

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-D-695-2022 (O&M)
Reserved on:20.01.2024
Date of decision:23.01.2024

Vishal Kumar

... Appellant

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR.
HON'BLE MRS. JUSTICE SUKHVINDER KAUR.

Present: Mr. Pawan K. Sharma, Advocate for the appellant.
Ms. Monika Jalota, Sr. DAG, Punjab.
...

SUKHVINDER KAUR, J.

1. The present appeal has been filed by the sole accused/appellant – Vishal Kumar against his verdict of conviction and order of sentence dated 27.07.2022 passed by Judge, Special Court, SAS Nagar, Mohali, whereby the appellant had been convicted and sentenced as follows:

Sr. No.	Under Sections	Conviction for	RI	Fine Rs.	In default imprisonment for
1.	363 IPC	To undergo rigorous imprisonment for a period of 7 years (seven years)		15,000/-	In default of payment of fine, he shall further undergo simple imprisonment for a period of one month
2.	366 IPC	To undergo rigorous imprisonment for a period of 7 years (seven years)		Rs.15,000/-	In default of payment of fine, he shall further undergo simple imprisonment for a period of one month
3.	506 IPC	To undergo rigorous imprisonment for a period of 2 years (2 years)		--	--

4.	6 POCSO Act	To undergo rigorous imprisonment for a period of 20 years (Twenty years)	Rs.20,000/-	In default of payment of fine, he shall further undergo simple imprisonment for a period of one month.
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All the substantive sentences were to run concurrently and the period of detention already undergone by the convict during the investigation or trial was ordered to be set off against the sentence of imprisonment imposed upon him as per provisions of Section 428 Cr.P.C.

2. The factual scenario as unfolded by the prosecution in the final report under Section 173 Cr.P.C. is that on 05.08.2020, a message was received from Civil Hospital, Derabassi regarding admission of the rape victim at the said hospital. SI Neha Saini was deputed to conduct the investigation at Civil Hospital, Derabassi. SI Neha Saini reached at the hospital and recorded statement of the complainant, namely, Jaswinder Kaur to the effect that she has a daughter (name withheld to protect her identity hereinafter to be referred to as 'prosecutrix'), aged about nine years, who was studying in 4th class. Her date of birth is 03.06.2012. She told her that she had some problem in her private part and had bleeding. So she took her daughter to the midwife, namely, Karti for her check up. After her check up, she was told by Karti that someone had committed wrong with her daughter and advised her to take the child to the Civil Hospital. On 04.08.2020, she took her daughter to Civil Hospital, Ambala, where doctors told her that as the incident had taken place in the jurisdiction of Civil Hospital, Derabassi, so the prosecutrix be taken to that hospital. She further stated that her daughter had also disclosed to her that on 01.08.2020 in the evening,

accused – Vishal Kumar had taken her in the room, on the first floor of the house of her mother-in-law, namely, Bimla Devi, where he had committed rape upon her. When her daughter started weeping, then he called Hanish and Nannu there and they threatened her that if she would disclose about it to anyone, then they would kill her. On the basis of the above said statement of the complainant, FIR was registered against the accused/appellant under Section 376 (AB) IPC and Sections 4/6 of the POCSO Act.

3. During the investigation, site plan was prepared at the instance of the prosecutrix. Medical examination of the victim for sexual assault upon her was got conducted from Civil Hospital, Derabassi. On 07.08.2020, statement of the complainant/mother of the prosecutrix was got recorded before the JMIC, Derabassi under Section 164 Cr.P.C. Accused was arrested on 06.08.2020 and his medical examination was also got conducted from Civil Hospital, Derabassi. After completion of investigation, final report under Section 173 Cr.P.C. was filed in the Court and the accused was sent to face trial for commission of offence under Section 376 (AB) IPC and Sections 4/6 of the POCSO Act.

4. After finding a prima facie case against the accused, he was charge sheeted under Sections 363/366/376 (AB)/506 IPC and Section 6 of the POCSO Act to which he did not plead guilty and claimed trial.

5. The trial Court culled out the following points for determination:

“1. Whether on 01.08.2020 at about 8:00 p.m. in the area of village Jadot, PS Lalru, accused had kidnapped the minor victim from the lawful custody of her guardian and thereby committed an offence under Section 363 IPC?”

2. *Whether on the same day, time and place the accused had kidnapped the victim with the intent that she might be forced or seduced to illicit intercourse with him and thereby committed an offence under Section 366 IPC?*

3. *Whether on the same day, time and place the accused had committed rape upon the minor victim aged about 9 years by doing illicit intercourse and thereby committed an offence under Section 376 (AB) IPC?*

4. *Whether the accused had committed aggravated penetrative sexual intercourse with minor victim and thereby committed an offence under Section 6 of the POCSO Act?*

5. *Whether prosecution has proved all these offences against the accused beyond reasonable doubt?*

6. *Conclusion.*

6. In order to prove its case, prosecution has examined PW1 Jaswinder Kaur, who is mother of the prosecutrix. She has deposed in detail as per the prosecution story that she has a daughter, aged about nine years, who was studying in Government Elementary School in 4th Class. On 02.08.2020, her daughter told her that she had some problem in her private part and she also had bleeding. She took her to a midwife, namely, Karti, who after checking told her that someone had committed wrong act with her daughter and advised her to take her daughter to the Civil Hospital. On 04.08.2020, she took her daughter to the Civil Hospital, Ambala, where doctor advised her to go to Civil Hospital, Derabassi as the occurrence had taken place in the jurisdiction at Derabassi. She took her daughter to Civil Hospital, Derabassi. She also asked her daughter that who had committed wrong with her. Then she disclosed that on 01.08.2020, Vishal Kumar accused had taken her in the room at the first floor where he had committed rape upon her. She also disclosed that when she started weeping, then the

accused called Hanish and Nannu there and they also committed rape with her. Thereafter, they all threatened her daughter that if she would disclose anything to anyone then they would kill her and due to this reason, her daughter did not disclose her about the incident. The police came at Civil Hospital, Derabassi and her statement Ex.P1/1 was recorded by the Investigating Officer and the same was read over to her and she had signed the same at point 'A'. On 06.08.2020, she again joined the investigation and on her identification of the accused, identification Memo Ex.P1/2 was prepared. Her statement under Section 164 Cr.P.C. was also got recorded in the Court of JMIC. Her daughter was handed over to her vide handing over Memo Ex.P1/3. She had not mentioned names of accused Hanish and Nannu in her statement recorded under Section 164 Cr.P.C. She admitted the same to be correct and admitted her signatures on said statement Ex.P1/4. She also identified the accused present in the Court.

7. The most material witness of the prosecution, i.e. the prosecutrix has stepped into the witness box as PW2. She has also deposed in detail on the similar lines as her mother Jaswinder Kaur. She also identified the accused produced through Video Conferencing system.

8. PW3 Dr. Girish Dogra after medical examination of accused Vishal opined that there was nothing to suggest that he was incapable of performing sexual intercourse.

9. PW4 Dr. Sugam Sharma is also one of the material witnesses examined by the prosecution. She has deposed that on 05.08.2020, one victim aged about nine years D/o Paramjit Singh R/o Village Jaraut was brought to her by LC Sukhchain Kaur for her medical examination, with the

allegations of having sexual assault. She had medico legally examined her. At the time of her examination, she alleged history of sexual assault around 01.08.2020 at Jaraut. The patient came along with her mother Jaswinder Kaur and as per mother's statement, prosecutrix had told her that she was having burning micturition. Then she took her to midwife, who told her that she should be taken to the Hospital as the child might have been sexually assaulted. She went to Civil Hospital on 04.08.2020 from where she had been told to take the child to Police Station and Derabassi Hospital for her examination. As per her examination, she found that labia majora and minora swollen conjuncted and labia majora, hymen not intact. She took the relevant swab and prepared the parcel and also took the blood samples of the victim for DNA analysis. She had prepared the parcel containing relevant papers and sealed the parcels and envelop with the seals of the hospital and handed over the said parcels and envelop to police. She prepared MLR, carbon copy of which is exhibited as Ex.P4/1. She also prepared the online MLR of the victim, copy of which is Ex.P4/2. As per provisional diagnosis, she had opined that sexual assault had been taken place upon the victim. As per FSL report Ex.PW4/4, possibility of sexual assault with the victim cannot be ruled out.

10. PW5 Dr. Surinta Kumar Sharma has deposed that on 04.08.2020 at about 8:26 a.m., victim had come to hospital along with her mother Jaswinder Kaur and she had given treatment to her. She had not commented about the rape at the time of her examination. She prepared her report Ex.P5/2.

11. PW6 SI Neha Saini is the Investigating Officer of the case and

she has deposed in detail regarding the investigation proceedings conducted by her pertaining to the present case.

12. PW7 ASI Mukesh Kumar is a formal witness, who tendered in his evidence his duly sworn affidavit Ex. P7/1.

13. PW8 Parvinder Singh was also in police party headed by SI Neha Saini and he had also deposed regarding the investigation conducted by her.

14. PW9 Iqbal Singh, Head Teacher, Government Elementary School brought the record pertaining to date of birth of the prosecutrix, as per which, her date of birth is 03.06.2012. He had proved the certificate Ex.P9/1 issued by him in this regard.

15. PW10 LHC Sukhchain Kaur is again the formal witness and tendered her duly sworn affidavit Ex.PW10/1.

16. PW11 SI Dilbagh Singh has also partly conducted the investigation in this case and had deposed that on 06.08.2020, he had been entrusted with the investigation of the present case and had deposed regarding the investigation proceedings conducted by him.

17. After the closure of the evidence of the prosecution, statement of accused under Section 313 Cr.P.C. was recorded wherein he had pleaded that he was innocent and had been falsely implicated. On the date of the alleged incident, he was in his barber shop at Ambala and due to lockdown, there was no conveyance to come to his residence and had reached at his house at about 10 p.m. Totally false case had been foisted upon him in order to save the real culprits and to blackmail him. However, no evidence in defence was led by the accused.

18. Learned counsel for the appellant has contended that a false and frivolous FIR was registered against the accused. There are major discrepancies in the statements of PWs which has materially vitiated the trial. He has further contended that the entire story has been concocted and is an afterthought with the ulterior motive by PW1, under the pressure of the police. He has submitted that the complainant was having personal grudge against the appellant and has concocted this false story due to obvious reasons. He has further argued that strange enough nothing was disclosed to PW5 Dr. Surinta Kumar Sharma regarding the alleged sexual assault. As per FSL report also, the human semen and male DNA was not detected on Ex.A1 to A5, which again falsifies the entire story of the prosecution. He has argued that the prosecution version is quite improbable that rape was committed at a place, where admittedly, as per the prosecution, five persons were residing, but none of these persons noticed any such incident. He has submitted that though Hanish and Nannu were named while deposing in the Court by PW1 and PW2, but PW1 did not name them when her statement under Section 164 Cr.P.C. was recorded. He has vehemently contended that the judgment of conviction passed by the trial Court is totally illegal, unjustified and deserves to be reversed and the accused person deserves to be acquitted as per law.

19. On the other hand, learned State counsel has contended that sufficient prosecution evidence has been produced on record to establish the guilt of the accused beyond the reasonable doubt and the accused has been rightly convicted by the trial Court.

20. We have heard learned counsel for the appellant as well as

learned State counsel and have perused the record of the case.

21. The entire case of the prosecution hinges around statements of the complainant - Jaswinder Kaur, who is mother of the prosecutrix, PW2 prosecutrix and the medical evidence that has been brought on record. First of all the prosecution was to prove the age of prosecutrix. It was incumbent upon the prosecution to prove the age of the victim in view of invocation of Section 6 of the POCSO Act. To prove the same, the prosecution has examined PW9 Iqbal Singh, Head Teacher, Government Elementary School, Village Jaraut, District SAS Nagar, who produced the school record to prove that date of birth of the prosecutrix is 03.06.2012 and as such on the date of the incident i.e. on 01.08.2020, the prosecutrix was about eight years of age. Mother of the prosecutrix while deposing as PW1 has also stated that her daughter/prosecutrix is nine years old. The prosecutrix herself while appearing in the Court has disclosed her age as ten years. This evidence has remained unchallenged and unrebutted. Even no contention regarding age of the prosecutrix has been raised by learned counsel for the appellant/accused while addressing the arguments. Hence, as per Section 2(d) of the POCSO Act, 2012, prosecutrix/victim is held to be a child.

22. It is well settled law that the testimony of a victim in a case of sexual offence is vital and if found worthy of credence, reliable and pristine, requires no corroboration. Only if the Court finds it difficult to accept her version it may seek corroboration from other evidence which lends assurance to her version. After perusing the testimony of PW2 prosecutrix the trial Court has rightly observed that, the victim in her testimony has given graphic narration of the occurrence. She remained consistent with her

statement on all the material points. Though, she was cross-examined at length but her testimony could not be shattered during her cross-examination. Before examining her, to make assessment as to whether she was able to give rational answers to the questions put to her, certain questions were put to the victim by the Court and only after the Court was satisfied that the witness had fairly satisfactory level of understanding and she could give rational answers to the questions put to her, her statement was recorded. Prosecutrix has been consistent in her testimony with regard to the fact that accused had forcibly ravished her and her statement inspires confidence. So in the present case, though PW2 is a child witness, but she is trustworthy and reliable witness and has narrated the incident in detail which shows that she is a competent witness and her version was true. There is nothing in her cross examination to suggest even remotely that she was tutored.

23. The prosecutrix has been duly corroborated by PW1, who is mother of the victim and also the complainant in the present case. The defence has failed to bring on record any enmity of the complainant or her daughter with the accused. No motive has been attributed for false implication of the accused in the present case. No reasons are forthcoming as to why the complainant would put her minor daughter to disrepute by fabricating a false case. Reliance in this respect can be placed upon **Wahid Khan Vs. State of Madhya Pradesh, 2010 (2) SCC 9**, wherein the Apex Court has been held as under:

“It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing

therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.”

24. Testimony of PW1 and PW2 is also duly corroborated by the medical evidence produced on record. PW4 Dr. Sugam Sharma, who had medico legally examined the prosecutrix has clearly opined in her opinion Ex.PW4/4 that possibility of sexual act with the victim cannot be ruled out.

25. We do not find any substance in this contention of learned counsel for the appellant that when as per FSL report no human semen and male DNA was detected on the exhibits A1 to A3, then the sexual assault with the victim is not proved. Perusal of the statement of PW4 Dr. Sugam Sharma reveals that she had stated that as per her examination she found that labia majora and minora swollen conjuncted and labia majora hymen not intact. So only as no human semen and male DNA was detected on Ex.A1 to A3, the version of the prosecutrix cannot be doubted. Simply because semen was not detected, it cannot be said with all certainty that there was no penetration. All that is required to prove the offence of penetrative sexual assault defined under Section 3 of the POCSO Act is, mere penetration of penis or any object or part of the body into the vagina, mouth, urethra or anus of a child or mere insertion to any extent, any object or a part of the

body, not being the penis, into the vagina, the urethra or anus of the child and even if the accused manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child then also it constitutes an offence of penetrative sexual assault.

26. Section 3 of the POCSO Act defines penetrative sexual assault and it reads as under:

“3. Penetrative sexual assault” – A person is said to commit “penetrative sexual assault: if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person. ”

27. Reading of the aforesaid Section shows that ejaculation of semen is not necessary pre-requisite for the purpose of proving penetrative sexual assault. Even without ejaculation of semen, if from the evidence on record, it is made out that there was penetration of penis or any object or part of the body of the accused into the vagina of a minor girl, it is sufficient to constitute an offence of penetrative sexual assault as defined under Section 3 of the POCSO Act. In this context reliance can be placed upon **Tamil Nadu**

Vs. Ravi @ Nehru, 2006 (3) RCR Criminal 500, wherein the Apex Court has held as under:

“14. We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus: "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

28. In the light of the above, evidence on record clinchingly proves that there had been a penetrative sexual assault committed by the accused against the victim minor girl of nine years.

29. Learned counsel for the appellant has tried to dilute the credibility of statements of PW1 and PW2 by pointing out that while appearing in the Court they had stated that Hanish and Nannu also came there and committed rape upon the victim. But PW1 is silent regarding the name of Hanish and Nannu in her statement recorded under Section 164 Cr.P.C. and has stated

that she had not mentioned their names being under pressure of the police. This contention of learned counsel for the appellant is without any substance. When PW1 has admitted her statement recorded under Section 164 Cr.P.C. Ex.PW1/4 to be correct and has also admitted her signatures upon the same. PW6 SI Neha Saini, the Investigating Officer has also deposed that she brought both the victim as well as the complainant i.e. her mother before the Court of JMIC, Derabassi and moved application Ex.P6/6 and then statement of the mother of the victim was recorded by JMIC, Derabassi. So there is no such material on record from which it could be inferred that PW1 had not named Hanish and Nannu being under the pressure of police.

30. Moreover, so far as accused/appellant is concerned, he was specifically named from the very beginning by the prosecutrix and her mother, having committed the offence of sexual assault upon the victim and at no point of time it was alleged by the prosecutrix or her mother that he had not committed forcible rape upon the victim.

31. Learned counsel for the appellant has also tried to impeach the credibility of the prosecutrix by contending that it was improbable that if the alleged occurrence took place at such place where five persons were residing but the alleged incident was not noticed by anybody. But again this contention of learned counsel for the appellant is devoid of any force, when the prosecutrix has specifically stated in her cross examination, that total five persons were residing in her grand-mother's house, but on that day none was present. No other such glaring discrepancies have been pointed out by counsel for the appellant which are material and go to root of the

prosecution case. It is settled law that totality and circumstances of the case are to be considered and no discrepancy coming forth, singularly to be taken into consideration.

32. Thus both the most material witnesses of the prosecution PW1 and PW2 have overstood the test of credibility and even after undergoing cross examination their depositions on vital aspects remained firm and could not be shaken. Furthermore, as already observed their testimony is also supported by the medical evidence. The accused has failed to prove any evidence qua his defence plea of false implication and plea of *Alibi*.

33. For the reasons recorded hereinabove, we find no merit in this appeal and thus, we dismiss the same by affirming the judgment and order, under challenge. In the present case, appellant is already in jail. He shall serve out the sentence, so awarded to him by the trial Court.

34. Let a copy of this judgment and order along with the LCR be transmitted to the Court with the direction to inform the appellant – Vishal Kumar about the fate of his appeal.

35. Pending application(s), if any, shall also stand disposed of.

(SURESHWAR THAKUR)

JUDGE

(SUKHVINDER KAUR)

JUDGE

23.01.2024
harjeet

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|-------------------------------|--------|
| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |