

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-243-2021 (O/M)

Reserved on : 31.01.2024

Date of decision : 16.02.2024

State of Haryana

..... Appellant

Versus

Monu and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER

Present :- Mr. Manish Dadwal, AAG Haryana
for appellant-State.

Mr. Ivneet Singh Pabla, Advocate
for respondent No. 1.

Mr. Pardeep Kumar Rapria, Advocate
for respondent No. 2.

Mr. Deepak Kumar, Advocate
for respondent No. 3.

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HARSH BUNGER, J.

1. The instant application seeking leave to appeal is preferred against judgment dated 17.02.2020, passed by the learned Additional Sessions Judge (Exclusive Court), Jhajjar, whereby the respondents have been acquitted of the charges under Sections 376/506/120-B IPC and under Section 6 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act').

2. Vide order dated 05.07.2022, the Lower Court Record was called for. The same was received on 01.11.2022.

3. The prosecution case, as per the complaint of the complainant (father of the victim) is that he was working in Sun Agro Zine Pvt. Ltd Factory in Kablana and he alongwith his family was residing in the same factory. It was stated by the complainant that he had two daughters and one son and his elder daughter was studying in 12th class and his younger daughter (victim) was studying in 9th class in M.D. Senior Secondary School, Bhupania and she used to go to her school by school bus. It was stated that on 21.12.2017, his daughter (victim) went to the school by school bus and returned home and thereafter, she changed her school uniform. At that time, they were working in the factory. It was stated that at about 11.00, his daughter (victim) left her house. The complainant alleged that he tried his level best to search his daughter (victim) on his own, but he could not succeed. It was alleged that the victim was confined by someone at some secret place. Accordingly, he prayed that his daughter be searched and legal action be taken against the culprit.

4. Based upon the aforesaid complaint (Ex.PW2/A), a formal FIR No. 1117 dated 24.12.2017 (Ex.PW8/A) was registered under Section 346 IPC at Police Station Jhajjar and the investigation was commenced. During investigation, the victim was medico legally examined, vide MLR (Ex.PW9/A) and the statement of the victim under Section 164 Cr.P.C. (Ex.PW1/B) was recorded. The certificate of date of birth of victim (Ex.PW23/A) was also taken into possession by the police. Thereafter, the accused were arrested and interrogated. During interrogation, respondents-accused admitted their guilt. Respondents-accused were also got medico

legally examined, vide MLRs (Ex.PW17/A, Ex.PW17/B, Ex.PW21/A and Ex.PW21/B) respectively. After completion of investigation, final report under Section 173 Cr.P.C. was presented before the Court. Thereafter, respondents-accused were charge-sheeted for commission of offences under Sections 376/506/120-B IPC and under Section 6 of POCSO Act, 2012, to which respondents-accused pleaded not guilty and claimed trial.

5. During the trial, the prosecution examined 23 witnesses, namely victim (PW1), complainant/father of the victim (PW2), mother of the victim (PW3), Nikesh, Halka Patwari, Jaitpur (PW4), Ct. Vikram (PW5), Pardeep, Halka Patwari, Bahadurgarh (PW6), EASI Kuldeep (PW7), ASI Ranbir Singh (PW8) Dr. Savita, M.O. G.H. Jhajjar (PW9), Ct. Naveen (PW10), HC Sandeep (PW12), Sneh Lata, Member CWC, Jhajjar (PW13), ASI Rakesh Kumar (PW14), Sandeep Sharma, Nodal Officer, Reliance (PW15), Rohtash Sharma SDE (PW16), Dr. Anurag, M.O. G.H. Jhajjar (PW17), HC Sonu (PW18), Owner of vehicle No. HR-14-L-3840 (PW19), Inspector Somvir (PW20), Dr. Abhimanyu, M.O. M.C.H. Unit Charkhi Dadri (PW21), Dr. Rohit Kumar, Nodal Officer, Bhartia Airtel Ltd. (PW21), Shri Anil Kumar, the learned Magistrate (PW22) and Arvind Garewal, Statistical Clerk (PW23).

6. In support of its case, the prosecution had also produced documentary evidence in the form of Ex.PW9/A (MLR of victim), Ex.PW9/B (Affidavit of Dr. Savita), Ex.PW10/A (Affidavit of Ct. Naveen), Ex.PW12/A (Disclosure Statement of accused Monu), Ex.PW12/B (Demarcation Memo at the instance of accused Monu), Ex.PW12/C

(Disclosure statement of accused Pankaj), Ex.PW12/D (Demarcation Memo at the instance of accused Pankaj), Ex.PW12/E and Ex.PW12/F (Recovery Memos), Ex.PW12/G (Recovery Memo), Ex.PW12/H (Disclosure Statement of Vikas), Ex.PW12/I (Demarcation Memo at the instance of accused Vikas), Ex.PW12/J (Disclosure Statement of accused Jitender), Ex.PW12/K (Demarcation Memo at the instance of accused Jitender), Ex.PW12/L and Ex.PW12/M (Recovery Memos), Ex.PW13/A (Counselling Report), Ex.PW14/A (FIR), Ex.PW14/B (Endorsement), Ex.PW16/A (Application Form), Ex.PW16/B (Application Form), Ex.PW17/A (MLR of accused Pankaj), Ex.PW17/B (MLR of accused Monu), Ex.PW17/C and Ex.PW17/D (Affidavits of Dr. Anurag), Ex.PW19/A (Superdari Order), Ex.PW21/A (MLR of accused Vikas), Ex.PW21/B (MLR of accused Jitender, Ex.PW21/C (Affidavit of Dr. Abhimanyu), Ex.PW22/A (Application moved for recording statement of victim under Section 164 Cr.P.C.), Ex.PW22/B (Certificate issued by the learned Magistrate), Ex.PW23/A (Birth Certificate of victim), Ex.PX (RFSL report) and Ex.PB (DNA report).

7. The defence did not lead any oral/documentary evidence in support of its case.

8. After the conclusion of the trial, the trial Court acquitted the respondents-accused.

9. The grounds considered by the trial Court for acquitting the respondents-accused can be summed up as under :-

- (i) the victim (PW1) when stepped into the witness box, nowhere stated that accused had enticed her and she was thereafter

sexually assaulted/raped by them ;

- (ii) the victim stated that she had gone to meet sister of her mother at Aasam without informing her family ;
- (iii) to prove the minority of the victim on the date of occurrence, prosecution placed on record photocopy of birth certificate (Ex.PW23/A), issued by the Registrar Births and Deaths, Municipal Corporation, Yamuna Nagar, Jagadhri, but the original certificate issued by the authority was not placed on record by the prosecution and no permission was taken by the prosecution for leading secondary evidence regarding the photocopy certificate of date of birth of victim and therefore, the same is inadmissible in evidence ;
- (iv) PW23 (Arvind Garewal, Statistical Clerk) had brought the original register pertaining to the entry of date of birth of victim as 17.10.2001. However, he admitted that the name of victim is written in different ink ;
- (v) prosecution examined 23 witnesses amongst whom the complainant (PW2) and victim (PW1) were the star and material witnesses to the case of the prosecution, but they could not support the case of the prosecution and turned hostile and categorically denied that accused were the persons who had taken away the victim and committed rape upon her.
- (vi) PW3 (mother of victim) also did not state anything incriminating against accused and testified that on 24.12.2017, her husband

made a missing report to the police (Ex.PW2/A), but her daughter had gone to meet her sister at Aasam without informing them. During her cross examination, she categorically stated that accused did not commit any offence against her daughter.

10. As regards the RFSL report (Ex.PX) and DNA report (Ex.PB), the trial Court returned the following finding :-

“ a bare perusal of the reports reveals that 1. Human semen was detected on exhibit-1 (underwear), exhibit-3 (underwear), exhibit-5a (underwear), exhibit-5b (jeans), exhibit-8a (underwear), exhibit-8b (jeans), exhibit-10 (swab) & exhibit-11 (swab). However, semen could not be detected on rest of the exhibits mentioned above. Suffice to say that exhibit-8a (underwear) exhibit-8b (jeans), exhibit-10 (swab) & exhibit-11 (swab) belongs to the victim and exhibit-1 (underwear), exhibit-3 (underwear), exhibit-5a (underwear) belongs to accused Pankaj, Monu & Vikas respectively. However, as per the D.N.A. Report (Ex.PB) it transpires that seminal strains on source of item No. 1A (underwear) & item No. 1B is matching with the D.N.A. profile of Jitender (Source of item No. 6) and not matching with the D.N.A. profile of Monu (Source of item no. 4), D.N.A. profile of Vikas (Source of item no. 7).

Needless to say that semen which was detected on the clothes of the victim had matched with the D.N.A. profile of Jitender (source of item no. 6) which proves that sexual intercourse was committed upon the victim but the fact remains that in her statement before the court the victim has categorically denied that rape was committed upon her by accused Jitender including remaining accused

namely Monu, Pankaj & Vikas. The relevant portion of the testimony of the victim as PW1 before the court is reproduced herein under :

“I was reading in 9th class in M.D. Senior Secondary School at Village Bupania, Bahadurgarh. Pankaj Dalal used to supply milk in our house. I had gone to meet my relatives without informing to my family members as I had gone to meet the sister of my mother namely Irma at Aasam. I have seen the accused Monu, Pankaj, Vikas and Jitender. They did not commit rape upon me. They did not entice me away. They did not administer me sleeping pills. I have seen the accused present in the court. They did not commit any offence against me”

Suffice to say, that in view of the aforesaid testimony of the victim she was declared as hostile by the learned Public Prosecutor for the State alleged to be suppressing the truth. Hence, in view of the above, the court has no hesitation to hold that in view of the aforesaid testimony of the victim, the D.N.A.s report filed by the prosecution become redundant with respect to the allegations of rape levelled by the victim in her statement under Section 164 Cr.P.C. coupled with the fact that prosecution has miserably failed to prove that victim was minor on the date of incident. Hence, the charges under Section 376/120B I.P.C. and Section 6 P.O.C.S.O. Act do not proved against accused beyond reasonable doubt, as alleged.”

11. Learned State counsel, while assailing the judgment of acquittal, passed by the trial Court, would argue that once the victim had got her statement recorded under Section 164 Cr.P.C. before Shri Anil Kumar, learned JMIC, wherein she categorically deposed that she was raped by

respondents-accused against her will on different occasions, which was further corroborated by RFSL report and DNA report, there was no occasion for the trial Court to discard the prosecution case. Learned State counsel submitted that once the semen detected on the clothes of the victim, had matched with the DNA profile of respondent-accused, namely, Jitender, there was no ground to hold that the prosecution had failed to prove its case against respondents-accused especially when the victim had been in the custody of respondent-accused persons from 21.12.2017 upto 26.12.2017. It is submitted that even as per MLR of victim (Ex.PW9/A), it was opined that the possibility of sexual intercourse could not be ruled out. As regards the MLRs of respondents-accused, it has come on record that there was no finding suggestive that accused were not capable of doing sexual intercourse. It is further submitted by learned State counsel that the trial Court has wrongly held the victim as a major, whereas it was duly proved that the victim was less than 18 years of age at the time of incident. It is, thus, contended that there was sufficient evidence to establish the guilt of respondents-accused, however, the trial Court has not appreciated the evidence and has acquitted respondents-accused.

12. After hearing the arguments advanced by learned counsel appearing for respective parties and upon considering the material available on record, the following issue would arise for consideration before this Court :-

- (a) Whether the statement of the victim under Section 164 Cr.P.C. before the learned JMIC can form the sole basis for holding

respondents-accused guilty of committing the alleged offence, moreso when the victim as well as other material witnesses i.e. complainant (father of the victim) and mother of the victim have not supported the prosecution story ?

13. The purport and value of Section 164 Cr.P.C. was considered by Hon'ble Supreme Court in ***Somasundaram alias Somu v. State***, 2020 (7) SCC 722, wherein it was held as under:-

“69. As to the importance of the evidence of the statement recorded under Section 164 and as to whether it constitutes substantial evidence, we may only to advert to the following judgment, i.e., in George and others v. State of Kerala and another, AIR 1998 Supreme Court 1376:

"In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under S. 164, Cr.P.C., cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him."

70. What is the object of recording the statement, ordinarily of witnesses under Section 164 has been expounded by this Court in R. Shaji v. State of Kerala, AIR 2013 Supreme Court 651:

*"15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: **Jogendra Nahak and Ors. v. State of***

Orissa and Ors., AIR 1999 Supreme Court 2565: (1999 AIR SCW 2736); and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. and Ors., AIR 2000 Supreme Court 2901) : (2000 AIR SCW 3150).

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section [164](#) Cr.P.C., 1973 can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section [164](#) Cr.P.C., 1973 such statements cannot be treated as substantive evidence."

71. Thus, in a case where a witness, in his statement under section [164](#) of the CrPC, 1973 makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the Court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164..."

14. In the instant case, the statement of the victim recorded under Section 164 before the learned JMIC (Ex.PW1/B), when translated into English, reads as under :-

“ Statement under Section 164 Cr.P.C

Preliminary questions related to life and family replied satisfactorily by Pxxxx

FIR No.1117 dated 24.12.2017 under Section 346 IPC P.S. JJR.

Pxxxxx daughter of Sxxxxx resident xxxxxxxx Kablana. (Details hidden)

On S.A.

Q.1 Why have you come here?

A. I have come to get recorded my statement.

Q.2 What do you want to say in your statement?

A. I remember the day was Saturday but do not know about date. On that day, Pankaj Dalal, who gives milk in our home and Monu Gulia who had taken me from home at night, Pankaj Dalal had given the sleeping pills to me for mixing the same in meals and I had cooked the meals at house and had mixed the sleeping pills in it. Then at night Monu Gulia, who is boyfriend of Nidhi had come outside my home in vehicle at about 1:30 AM and had called me out of home by making phone call. I refused, whereupon he threatened me that he would abduct me. Then he dragged me inside the vehicle. At that time, Monu's friend was also accompanying him who is very fat. They dragged me in vehicle (only Monu had dragged) and Monu had brought his friend along to tell about the passage. Then he took me to Chudani and committed wrong act with me in vehicle, committed sex with me. His friend had gone away after leaving me and Monu in the vehicle and he did not do any wrong act with me. He kept on helping Monu only in telling the way and showing other sites.

Pankaj Dalal has also done wrong act with me a number of times. He used to take me in brick kilns in his vehicle. The name of the place is Silani. Firstly, Pankaj Dalal had committed sex with me. He did not use to give any threat to me but used to say that he would not allow me to forget. In Safidon, Vikas committed wrong act with me (committed sex). He had made me to hear on phone that he had committed sex with many girls. In Kurukshetra, Jitender (do not fully remember name perhaps it was Jitender) kept me at home for a number of days and committed sex with me and asked me to do household work and look after. Rohit, who was chasing me from Bahadurgarh, also committed sex with me. I

want to go to my parents' house.

Sd/-

Pxxxxxx

Sd/-

Anil Kumar

D/Judicial Magistrate Ist Class”

15. However, when the victim was examined during the course of the trial, she made the following deposition :-

“ I was reading in 9th Class in M.D. Senior Secondary School at village Bupania, Bahadurgarh. Pankaj Dalal used to supply milk in our house. I had gone to meet my relatives without informing to my family members as I had gone to meet the sister of my mother namely Umra at Aasam. I have seen the accused Monu, Pankaj, Vikas and Jitender. They did not commit rape upon me. They did not entice me away. They did not administer me sleeping pills. I have seen the accused present in the court. They did not commit any offence against me.

At this stage, learned PP for the State requests that this witness is suppressing the truth and therefore, this witness be declared hostile and Public Prosecutor for the State be allowed to cross-examine her. Heard. Request allowed.

XXXXXXX by Sh. Neeraj Kumar, Public Prosecutor for the State.

I have heard and understood the contents of the statement Ex.PW1/A. Volunteered that I did not make such statement before the police. I did not state that I was reading in 9th class in Senior Secondary School in village Bupania or that in that school one person namely Monu is the boy friend of another student in our school, he met me and gave his phone no. 8685907011 to talk with him or that Monu talked over that phone to me and he told his

name as Monu son of Ved Parkash or that I do not remember the date of talking (Confronted with portion A to A1 of statement Ex.PW1A, wherein it is so recorded). I did not state that accused Pankaj Dalal used to give milk in our house and that accused Monu Gulia who had taken me from my house in the night time and Pankaj Dalal gave me sleeping pills for the sake of administering in the food to my family members or that on that day, I prepared the meal and mixed the sleeping pills in that food and administered the same food to my family members. (Confronted with portion B to B1 of statement Ex.PW1/A, wherein it is so recorded). I did not state that accused Monu Gulia came to my house at about 1.30 a.m. and called me on the phone to come out from the house or that when I denied to come out, he gave me a threat to abduct me or that accused Monu dragged me inside the vehicle and Monu's friend was also with him. I did not state that accused persons took me in village Chhudani or that accused Monu committed rape upon me in the vehicle against my wish. (Confronted with portion C to C1 of statement Ex.PW1/A, wherein it is so recorded). I did not further state that Monu's friend had left me to my house and he did not commit any rape upon me and he was helping only accused Monu for guiding and telling the way or that accused Pankaj Dalal committed rape upon me after taking me in the brick-kiln in the name and style of K.B.C. Siliani. I did not state that first of all accused Pankaj Dalal committed intercourse with me and he did not give me any threat or that accused Vikas son of Naresh, resident of Railway Colony, Safidon, Jind had also committed rape upon me by taking me in Panipat or that he also got me heard by talking over the phone that

he had sexual intercourse with many girls or that the accused Jitender son of Ram Bharose, resident of Krishan Nagar, Gamri had committed rape upon in Kurukshetra. (Confronted with portion D to D1 of statement Ex.PW1/A, wherein it is so recorded). I did not state that brother-in-law of Jitender had taken me at the house of accused Jitender and he left me there and this was committed because of the planning of Rohtas, the brother-in-law of Jitender for the purpose of marrying with me or that I denied to marry with Jitender because my age was 16 years or that thereafter, Rohtas left me on the Railway Station after giving me Rs. 200/- or asked me to go to Delhi by train or that on 21.12.2017 when I reached at the Bahadurgarh Railway Station and travelling in the train, then a boy namely Rohit met me there and he had taken me Bhiwani via Rohtak or that on the Railway Station, accused Rohit committed rape upon me in the night time and he gave me his phone number in a paper bearing no. 8684005494 or that said paper has been misplaced by me or that on 22.12.2017, he gave me Rs. 200/- and I was seated in the bus for travelling to Jind. (Confronted with portion E to E1 of statement Ex.PW1/A, wherein it is so recorded). I did not state that I got written my statement to the police regarding taking against the accused persons and I was recovered by the police in presence of my father at Railway Station, Kurukshetra or that I got written in my statement that accused be punished as they have committed rape upon me against my wish. (Confronted with portion F to F1 of statement Ex.PW1/A, wherein it is so recorded).

At this stage, a sealed envelope is opened in the court with the permission of the Court, containing the statement

of victim under Section 164 Cr.P.C. The statement is shown to the victim. The victim identifies her signature on the statement which is Ex.PW1/B and the police had obtained my signature on some blank papers as my family member had already lodged a report regarding my missing. Volunteered that I made the statement Ex.PW1/B under the pressure and tutoring of the police and the accused persons did not commit rape upon me or that they did not take or enticed me away. It is correct that I was medico-legally examined at Civil Hospital, Jhajjar. It is wrong to suggest that the accused present in the court committed rape upon me against my wish or that they commit rape upon me or they had enticed me or taken away me or that I had not gone to meet the sister of my mother namely Urma at Aasam and the accused have committed rape upon me. It is wrong to suggest that I am retracting from my statement Ex.PW1/A made to the police in collusion with accused. It is wrong to suggest that I made the statement Ex.PW1/A and Ex.PW1/B due to my sweet will. It is wrong to suggest that I did not make statement Ex.PW1/B under Section 164 Cr.P.C. under the police pressure. It is wrong to suggest that I am retracting from the statement under Section 164 Cr.P.C. intentionally and deliberately in collusion with the accused. It is wrong to suggest that I am deposing falsely in collusion with the accused having been won over by them.

XXXXXXX by defence counsel for all the accused.

Today I am giving the statement out of my free will and without any pressure. I have seen the accused present in the court but they did not commit any offence against me. It is correct that I was having speaking terms

with one person namely Rohit and I do not about his address and whereabouts. He did also not commit any offence against me.”

A perusal of the above extracted deposition of the victim before the trial Court reveals that she has not supported the prosecution case and as regards her statement under Section 164 Cr.P.C. (Ex.PW1/B) before the learned Magistrate, she stated that she was under pressure and tutored by the police. Apart from the victim, even the complainant/father of victim (PW2) as well as mother of the victim (PW3) did not support the prosecution case. It is a well settled law that the statement of a victim or a prosecutrix recorded under Section 164 Cr.P.C. is only corroborative in nature having corroborative value and the same cannot be treated as substantive evidence.

16. Thus, once the victim as well as the other material witnesses have failed to support the prosecution case and neither it has been proved on record that at the time of occurrence, the victim was minor, no fault can be found with the findings returned by the trial Court. Accordingly, issue is decided in negative.

17. In criminal appeal against acquittal what the Appellate Court has to examine is whether the finding of the learned Court below is perverse and prima facie illegal. Once the Appellate Court comes to the finding that the grounds on which the judgment is based is not perverse, the scope of appeal against acquittal is limited considering the fact that the legal presumption about the innocence of the accused is further strengthened by the finding of the court. At this point, it is imperative to consider the decision of the Hon'ble Supreme Court passed in the case of *Surajpal Singh and others*

Versus The State, 1952 SCR 193, wherein it was held as under :-

“... the High Court has full power to review the evidence upon which the order of acquittal was founded. But it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

In the case of *Ghurey Lal Versus State of Uttar Pradesh*, 2008 (10) SCC 450 in para no. 75, the Hon'ble Supreme Court reiterated the aforesaid view and observed as follows :-

“75. The trial Court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial Court should not be interfered with unless it is totally perverse or wholly unsustainable.”

18. Thus, an order of acquittal is to be interfered with only for compelling and substantial reasons. In case the order is clearly unreasonable, it is a compelling reason for interference. But where there is no perversity in the finding of the impugned judgment of acquittal, the Appellate Court must not take a different view only because another view is possible. It is because the trial Court has the privilege of seeing the demeanour of witnesses and, therefore, its decision must not be upset in the absence of strong and compelling grounds.

19. In view of the above, we do not find any illegality and perversity in the findings recorded by the trial Court. Accordingly, the present

application is dismissed and leave to appeal is declined.

20. All pending application/s, if any, shall also stand closed.

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

16.02.2024
sjks

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No