



242 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1160-2023(O&M)
Reserved on: 14.10.2024
Pronounced on: 18.10.2024

Avneet Singh

....Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Lakhwinder Singh Mann, Advocate
for the appellant.

Mr. Vikas Bharadwaj, AAG Haryana.

HARPREET SINGH BRAR, J.

1. The present appeal is preferred against the judgment of conviction dated 10.02.2023 and order of sentence dated 13.02.2023 passed by the learned Additional Sessions Judge, Fast Track Court under POCSO Act, Ambala in the case stemming from FIR No. 44 dated 20.05.2018 registered under Sections 376(2)(n), 328, 506 IPC at Police Station Women, Ambala. The appellant was sentenced as follows:

Offence under	Sentence
Section 4 Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act')	Rigorous imprisonment of 7 years and a fine of Rs. 10,000/-, in default of which further rigorous imprisonment of 3 months.

FACTUAL BACKGROUND

2. As alleged by the prosecution, succinctly, the facts of the present case are that in 2018, the appellant took the prosecutrix to the house of his



friend Kala on the pretext of a party. The prosecutrix was offered a beverage on consumption of which, she fell unconscious and the appellant raped her. Thereafter, he took her to a hotel near M.M. College where he threatened her and raped her again. Under the garb of marrying her, the appellant continued to rape her at different places and threatened her. On 08.02.2018, the prosecutrix was taken to a room in Galaxy Mall where the appellant raped her again. On instigation by the appellant, the prosecutrix consumed some poisonous substance and was admitted in the hospital by her father.

3. The appellant was charged with offences under Sections 328, 376(2)(n) and 506 IPC to which he pleaded not guilty and claimed trial. However, the charges were amended subsequently and the appellant was charged under Section 4 of the POCSO Act along with Sections 328, 376(2)(n) and 506 IPC, to which the appellant pleaded not guilty as well. In order to establish its case, the prosecution examined 14 witnesses. The statement of the appellant under Section 313 Cr.P.C. was recorded wherein he pleaded false implication but did not examine any witness in his defence. After assessing all the material available on record, the learned trial Court passed a guilty verdict against the appellant and sentenced him in the abovementioned terms. Aggrieved by the same, the present appeal was preferred by the appellant.

CONTENTIONS

4. Learned counsel for the appellant, *inter alia*, contended that the learned trial Court has erred in discarding the statement given by the prosecutrix under Section 164 Cr.P.C. when she handed over her Aadhar card indicating her date of birth to be 01.07.1992 to the police. The prosecutrix subsequently moved an application to correct her date of birth in the Aadhar card to 07.07.2018 only to falsely implicate the appellant. Moreover, an



application to place on record the High School Certificate(Ex. PX) of the prosecutrix, which itself is an illegally obtained forged and fabricated document, was moved one and a half years after the registration of FIR(supra) The said document was only placed on record to invoke the provisions of POCSO Act in order to torment the appellant. Moreover, there are material contradictions between the depositions of the prosecutrix (PW1) and her father namely Suresh Yadav(PW8). Further, Dr. Parvinder Kaur, who appeared as PW-9, medico-legally examined the prosecutrix but did not record any injury or struggle marks on her person. The MLR also makes it clear that the prosecutrix was unsure of her age and a referral was sent to the Radiologist and the Dental Surgeon for estimation of her age, which was never done. Finally, PW11- Dr. Sanjay Kumar, who examined the prosecutrix at the first instance at Civil Hospital, Ambala City, admitted in his cross-examination that the prosecutrix did not give any history of sexual assault. As such, the learned trial Court has failed to appreciate the evidence available on record and erroneously delivered a judgment of conviction, which deserves to be set aside. Learned counsel places reliance on the judgment rendered by a Division bench of this Court in ***Sumit vs. State of Haryana 2024(1) R.C.R.(Criminal) 762***, the Guhati High Court in ***Padi Tamo vs. The State of A.P. and another in Crl.A/19 of 2023 decided on 21.02.2024*** and the ***Delhi High Court in State (NCT of Delhi) vs. Ranjeet @ Ganja @ Sombar Roy AIR Online 2019 Del 1662***.

5. Learned State counsel submitted that the impugned judgment has been passed by the learned trial Court after duly appreciating the complete evidence on record which establishes the guilt of the appellant beyond the shadow of reasonable doubt and therefore, the said impugned judgment of conviction does not warrant any interference by this Court.

**OBSERVATION AND ANALYSIS**

6. Having heard the learned counsel for the parties and after perusing the record with their able assistance, it transpires that the narrative put forward by the prosecution is laden with ambiguity. The prosecutrix, while appearing as PW1 deposed that she passed class 10th in year 2014, however, in her statement under Section 164 Cr.P.C., she deposed that she was studying in 10th standard in 2015. The High School Certificate (Ex. PX) based on which the prosecutrix has been declared to be a child, has been issued by Board of High School and Intermediate Education, Uttar Pradesh while PW8- her father has stated that she appeared for her matriculation examination when she was a student of Government School, Ambala City. Further, it is the case of the prosecution that the appellant went to Sonapat with the brother of the prosecutrix to fetch her High School Certificate, which indicates she failed to submit the same at the first instance, in spite of it being available with her and presented her Aadhar card to the Investigating Officer instead. The High School Certificate (Ex. PX) was brought on record by moving an application dated 28.01.2021 under Section 311 Cr.P.C read with Section 91 Cr.P.C, approximately two and a half years after the registration of FIR(supra). However, the same was objected to by the defence. Further still, the Investigating Officer, in her deposition as PW12, has specifically stated that the prosecutrix disclosed her age to be 23 years when she first approached her on 18.05.2018 in order to make a statement. Moreover, a perusal of the MLR indicates that the prosecutrix stated her age to be 20 years but was unsure about her date of birth. Accordingly, PW9- Dr. Parvinder Kaur had referred the matter to a radiologist and dental surgeon for estimation of age. However, the prosecutrix (PW1) has admitted that she was not examined by them for the said purpose.



7. In view of the glaring discrepancies in the narrative put forward by the prosecution, the learned trial Court ought to have taken a cautious approach before exhibiting the High School Certificate (Ex. PX), as the contents of the document do not align with the circumstances. In fact, the application under Section 311 read with 91 Cr.P.C. to place the same on the record was moved when the trial was at the final stage, which begs the inference that it was only done to attract the provisions of the POCSO Act. While the entire case of the prosecution hinges on the age of the prosecutrix, no witness from any of the educational institutes attended by her have been examined or documents of admission etc. procured in order to establish a timeline and inspire confidence in the circumstances alleged as also the High School Certificate (Ex. PX). Further, both the contents and existence of the High School Certificate (Ex. PX) were objected to by the defence, which made it necessary to lead evidence to speak to the accuracy of the contents of the same as even if it was an original document but that would not automatically lead to the inference that its contents are correct. A two Judge Bench of the Hon'ble Supreme Court in ***Narbada Devi Gupta vs. Birendra Kumar Jaiswal and another, 2003 (8) SCC 745***, speaking through Justice D.M. Dharmadhikari, held as follows:-

"16. ...The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue..."

8. It is trite law that the Special Courts are first required to determine the age of the victim under Section 34 (2) of the POCSO Act and only if the victim is found to be a child within the meaning of Section 2(1)(d) of the POCSO Act, the presumption under Sections 29 and 30 of the Act would be



imposed on the accused. Since the determination of the age under Section 34(2) of the POCSO Act is a condition precedent before fastening the presumption under Sections 29 and 30 of the POCSO Act, the same cannot be invoked in the present case as the date of birth of the prosecutrix remains unproven. As such, she cannot be safely considered to be a child in terms of Section 2(1)(d) POCSO Act, beyond the shadow of reasonable doubt. Reliance in this regard can be placed on ***Dewan Singh alias Ram Singh vs. State of Haryana 2023(4) R.C.R.(Criminal) 17.***

9. Further, there are material discrepancies in the statements made by the prosecutrix. In her deposition as PW1, the prosecutrix mentions that her elder sister namely Gunjan and her mother were aware of the alleged sexual assault. However, neither have their names been mentioned in the complaint (Ex.P-1) or her statement under Section 164 Cr.P.C.(Ex.P-4), nor have they been cited as witnesses for the prosecution. Additionally, PW1-the prosecutrix has stated that when her family found out about her relationship with the appellant, she moved to her maternal grandmother's place in Lucknow. However, her father, who appeared as PW8, has categorically stated in his cross-examination that they do not have any relatives in Lucknow. Further, the prosecutrix has alleged that she kept quiet about the incidents of sexual assault as the appellant threatened to leak her obscene pictures and videos, however, no such pictures or videos have been shown to exist before the Court. Rather, all relevant data was found to be deleted when her mobile phone (Ex. MO/1) was accessed in Court. Curiously, the factum of the appellant being in possession of obscene photographs or videos was not mentioned by the prosecutrix in either the complaint (Ex. P-1) or the statement recorded under Section 164 Cr.P.C. (Ex. P-4).



10. As per the prosecution version, the prosecutrix was taken to the house of one Kala, friend of the appellant, on the pretext of a birthday party. The prosecutrix, in her cross-examination as PW1, has admitted that the house of Kala was in a thickly populated area and has a shop on the ground floor. As such, it is suspicious as to how people in the neighbourhood would have failed to hear any alarm, if raised, by the prosecutrix. Surprisingly, for reasons known best to the prosecution, said Kala was not even joined in the investigation.

11. Furthermore, the prosecutrix was admitted to the hospital in a poisoning case on 20.05.2018 and was tended to by PW11-Dr. Sanjay Kumar, who categorically stated that while she did test positive for aluminium phosphide, the prosecutrix did not make any mention of a history of sexual assault. However, the prosecutrix, in her cross-examination as PW1, admitted that no blood sample or gastric lavage was taken by the doctors for determining incident of poisoning.

12. While it is settled law that the conviction in a case of sexual assault can be made solely on the testimony of the prosecutrix, however, such testimony must bear sterling character, which does not appear to be the case with respect to the matter at hand. 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.”

13. 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.”

14. Furthermore, the first instance of sexual assault allegedly occurred in March 2015 while the last occurrence was on 08.02.2018. The prosecutrix has admitted in her statement under Section 164 Cr.P.C. that the appellant has raped her about 25 times on the pretext of marriage yet, curiously, the



prosecutrix did not apprise anyone of the matter in about 2 years. The prosecutrix, while appearing as PW1, stated that she used to meet the appellant at the boundary wall of her house and that he also provided her with a contraceptive pill. Admittedly, the prosecutrix also visited the house of the appellant after his arrest and a video of the said incident was recorded by his family wherein she stated that she had come to compromise the matter. As such, the proximity in age of the parties as well as other material available on record suggests that a consensual relationship existed between the appellant and the prosecutrix, which subsequently deteriorated.

15. A three Judge bench of the Hon'ble Supreme Court in ***Maheshwar Tigga vs. State of Jharkhand (2020) 10 SCC 108*** has held that the misconception of fact in terms of a false promise to marry cannot be spread over a long period of time. Speaking through Justice Navin Sinha, the following was held:

“14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest.”

Reliance in this regard can also be placed on ***Pramod Suryabhan Pawar vs. State of Maharashtra (2019) 9 SCC 608***.

16. 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 an absolute mechanical form, devoid of context and nuance. Therefore, in view of the proximity of age between the parties and the evidence pointing towards a consensual relationship gone sour, this Court is of the considered opinion that it would not serve the interest of justice to convict the appellant solely for the reason of the alleged age of the prosecutrix.

17. 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

18. In view of the above discussion, this Court finds that learned counsel for the appellant has been successful in establishing his case. Hence, the present appeal is allowed and consequently, the impugned judgment dated 10.02.2023 and order of sentence dated 13.02.2023 are hereby set aside.

19. The appellant stands acquitted of the charges framed against him in the present case and his bail bonds and surety bonds also stand discharged.



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

(HARPREET SINGH BRAR)
JUDGE

18.10.2024
Neha

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