

2024:PHHC:097686-DB



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

**CRM-A-425-2024 (O&M)
Reserved on 22.07.2024
Pronounced on: 30.07.2024**

FAJJAR

...Appellant

Versus

STATE OF HARYANA AND ORS

...Respondents

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE KARAMJIT SINGH**

Present:- Ms. Ruchi Sekhri, Advocate, Legal Aid Counsel,
for the applicant.

Mr. Manish Dadwal, AAG, Haryana.

SUDHIR SINGH, J.

The present application seeking leave to appeal is directed against the judgment dated 31.10.2022 passed by the learned Additional Sessions Judge, Fast Track Special Court, Nuh, whereby respondents No.2 and 3 have been acquitted of the charges framed against them by extending them benefit of doubt.

2. Vide order dated 30.04.2024, the Lower Court records was called for. The same was received on 08.07.2024.

3. As per the case of the prosecution, the complainant moved a complaint on 20.07.2019 to the police, stating therein that the victim (complainant's daughter's daughter i.e. his granddaughter) had been residing with him for the last 03 years. On 01.07.2019, he found

his grand-daughter speaking on phone with someone and after snatching the phone, he found that a call was received on the said phone from SIM No. 9671512245. Thereafter, the complainant and his son enquired from his grand-daughter about the person, who she was talking to, whereupon she disclosed that she used to talk with accused Anish. On 03.07.2019, she disclosed that she had been having friendship with said Anish for the last 02 years, when she was about 16-17 years old and the accused had given her a false promise to marry her, when she would turn to 18. It was further stated by her that accused used to meet her in jungle and commit rape upon her. It was further stated by her that on 25.06.2019, on the asking of the accused she had administered sleeping pills by mixing the same in the Pepsi to her family members and once they fell asleep, the accused entered the complainant's house and had committed rape upon her. On 27.06.2019, accused Anish and Aamir again came and both had committed rape upon her on the false pretext that accused Anish would perform marriage with her and that accused got her speak with his sister Anisha and father regarding the proposed marriage and they had also promised her to bring her in their house as a bride of accused Anish. Thereafter, a Panchayat was convened on 14.07.2019, in the house of Hazi Ibbar, who sought some time but on 17.07.2019, the father of the accused had refused to marry his son with the victim.

4. On the basis of the aforesaid complaint, FIR No.316 dated 20.07.2019 registered under Sections 366, 376-D and 506 IPC and Section 6 of Protection of Children from Sexual Offences (POCSO) Act, 2012 was registered at Police Station Firozpur, Zirka.

Both the accused were arrested on 12.10.2019. After investigation, the charge sheet was filed. Charges under Sections 366, 506 IPC and Section 6 of POCSO Act (in the alternative under Section 376-D IPC) were framed against the accused, to which they pleaded not guilty and claimed to be tried.

5. During trial the prosecution examined as many as 13 witnesses i.e. PW-1 Ct. Lakhan Pal; PW-2 Dr. Sarita Rani; PW-3 Ct. Hari Om; PW-4 Lady HC Saroj; PW-5 ASI Dharampal, Draftsman; PW-6 SHO Hari Singh; PW-7 Sangpal Head Teacher, Government Primary School Mamlika; PW-8-the victim; PW-9 Fajar is the complainant/maternal grandfather of the victim; PW-10 ASI Saroj; PW-11 ASI Sarita; PW-12 Yunis, father of victim and PW-13 Usman Reader of Sh. Vivek Chaudhary, learned SDJM, Ferozepur, Jhirka. Further, the prosecution produced documentary evidence in the form of Exs. P1 to P-36 and EX. PA. Thereafter, the statements of the accused under Section 313 Cr.P.C. were recorded and the entire incriminating material was put to them which they denied and pleaded false implication. The accused also tendered into evidence Ex. P1, statements of father of the victim under Section 161 Cr.P.C.

6. The trial Court acquitted the accused of the charges framed against them on the following grounds.

1. The prosecution has failed to prove on record that the accused had committed any offence of rape against the victim, when she was a child within the meaning of Section 2(1)(d) of the POCSO Act.

2. When the alleged offence of rape was allegedly committed on 25/27.06.2019, the victim was major.

3. It was the version of the victim that at the instance of the accused she used to administer sleeping pills to her maternal grand-parents and when they had fallen asleep, the accused used to enter their house and commit rape upon her. It was, thus, found that the victim herself was the perpetrator of the crime.

4. That the medical examination of the prosecutrix could not be got done and her samples of swabs could not be obtained for the purpose of examination from the FSL.

5. There was no medical and scientific evidence to connect the accused with the offence.

6. The call details between the accused and the victim could not be proved as no certificate under Section 65B of the Indian Evidence Act was produced.

7. If for the sake of arguments, the story of the victim regarding sexual assault during the period of her majority is accepted, then also, the same seems to be consensual.

7. Learned counsel appearing for the applicant-appellant vehemently submits that the prosecution has proved the guilt on the

part of the accused, inasmuch as all three i.e. the victim PW8, complainant-PW9 (Fajjar) and PW12- father of the victim (Yunis), had duly supported the case of the prosecution and, therefore, there was no occasion for the trial Court to record the finding of the acquittal against the accused.

8. It is further submitted that PW-2, Dr. Sarita Rani, who had conducted the sexual medical examination of the victim, had opined that the possibility of sexual inter-course with the victim could not be ruled out. It is thus submitted that once the prosecution version was consistent, the accused ought to have been held guilty by the trial Court.

9. On the other hand, the learned State counsel, who is present in Court, on the service of advance notice to the present application, states that the findings recorded by the trial Court, are just and proper, based on the evidence on record and thus, no interference is called for in the present application.

10. We have heard learned counsel for the appellant and have also gone through the records of the case.

11. The sole question that requires consideration by this Court is as follows:-

“Whether in the face of the complicity of the victim herself in facilitating the crime, could it be said that she had been subjected to sexual assault by the accused-respondents?”

12. A perusal of the findings recorded by the trial Court would show that the prosecution has failed to prove on record by stipulating specific dates and time regarding the commission of rape upon the victim by the accused, when she was a minor. The

prosecutrix in her initial statement before the police stated that she had been sexually assaulted by the accused Anish on the false promise of marriage when she had been a minor, but in her subsequent statement before the Magistrate, she stated that she had been raped by the accused during her minority as also on 25/27.06.2019. The police did conduct any investigation regarding the alleged act of sexual assault upon the victim during the period of her minority. It was thus, concluded that there being no specific time and dates regarding the commission of the offence by the accused during the minority of the victim, the prosecution has failed to prove that the accused had committed sexual assault upon the victim, when she was minor.

13. So far as the alleged offence having been committed on two dates i.e. 25.06.2019 and 27.06.2019 is concerned, it was found that the victim in her testimony, had deposed that she had administered sleeping pills to her grandparents and when they had fallen asleep, the accused came and had committed rape upon her. On the said dates i.e. 25/27.06.2019, the victim was found to be major. The trial Court has found that the victim being major, she herself was a perpetrator of the crime. Still further the call details between the accused and the victim were not proved by the prosecution by producing a certificate under Section 65-B of the Indian Evidence Act. It was thus concluded by the trial Court as under:-

“21. Keeping in view of my above discussion, this Court has reached on conclusion that the prosecution has not been successful to prove the occurrences of both the times by leading cogent and convincing evidence. The story of prosecutrix while leveling the allegations of rape during the period of her minority

*is not believable and if for the sake of arguments, the story of prosecutrix regarding rape during the period of her majority is accepted, then the same seems to be consensual acts of a major girl knowing well the repercussions and having sufficient knowledge about the consequences of the acts because the prosecutrix herself was involved in the commission of those acts as she was the perpetrator and to facilitate the acts of accused qua sexual activities, she used to administer the sleeping pills to her family members so that after consuming those pills through food, they could fall asleep in deep sleeping and the accused could enter into her house easily and could do the desired acts. The necessary elements for constituting the offence of rape i.e. “against her will” and “without her consent” are missing from the allegations of prosecutrix. The Hon’ble Punjab and Haryana High Court in a recent judgment, titled as “**Amandeep Kaur vs. State of Punjab and Another**”, passed in CRA-AD-708-2019-Punjab, decided on 21.09.2022 have held that “A belief that the promise of marriage was meant to be fulfilled is not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed.”*

14. In the instant case, the version of the prosecution was that when the complainant had been residing with maternal grand-parents, the accused had sexually assaulted her. It is the case of the prosecution that the victim was found talking to the accused on phone and when her maternal grandfather had snatched the mobile phone, the victim had disclosed to him the entire sequence of events as regards the sexual assault committed upon her by the accused. As noticed above, the statement of the victim was recorded by the police, wherein she stated that when she was minor, she had been sexually

exploited by the accused. However, in her statement before the Magistrate, she stated that the accused had also committed sexual assault upon her on 25/27.06.2019. Besides, it has also come on record that a Panchayat was convened on 14.07.2019, wherein the family of the accused Anish had promised to perform the marriage between the said accused and victim. It was only after that when the accused and his family did not agree for the said marriage that the matter was reported to the police.

15. The entire facts and circumstances of the case coupled with the evidence on record clearly suggest that there was a consensual sexual relationship between the accused (Anish) and the victim. It has been the case of the prosecution through and through that the accused had promised to marry her and on that pretext he had been sexually assaulting her. As noticed above, it has been proved on record that the aforesaid two incidents i.e. 25/27.06.2019 had taken place when the victim was major. The victim in her testimony before the trial, while appearing as PW8, had duly admitted having administered sleeping pills to her grandparents, to facilitate the entry of accused-Anish in her/their house. The relevant extracts from her testimony before the trial Court, would read as under:-

“...On 25.06.2019, accused Anish gave me sleeping pills and the same, I gave to my maternal grandparents. Then accused Anish came to my house in the night. He again did wrong act with me. On 27.06.2019, accused Anish and Aamir came to my house at about 12 midnight. Firstly Anish did wrong act with me, then Aamir also did wrong act with me.....”

Therefore, by all means, it emerges that the relationship between the accused and the victim was consensual one and it could not be said that there was any forced sexual assault upon the victim by the accused.

16. Besides, the case of the prosecution was that the Panchayat was convened on 14.07.2019, in the house of Hazi Ibbar, who sought some time, to facilitate the marriage between the victim and accused Anish. However, neither said Hazi Ibbar nor any other member from the said Panchayat was examined as a witness to prove the said fact. The victim in her statement had stated that she had been in visiting terms to the house of victim Anish and his family members were willing to take her as a bride of said Anish. This fact clearly shows that the alleged sexual intimacy of the accused with the victim was not a forcible act.

17. It has been held in a plethora of judgments of the Hon'ble Apex Court that where from the very inception, promise given by the accused to marry the prosecutrix was a false promise and from the very beginning, there was no intention of the accused to marry her, the consent obtained thereof, would amount to have been obtained under misconception of fact. In the instant case, based on the evidence on record, the only dates relevant are 25.06.2019 and 27.06.2019, when it was specifically alleged that the accused had committed rape upon the victim. As noticed above, at that time, she was major. However, from the testimony of the victim, as noticed above, she was found to be administering sleeping pills to her grandparents to facilitate the entry of accused in her/their house. The trial Court has, thus, rightly found

that she herself was a perpetrator of the crime. Still further, her deposition before the Court that she had also been raped by accused Anish at his house, was also discarded by the trial Court, especially when it had come on record that accused-Anish had been residing in his house with his 4-5 sisters and his parents. Thus, the question framed is answered in negative.

18. The findings recorded by the learned Trial Court are plausible one, based on the evidence led. It could not be pointed out that any material evidence has been misread or not taken into consideration by the trial Court. Therefore, no fault could be found in the findings of the trial Court that the accused is entitled to benefit of doubt.

19. 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 **Mrinal Das versus State of Tripura**, (2011) 9 SCC 479, it has been observed that:

“13. It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, it being the final Court of fact,

is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, the law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate Court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent Court. If two reasonable views are possible on the basis of the evidence on record, the appellate Court should not disturb the findings of acquittal.

*14. There is no limitation on the part of the appellate Court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate Court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate Court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are “compelling and substantial reasons” for doing so. If the order is “clearly unreasonable”, it is a compelling reason for interference.
... ..”*

In the case of **Ghurey Lal Vs. State of Uttar Pradesh**, (2008) 10 SCC 450 in para no. 75, the Hon'ble Supreme Court reiterated the said 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."

20. 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.

21. 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.

[SUDHIR SINGH]
JUDGE

[KARAMJIT SINGH]
JUDGE

30.07.2024
Himanshu

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No