pleaded not guilty and claimed trial.

17. Keeping in mind the argument raised and the evidence placed on record we have gone through the record minutely. We are of the considered view that the trial Court has not examined certain aspects of the matter and the trial Court has gone ahead to record the conviction in a very mechanical

manner. Sterling quality of the witness who is the sole witness is not in place and that it is absolutely not trust worthy has not been kept in mind by the learned trial Court. No doubt, on the sole statement of the prosecutrix, the conviction can also be sustained but inherent contradictions which we will point out cannot be ignored. We are of the considered opinion that the matter should have been examined with a more open mind rather than accepting what has been stated. Since, admittedly, there is delay of two days in lodging of the FIR also, the said delay would have given sufficient time as such to the complainant and her family members to cast the net wider and include the appellant No.2 in the said case.

AGE OF VICTIM:-

18. Regarding the issue of minority of the prosecutrix we are of the considered opinion that the record as such would go on to show that there is sufficient material to show that she was minor on the date of incident. Apparently, the prosecutrix got admission in Navyug Senior Secondary School, Faridabad on 25.04.2011 in 5th class and there is also a School Leaving Certificate Ex.PJ on record showing the date of admission as such and she was 14 years of age as on that date. She had studied upto 8th class in the said school and applied for the School Leaving Certificate on 11.07.2015 which was issued on 13.07.2015.

19. The prosecution also brought on record Ex.PK dated 12.11.2016 which is the certificate issued to the Inspector, Women Cell, Ballabgarh Zone, Faridabad showing that she was the student of Navyug Senior Secondary School from 25.04.2011 to 31.03.2015 and had passed her 8th class in March-2015 and she had received her School Leaving Certificate on 13.07.2015 after passing 8th class. Accordingly, her date of birth was recorded as 06.06.2001.

The said documents were duly proved by the Dr. Ved Pal Dhankar, Principal

of the said school who appeared as PW13 and has also produced the Admission Form Ex.P1/1 which has been signed by her brother showing the date of birth as 06.06.2001. The said certificate depicts the name of her father as Data Ram and mother as Smt. Kela Devi. However, if one examines the Birth Certificate Ex.DW3/B produced by the defence, which has been issued under Section 12/17 of the Birth & Death Registration Act, 1969, by the Additional District Registrar (Births and Deaths) cum Civil Surgeon, Faridabad, it shows that the victim was born to the said parents on 28.10.1998 and the date of registration was 30.11.1998 a month later which would still keep her age below 18 years on the date of incident. Therefore, the question for consideration of minority at the time of commission of offence has been decided by the trial Court but the fact that under Section 4 of the POCSO Act different punishments are provided if the age is below 18 and 16 respectively, was not kept in mind.

20. The minority aspect as such would be apparent that if the certificate produced by the defence Ex.DW3/B has been wrongly ignored by the trial Court as the same was registered way back in the year 1998 much before the incident taken place and there were no occasion as such at that point of time for the parents of the victim who have recorded the said date of birth wrongly. The birth certificate having been issued under Section 12/17 of the Birth & Death Registration Act, 1969 would have a presumption of truth under Section 35 of the Evidence Act as such as the father of the victim as such apart from his cross examination when the said certificate/document was put to him could not explain whether it was incorrect certificate or pertains to some other person.

21. As per the law laid down by the Apex Court in ***Madan Mohan Singh and others vs. Rajni Kant and others 2010(10) SCR 30***, the date of birth entered in the birth register could impeach evidence of entries made in the school register/certificate on account of the presumption in favour of such entries made by the statutory authorities. The Apex Court was dealing with the issue of legitimacy of the children born and the entries made in the school register and also the entries made by the officials under the statute as such. Resultantly, it was held as under:-

“16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under [Section 35](#) of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: [Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors.](#) AIR 1965 SC 282; [Birad Mal Singhvi Vs. Anand Purohit](#) AIR 1988 SC 1796; [Vishnu Vs. State of Maharashtra](#) (2006) 1 SCC 283; and [Satpal Singh Vs. State of Haryana JT 2010 \(7\) SC 500](#)).

22. A Division Bench of this Court also in a Letters Patent Appeal No.1613 of 2014 titled as ***Ambika Kaul vs. Central Board of Secondary Education and others***, decided on 21.05.2015, while dealing with the issue of correction of date of birth, held that the birth certificate is a public record of births & deaths and must prevail over the certificate issued by the school authorities while affirming the earlier Division Bench judgment in ***Resham Singh vs. Union of India and another 2008(1) PLR 621*** and also held that

reporting of birth is to be done within the prescribed period and it was mandatory as such. The relevant paragraph of the judgment reads as under:-

“16. We respectfully agree with the views expressed by the Division Bench of this Court in Resham Singh’s case (supra) that the birth certificate is a public record of births and deaths and must prevail over the matriculation certificate issued by school authorities. But the issue required to be examined is that even though the date of birth recorded in the matriculation certificate is at variance with the date of birth as recorded in the Register of Births & Deaths, whether such person is entitled to seek correction in the matriculation certificate relying upon the birth certificate. We find that he is estopped from disputing the entry in the matriculation certificate, which is made basis for employment in the public service in terms of the relevant recruitment Rules.”

23. As per the said certificate the victim would have completed 18 years of age on 28.10.1998 and incident is of 05.10.2016 and thus she was just short of 18 years which is the age of consent as provided under Section 375 of the Indian Penal Code. As per the definition of rape, if the victim is under 18 years of age, the consent element is immaterial. The quantum of punishment thus would have accordingly to be seen since the provisions of POCSO Act would be applicable and if the child is below 16 years of age, Sections 3 and 4 of the POCSO Act would come into play since it is provided that if the child is below 16 years, the sentence would not be less than 20 years under Section 4(2) of the POCSO Act whereas it would not be less than 10 years but may extend to imprisonment for life under Section 4(1) of the Act. Thus, the trial Court fell into material error as such by ignoring the certificate produced by the defence and giving preference to the School Leaving Certificate which depicts a different date of birth and made the victim three years younger.

Conduct of the victim:-

24. The first question which arises for consideration is whether the prosecutrix as such was kidnapped from the custody of her guardians at the knife point as projected by the prosecution with intention to compel or seduce to illicit intercourse and whether she was criminally intimidated. Apparently, the appellants-accused were arrested as noticed on 08.10.2016 the date when the crime scene had been visited. The memo of demarcation had been got done by the Investigating Agency vide Ex.PL which was duly signed by accused Neeraj and attested by constable Sunil Kumar and the Investigating Officer and a perusal thereof would go on to show that the statement had been made by the accused Neeraj to the effect that both the appellants were going to Ballabgarh from their village Garkhera in an auto and on the way they met the complainant who was going to Atali where her school was situated. Being acquainted with them, she sat in the auto and thereafter she had been taken to Ballabgarh at the knife point used for vegetable cutting. As per the version of the prosecution which had been put down in the demarcation report was that the complainant had been left with accused-appellant No.2 at Khattar Chowk and appellant No.1 had gone to take the key of the room built over the shop Sai Foot Wear where he used to work from the owner on the pretext of keeping the card boards there. Then the complainant was taken to the said room from the back side way by threatening her of dire consequences and thereafter both the accused committed rape forcibly upon her without her consent. Thereafter at 2.30 pm the accused-appellant Neeraj asked accused-appellant Naveen to leave the complainant in her village in the auto and threatened the complainant that if she told about it to someone, she would be killed. The knife was stated to have been thrown on the way. A similar statement of accused Naveen Ex. PL dated 08.10.2016 was also got recorded

to the effect that since accused-appellant Neeraj used to talk with the complainant, he told the complainant to sit in the auto and at the knife point she was taken to Ballabgarh. Accused Neeraj went to his shop at Sai Footwear to collect the key of the room and he stayed standing alongwith complainant at Khattar Chowk under the threat of life. Thereafter they both had taken the complainant in the room built on the Sai Foot wear shop and committed rape and thereafter accused Naveen had left the complainant to her village in the auto.

25. In her examination in chief before the trial Court, complainant stated that she knew both the accused-appellants since her childhood as both were her neighbourers and both were vagabonds. She was forcibly made to sit in the auto by both the accused when she was going to school on foot and threatened her at the knife point. The auto driver had covered his face with a cloth and they had reached at Ballabgarh where accused Neeraj used to work and was taken to a room on the first floor of the shoe shop. The auto driver had gone away and thereafter she was violated twice each and then released at 2.30 p.m. by both the accused by hiring an auto rickshaw and they had left her at bus stop of village Garkhera. In her examination she further stated that accused Neeraj used to tease her on various occasions when she went to attend the school and even after school was over. Delay part has been explained by the complainant on the ground that she was frightened and narrated the incident only on the next day i.e. 06.10.2016 and the matter was reported to the police. In her cross examination, it was put to her that village Atali was approximately 11-12 kilometers away from her village and there were at least six villages between her village to Ballabgarh and the way was fully urbanized to a large scale and there were speed breakers on the road leading from her village to Ballabgarh. In cross examination neither she could tell the number of the auto

rickshaw nor the name of the driver or his physique and it was admitted that it takes half an hour to reach Ballabgarh from her village by auto rickshaw and on the way she had made hue and cry but nobody had come for her help and the driver of the auto rickshaw was helping the accused. This is a complete improvement over the first version which was recorded before the police in which there is no such explanation regarding hue and cry or the driver being associated and helping the accused. She also sought to explain the omission not to complain to the driver of the auto rickshaw on her way back on the ground that he was driving the same at full speed even at the time of passing over the speed breakers. She admitted that she had made complaint to her parents about the eve teasing and her mother had also visited the house of accused Neeraj in this regard. She also admitted that she had not given any fist blow or nail scratches or teeth bite upon the accused at the time of commission of offence and there was no resistance as she was threatened.

26. The statement recorded before the Magistrate under Section 164 of the Code of Criminal Procedure (Ex.PB) also does not mention any fact that she had made any attempt to raise hue and cry at any point of time or that the driver of the auto rickshaw who had taken her to Ballabgarh knew about the threat and helped the accused. The statement is categorical that both the accused had dropped her back in an auto which is similar to the first version Ex.PA on the basis of which the FIR was recorded which is in contradiction to the statement of the accused got recorded at the time of demarcation Ex.PL and Ex.PM that only accused Naveen had dropped her back to her village.

27. The statement of Lakhan, PW21, the employer of appellant No.1, is also to be considered after proper appreciation as apparently it is the case of the prosecution that accused Neeraj had gone to the shop for some work and came back to the shop for the second time. A perusal of his statement would

go on to show that on 5.10.2016 at 9.00 a.m., the accused Neeraj came to his shop and took the key of the room on the pretext to keep the empty card board of shoes in that room and after some time he had come back to the shop. On 08.10.2016 he had come to know that the appellant Neeraj had committed rape upon the prosecutrix in that room on that date and he came to know only when the police officials reached there and the recovery of one check shirt, half saree and card boards was made from the spot in his presence which he had duly identified. He further stated that accused Naveen used to come to his shop frequently with accused Neeraj as he was working in a nearby shop. In cross examination he stated that he had not seen accused Naveen in his shop on that date and neither had he also seen the prosecutrix on that date. He had, however, explained that the way of the room on the first floor was from the back portion of the shop and he had not noticed anything unusual on the room above his shop on that date.

28. These facts would go on to show that apparently the victim travelled 12 kilometers for more than half an hour with the appellants and therefore, the fact that she was kidnapped under the knife point is highly doubtful. She was known to the appellants who are stated to be the residents of the same village and the police had made no efforts as such to identify the auto rickshaw in which she was kidnapped or recover the knife in question. The allegation was that the vegetable knife was being carried earlier in the morning while going to work and thereafter thrown on the way. The said knife was never recovered which would go on to show that the story putforth by the complainant and projected by the prosecution and accepted by the trial Court cannot be rightly said to be have any substance which aspect has not been examined in a proper manner by the trial Court. In such circumstances, the conviction as such recorded under Sections 363 and 366 of the Indian Penal

Code is not liable to be sustained. It is also to be noticed that the prosecution has not made any effort as such to bring on record the details of the auto rickshaw in which she had travelled and at which point also she had not made any hue and cry.

Delay of two days and Effect:-

29. The delay in lodging of the FIR for a period of two days is also another reason as such which has given sufficient time to the complainant to enlarge the scope of false implication which aspect has not been kept in mind. The explanation given that she was frightened has to be examined also from the statement of her father that her condition was bad at the time when she reached and on repeated asking she had disclosed to him and his wife. Thereafter they took her to Chhiansa police station but the police refused to take any action. Similar exercise had been conducted on 06.10.2016 and they had gone to the Women Police station where they had been referred to Ballabgarh police station in the late evening hours and on 07.10.2016 they went to Ballabgarh police station and got registered the FIR.

30. The father of the prosecutrix had denied the birth certificate Mark D1 showing her date of birth as 28.10.1998 and stated that he could not say whether the document pertained to his daughter or not though his name and his wife's name figure in the same as she is also known as Kela Devi and Lacho. He also stated that he had moved an application to the police station Chhainsa regarding eve teasing by both the accused persons and his brothers but he has no such proof. He had also admitted that there is a distance of 12 kilometers between their village Gadkhera to Ballabgarh and eight villages fall in between the same and there are three to five speed breakers in each village and there are shops on both sides of the road and about 30 to 45 minutes time it would take to reach from Atali to Ballabgarh. He denied the suggestion that

they had falsely implicated accused Neeraj as he had refused to marry with his daughter and the complaint was lodged only to save the reputation at the instigation of her daughter. The appellant was only 19 years of age at the time of framing of the charges in December-2016 and the chances of having an affair with appellant No.1 cannot be ruled out.

Defence Case:-

31. In the statement recorded under Section 313 of the Code of Criminal Procedure the accused-appellants sought to explain their false implication and it is pertinent to be kept in mind as the statement of accused-appellant No.1 is that he had remained in the shop from morning 9.00 A.M. to 7.00 P.M. and the prosecutrix had fallen in a one sided love with him and he had neglected to marry with her. The defence of accused-appellant No.2 Naveen is that he had convinced accused-appellant No.1 not to marry with the prosecutrix on account of same caste, gotra and village and therefore, the complainant had falsely implicated him.

32. In defence, the appellants had also produced the proprietor of the adjoining shop-Shri Krishna Ghee Bhandar, namely, Amit Bansal as DW1 who stated that he knew that the said appellant-Neeraj Kumar was working as a helper in Sai Footwear shop. It is his statement that he had not heard about the said occurrence on 05.10.2016 and the CCTV footage had been taken from the shop by someone to which he is not aware off and it was given only on account of the fact that the incident had taken place. Mahesh Kumar, Head Master of MVL Public High School, village Atali, who was examined as DW2, had stated that the complainant was not a regular student and no attendance of the complainant was marked in the school as she was neither a regular student nor was she using the school bus. The certificate of Births & Death showing the date of birth of the complainant as 28.10.1998 (Ex.DW3/A)

was duly proved by Computer Clerk DW3-Ravinder, which would go on to show that the complainant was close to attaining the age of 18 years on the date of incident i.e. 05.10.2016.

33. It is pertinent to notice here that accused-appellant Neeraj choose to get himself examined as DW4 under Section 313 of the Code of Criminal Procedure and stated that he was working in a shop located in a busy market in Ballabgarh near police station and the distance between his house and the shop was about 12-13 kilometers and that there were various villages in between and there were various speed breakers, shops and houses located on both sides of the road. The key was always kept by the owner of the shop and the prosecutrix had one sided love affairs and she belongs to the same caste, Gotra and the village and he had refused to marry her being co-villager and she had not mended her ways and falsely implicated him. He had denied that the complainant was taken to the shop but admitted in cross examination that the only way to reach at the first floor was from the back side of the shop.

Findings by us:-

34. The only inference which can thus be drawn from the above cumulative discussion of the evidence is that there was relationship as such apparently between the appellant No.1 and the complainant and apparently it is on that account that the place of incident is also the work place of appellant No.1. Apparently, the factum of injuries as such on the complainant have come forth which would go on to show that the offence as such had taken place without the consent of the complainant which is immaterial as she was below 18 years of age if Ex.DW3/B is kept in mind. The medical examination which was conducted on 07.10.2016 would go on to show that there was alleged history of sexual assault two days back by two boys and the victim was well developed and had reached menstruation at the age of 13 years. The hymen

was torn and ruptured with healed margins and there was no mark of external injury seen though there were multiple reddish abrasions of variable sizes over back of left hip, on the basis of which the opinion had been given and the possibility of sexual intercourse cannot be ruled out. The said report reads as under:-

“Alleged history of sexual assault two days back by two boys in a room morning around 9.00 AM on dated 05.10.2016.

Age of Menarche: 13 years

LMP: 07.10.2016

On G/E the patient is well oriented to time, place & person.

Secondary sexual characters well developed.

L/E: Libia, Minora, Majora well developed, Hymen torn & ruptured with healed margins. No mark of external injury seen, bleeding bpv present.

ADV: UPT, USG lower abdomen.

Refer to radiology department for age verification.

I have shown all my injuries to DOD & I am willing for Medico Legal Examination. I have changed my clothes since the time of incident.

She has changed her clothes since the time of incident, therefore, the clothes are not being sent for examination.

1. MULTIPLE REDDISH ABRASIONS OF VARIABLE SIZES RANGING FROM 0.1CM X 0.1 CM AND 0.2 CM X 02CM OVER BACK OF LEFT HIP NOT SIMPLE-KOW-BLUNT-PROBABLE D I WITHIN 48 HOURS.

OPINION: IN MY OPINION, THE POSSIBILITY OF SEXUAL INTERCOURSE CANNOT BE RULED OUT.”

The same was duly proved by the prosecution by examining Dr. Sangeeta Aggarwal, Medical Officer as PW4.

35. The report of the Forensic Science Laboratory (FSL) as such also could not link the appellant No.2 in any manner with the crime. It is not disputed that the salwar worn by the victim and one black & white full sleeved shirt, one pinkish coloured Saree along with five pieces of cardboard carton

were taken into possession by the police from the crime scene. The human semen was detected on the Salwar but not on any other exhibits including the vaginal swab. As per the report of Forensic Science Laboratory Ex.PX, the DNA report as such was also inconclusive in as much as the DNA extracted from the Salwar if compared with the blood samples of the accused-appellants was also inconclusive as there was no amplification of male DNA extracted from the salwar worn by the victim which was necessary to compare and to co-relate as such to fix the liability upon the appellant No.2 and therefore, the opinion was not given by the Assistant Director (Serology) Forensic Science Laboratory, Madhuban.

36. In such circumstances, the medical report as such not connecting the appellant No.2, the offence of committing rape would necessarily mean that the benefit of doubt as such has to be granted to appellant No.2 as he apparently seems to have been involved only on account of the fact that due to working in the neighbourhood of appellant No.1 and being resident of the same village and he was a co-passenger in the auto when all of three came to Ballabgarh.

37. It is also apparent to notice that as per case of the police itself, as per demarcation reports Ex.PL and Ex.PM, appellant No.2 Naveen had gone and dropped the victim back to her village by hiring auto rickshaw. The said demarcation reports are duly signed by the accused-appellants and also by Constable Sunil Kumar, who has been examined as PW14 and have been relied upon by the prosecution as the said witness has stated that the said memos were signed by the accused-appellants as per their respective rules and were attested by him and were further sent to the Investigating Agency. No effort was made to locate the said auto driver who dropped back the victim and appellant No.2 Naveen in the village. In contradiction, the victim stated that

both the accused-appellants had gone to drop her back in the village which is a contradiction again to the statement of the employer who was duly examined as PW21, namely, Lakhan, who had categorically stated that appellant No.1- Neeraj after taking the key had come back to the shop. In cross-examination, by the defence counsel he has stated that the said appellant No.1 remained at the shop after coming back after 15-20 minutes. The police never recovered the knife as such on the basis of which it is stated that she was kidnapped and thus, these are the discrepancies which have been overlooked by the trial Court. After the incident even if the appellants as such were to release the victim, there was no occasion for either of them to have accompanied her back to her village. Apparently, the victim had gone back on her own after having been violated by appellant No.1 and not able to accept the said fact later on implicated both of them on account of the fact that they were known to each other and defence was that appellant No.2 standing in the way of permanent relationship. Thus, appellant No.2 is entitled for the benefit of doubt.

38. The charge framed under Section 12 of the POCSO Act by the trial Court on 23.12.2016 reads as under:-

“Fifthly, on the same date, time and place, you the above named accused committed sexual assault upon complainant cum prosecutrix (name withheld to protect the identity) minor daughter (under 16 years of age) of Datta Ram and thus you thereby committed an offence punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012 and within the cognizance of this Court.”

39. Section 12 of the POCSO Act provides for punishment for sexual harassment upon child for which punishment can be extended to three years. The sexual harassment is defined under Section 11 of the Act which talks about utterance of words, sounds or gestures and exhibitions of a body or a

part to a child or shows any object to a child in any form or media for

pornographic purposes. Similarly, it talks about watching or contacting a child and repeatedly following or threatening to use any part of the form of media, or involvement of the child in a sexual act and enticing a child for pornographic purposes. Thus, the charge as reproduced above, would be defective to the extent under Section 12 of the POCSO Act under which the sentencing has been done for one year.

40. The last charge framed under Section 6 of the POCSO Act is punishable for aggravated penetrative sexual assault, which is defined under Section 5 of the POCSO Act, which would only be applicable under Section 5(m) of the POCSO Act if there was penetrative sexual assault on a child below twelve years. The correct charge should have been framed under Section 3 of the POCSO Act and the punishment would be prescribed under Section 4 of the Act which we proposed upon Appellant No.1 by modifying the conviction as such both under Section 376 of the Indian Penal Code read with Sections 3 and 4 of the POCSO Act.

41. Resultantly, the charge of gang rape framed under Section 376-D of the Indian Penal Code has to fail whereby the sentence of rigorous imprisonment of twenty years alongwith fine was awarded to both the appellants. Accordingly, the conviction as such awarded under Section 376-D of the Indian Penal Code is modified and the accused-appellant No.1 is sentenced to undergo rigorous imprisonment for a period of 10 years under Section 376 of the Indian Penal Code read with Sections 3 and 4 of the POCSO Act which is the minimum prescribed keeping in view the fact that the victim was just short of 18 years and the appellant No.1 was 19 years of age. The sentence imposed under Section 506 of the Indian Penal Code regarding criminal intimidation, however, is sustained qua appellant No.1 whereas qua appellant No.2 in view of the findings given there is no question as such for

appellant No.2 to give any threat of criminal intimidation and therefore, he is acquitted of the charge of criminal intimidation under Section 506 of the Indian Penal Code. Resultantly, the conviction recorded under Section 6 of the Protection of Children from Sexual Offences Act, 2012 qua appellant No.2 is also set aside. The conviction under Sections 363/366 of the Indian Penal Code of appellant No.1 is also set aside.

42. Resultantly, the appeal is partly allowed acquitting accused-appellant No.2 Naveen of all the charges framed against him and he be released forthwith, if not required in any other case.

43. However, the sentence awarded upon accused-appellant No.1 Neeraj is modified to the extent that he shall be sentenced to undergo rigorous imprisonment for a period of 10 years under Section 376 of the Indian Penal Code read with Sections 3 and 4 of the POCSO Act and fine of Rs. 10,000/- and Rs. 1,000/- shall be liable to be deposited and in case of default, he shall undergo three months and one month rigorous imprisonment respectively. The sentence imposed under Section 506 of the Indian Penal Code regarding criminal intimidation, however, is sustained qua appellant No.1. All the sentences shall run concurrently and he shall be entitled to adjust the undergone period against the 10 years of sentence imposed.

(G.S.SANDHAWALIA)
JUDGE

(VIKAS SURI)
JUDGE

19.07.2024
ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No