



**113 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-27261-2024 (O&M)
Date of decision: 23.07.2024

Deepak alias Chor

....Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Shikhar Goel, Advocate
for the petitioner (through V.C.).

Mr. Subhash Godara, Addl.A.G., Punjab.

Mr. Vikas Bhardwaj, AAG, Haryana.

Mr. Manish Bansal, P.P., U.T., Chandigarh.

HARPREET SINGH BRAR, J.

1. The present petition is preferred under Section 482 Cr.P.C. seeking directions to the learned trial Court for a psychiatric evaluation of the prosecutrix to evaluate her competency as a witness under Section 118 of the Indian Evidence Act, 1872 (hereinafter 'Evidence Act') with respect to trial of case stemming from FIR No. 754 dated 07.09.2023 registered under Sections 376, 450, 323, 506 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'the POCSO Act') at Police Station Camp Palwal, District Palwal.

2. Briefly, the facts as alleged are that the prosecutrix- daughter of the complainant was taken to the ESIC Hospital, Faridabad for stomach pain and vomiting. It was later discovered that the prosecutrix was four months pregnant. Therefore, a *ruqa* qua the same was sent to Police Station Camp Palwal, as the prosecutrix was 17 years 11 months 24 days old at the time.



When asked about the perpetrator, the prosecutrix said- “Chor”, (*that is how the minor victim addressed the petitioner, her cousin*).

3. Since the prosecutrix is intellectually disabled, the petitioner-accused moved an application dated 02.02.2024 under Section 156(3) Cr.P.C. read with Section 118 of the Evidence Act, seeking psychiatric evaluation of the prosecutrix to establish her competence as a witness. However, the same was dismissed on the grounds of maintainability vide order dated 26.02.2024 (Annexure P-10) passed by Special Court/ Additional Sessions Judge (Fast Track), POCSO, Palwal (hereinafter ‘trial Court’).

4. Learned counsel for the petitioner contends that the father of the prosecutrix, in his testimony as PW1, has categorically admitted that the prosecutrix is intellectually disabled to the extent of 90%. However, the police authorities have failed to collect her disability certificate from her family or get her medically examined. Further, the MLR of the prosecutrix reflects that the prosecutrix has a seizure disorder since childhood. It is a matter of record that all the questions put to the prosecutrix by the doctor were answered with “Don’t know.” Moreover, no injury marks were seen on her person that would substantiate the allegations of rape. Learned counsel further contends that the statement of the prosecutrix under Section 164 Cr.P.C. was recorded 11 days after the registration of the FIR (Supra), without taking aid of an interpreter or special educator, to be able to ascertain what is actually being stated by her, as she is a child with special needs. Therefore, the prosecutrix is not a competent witness in terms of Section 118 of the Evidence Act and her statement cannot be relied upon, without conducting a psychiatric evaluation and obtaining a medical opinion in this regard.



5. Having heard the learned counsel for the petitioner and after perusing the record of the case, it transpires that the prosecutrix is intellectually disabled. The factum of rape only came to the forefront when the prosecutrix was taken to the hospital when she complained of stomach pain. On being asked about the culprit, the prosecutrix stated – “Chor,” (*that is how she addressed the petitioner, who happens to be her cousin brother*).

6. For proper adjudication of the case, it is pertinent to examine Section 118 of the Evidence Act, which reads as follows:

Section 118- Who may testify.

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation. -- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

A perusal of the abovementioned provision clearly reflects that it is only the Court that wields the power to decide upon the competence of a witness. The power to declare a witness incompetent lies exclusively with the trial Court, which it shall exercise when the prosecutrix is examined as a prosecution witness. Pertinently, this Court is of the considered opinion that questioning the competence of the prosecutrix at the *ipse dixit* of the accused would set a dangerous precedent. A two Judge bench of the Hon’ble Supreme Court in ***Golla Yelugu Govindu vs.State of Andhra Pradesh 2008(4) R.C.R. (Criminal) 183***, speaking through Justice Arijit Pasayat, observed as follows:

*“7. Indian Evidence Act, 1872 (in short the "Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. **On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from***



understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease-whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States*, (159 U.S. 523). The evidence of a child witness is not required to be rejected *per se*; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Surya Narayana v. State of Karnataka*, 2001(1) RCR (Criminal) 602 : (2001(1) Supreme 1).

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9. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”(emphasis added)

7. Suffering from a disability does not automatically make a witness incompetent and it would defeat the ends of justice if the same is mechanically cited as a reason to alienate the prosecutrix from the legal process. A two Judge bench of the Hon’ble Supreme Court in *Patan Jamal Vali vs. State of Andhra Pradesh* 2021 AIR SC 2190, speaking through Justice D.Y. Chandrachud has issued the following guidelines to make the criminal justice system more accessible to persons with disabilities:

“39. While changes in the law on the books mark a significant step forward, much work still needs to be done in order to ensure that their fruits are realized by those for whose benefit they were



brought. In this regard, we set out below some guidelines to make our criminal justice system more disabled-friendly.

(i) The National Judicial Academy and state judicial academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally;

(ii) Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, in order to facilitate easy access and coordination;

(iii) The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;

(iv) Police officers should be provided sensitization, on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and

(v) Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.”



8. In view of the above discussion, this Court is of the considered opinion that it is for the trial Court to satisfy itself whether the victim is competent to testify in terms of Section 118 of the Evidence Act, when she appears as a prosecution witness, if the need arises.
9. The present petition is disposed of in the above mentioned terms.
10. Pending application(s), if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

23.07.2024
Neha

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