

2024:PHHC:063376-DB

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

CRA-AD-296-2023 (O&M)
Reserved on: 16.04.2024
Date of decision: 07.05.2024
....Appellant

Ms. MXXXX

Versus

Amit Kumar& Anr.

....Respondent

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

Present: Mr. Ashwani Arora, Advocate for the appellant.

SUDHIR SINGH, J.

The instant appeal is preferred against the judgment dated 11.01.2023 passed by the learned Judge, Fast Track Special Court, Chandigarh, whereby respondent no. 1 has been acquitted of the charges under Section 354-A, 376(2)(n), 506 of IPC and Sections 6 & 8 of the Protection of the Children from Sexual Offence Act, 2012 (for short 'POCSO Act').

2. Vide order dated 24.01.2024, the lower Court record was called for. The same was received on 07.03.2024.

3. The prosecution case, as per the complaint of the complainant-victim (PW-2), is that the complainant was 17 years old and was a resident of Sector 56, Chandigarh. It was alleged that the accused, who was her neighbour, was on visiting terms to her house and he befriended her in 2018. The victim used to meet the accused in Sector 56 Park and at Sukhna Lake and he had also clicked her photographs. The victim alleged that the

accused used to visit her at the College and touch her inappropriately on various occasions. The victim stated that the accused had assured to solemnize marriage with her and blackmailed her by using her photographs and voice recordings made on his phone. It was further alleged that in November 2019, the accused took the victim to Naya Gaon and had forcibly committed rape upon her. The victim disclosed everything to her mother and filed her complaint with the police through Zero FIR.

4. Based on the aforesaid complaint, FIR No. 257 dated 15.08.2020 under Sections 354-A, 376(2)(n), 506 of IPC and Section 4, 6 & 8 of the POCSO Act, 2012, at P.S. 39, Chandigarh was registered. After investigation, the chargesheet was filed, whereafter cognizance was taken. Thereafter, charges were framed against respondent No. 1 to which he pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined twelve witnesses, namely, L/SI Rajni (PW-1), Victim (PW-2), ASI Yash Pal (PW-3), Amar Singh (PW-4), Parminder Singh, Incharge, GMSSS (PW-5), Dr. Neha Marwaha, MO (PW-6), SI Sarita Roy (PW-7), L/C Jyotpal Kaur (PW-8), Dr. Satyam Tyagi, EMO (PW-9), Dr. Priyanka (PW-10), Constable Parveen Kumar (PW-11) and SI Ashok Kumar as PW-12. In support of its case, the prosecution had also produced documentary evidence in the form of Ex.P1 Complaint, Ex. P2 Police Proceedings, Ex. P3 FIR, Ex. P4 Letter, Ex. P5 Statement u/s 164 Cr.P.C., Ex. P6-MLR of victim, Ex. P8, P9 Arrest & Personal Search Memo, Ex. P10 Scaled Site Plan, Ex. P11 Hotel Visitor Register, Ex. P12 School

Verification Report, Ex. P13 Admission & Withdrawal Register, Ex. P14 Admission Form, Ex. P15 OPD Card of Victim, Ex. PW7/1 FIR, Ex. PW7/2 rough site plan; PW7/3, PW7/4 & PW7/5- Seizure Memos, Ex. PW8/1 memo, PW9/1 MLR of Accused, Ex. PW9/2- Memo and Ex. PW10/1 FSL Report. The defence led documentary evidence in the form of Ex. D1- D16 Photographs, Mark DA Pen Drive, Mark DB Complaint dt. 04.08.2020, Mark DE Complaint dt. 09.08.2019, Mark D1 WhatsApp chat b/w accused & victim and Mark DW/X Transcript of conversation b/w accused & victim, in support of his case. After the conclusion of the trial, the learned Trial Court acquitted the accused person.

6. The grounds considered by the learned Trial Court for acquitting respondent no. 1 are as under:-

- i) There was no conclusive finding establishing the age of the victim being minor. Only the school record was brought on record to prove the date of birth, but the same was not corroborated with the original birth certificate or affidavit of the victim's parents. The admission form did bear the signatures of the victim's father, but for reasons best known, he was not examined as a witness by the prosecution.
- ii) The complaints and statement of the victim suffered from discrepancies and contradictions with respect to the date and time as well as place of occurrence. She even claimed ignorance with regard to the complaints filed by her mother qua the accused. The victim took three different stands in

the case, which were self-contradictory in nature and did not inspire confidence.

iii) There were no injury marks present on any external part of the genital region of the victim, and there were no medical findings which could further prove that the victim was sexually assaulted.

7. The learned counsel for the appellant, while assailing the judgment of acquittal passed by the trial Court, would argue that once the prosecutrix stood by the version recorded in the FIR, there was no occasion for the trial Court to discard the prosecution case. He has further submitted that merely because the father of the victim was not produced as a witness before the Court, was no ground to draw an adverse inference, inasmuch as the victim herself had stood the lengthy cross-examination and had proved the case of the prosecution. It is yet further submitted that the date of birth of the victim, i.e. 29.10.2002, stood duly proved by way of Ex. P13 i.e. the school record which was corroborated by the testimony of PW-5 Parminder Singh, Incharge Admissions & Withdrawal, GMSSS, Sector 56, Chandigarh. It is further contended that as per settled law, matriculation certificate is an authentic basis to determine the age of the victim/minor, but in the instant case, despite the said record having been proved, the trial Court, fell in error of law in discarding the case of the prosecution.

8. After hearing the arguments advanced by the learned counsel appearing for the appellant and upon marshaling the material available on the record, the following issues arise for consideration before this Court:-

“1. Whether the evidence brought on record conclusively establishes the age of the victim as minor?

2. Whether in light of the sole testimony of the victim, wherein she has taken contradictory stands, can the accused be held guilty of committing the alleged offence?”

9. With reference to Issue No. I, we deem it necessary to discuss the provisions of law pertaining to the determination of the age of minor.

10. As per Section 2(d) of the POCSO Act, 'Child' within the meaning of the Act means any person below the age of 18 years. Still further, Section 34 of the POCSO Act, stipulates the procedure to be followed in case of the commission of offence by a child and determination of the age of such child by a Special Court under the POCSO Act. Section 34 reads thus:-

“34.- Procedure in case of commission of offence by child and determination of age by Special Court. –

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

It may be noticed that earlier Juvenile Justice (Care and Protection of Children) Rules, 2007 framed under the

Juvenile Justice (Care and Protection of Children) Act, 2000 ('J.J. Act of 2000' for short) carried relevant provisions under Rule 12 for determination of age of the child. J.J. Act of 2000 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 ('J.J. Act of 2015' for short). Section 94 (2) of the J.J. Act of 2015 lays down a similar provision for determining the age of a child in conflict-with-law which reads as under:-

“94. Presumption and determination of age. –

(1) XXXX

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) XXXXX.”

11. The Hon'ble Supreme Court in Jarnail Singh Vs. State of Haryana (2013) 7 SCC 263, has held that 'Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, framed under the provisions of J.J. Act, 2000 is applicable to determine the age of the child in conflict-with-law and the aforesaid provision should also be the basis for determination of the age of

a child who is 'victim of crime.' The Court further observed that there was hardly any difference with respect to the question of minority between a child in conflict with law, and a child who is a 'victim of crime.' The law is now well-settled that the method to determine the age of a juvenile is also applicable to determine the age of the victim. The Hon'ble Supreme Court in P. Yuvaprakash Vs. State represented by Inspector of Police, 2023 SCC OnLine SC 846; (2023) 10 Scale 136, has observed that wherever the dispute with respect to the age of a person arises in the context of her/him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the J.J. Act, 2015.

12. Thus, in the scheme of Section 94, the matriculation (or equivalent) certificate of the child concerned is the highest-rated option for determining the age of the child. In the absence thereof, the Section envisages reliance on a birth certificate issued by a Corporation, Municipal Authority or Panchayat. If such a certificate is available, then no other material is to be considered for determining the age of the child concerned. It is only in the absence of any of the aforesaid sources, the age of the child concerned is to be determined on the basis of medical evidence.

13. To bring home the conviction under Sections 6 and 8 of the POCSO Act, the onus was on the prosecution to prove that the victim was below 18 years of age as on the date of the alleged incident, and, therefore, the victim fell within the definition of 'child' under Section 2(1)(d) of the POCSO Act. The Hon'ble

Supreme Court in Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal, (2012) 9 SCR 224, has held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. It is now well settled that the burden is always upon the prosecution to establish what it alleges.

14. To prove the age/ date of birth of the victim, the prosecution has relied on the testimony of the victim (PW-2) and further on the documentary evidence i.e. Verification Report prepared by the School (Ex.P12), Admission & Withdrawal Register (Ex.P13) and Admission Form as Ex.P14, wherefrom it was found that the victim was admitted in School on 06.04.2006 vide Admission No. 2979 and her date of birth recorded therein is 29.10.2002. The same was also corroborated by the testimony of PW5-Parminster Singh, Incharge Admissions & Withdrawal, Govt. Model Sr. Sec. School, Sec. 56, Chd, who verified the birth records of school and submitted the aforementioned records. However, as per his cross-examination, PW-5 had stated that the School authorities did not have the birth certificate of the victim or affidavit of the victim's parents or any other such documents that could prove the School records vis-a-vis the date of birth. Thus, nothing was brought on record that could prove the basis upon which the date of birth was recorded in the said exhibits.

15. In Alamelu and Anr.Vs. State, Represented by Inspector of Police, AIR 2011 SC 715, it was held by the Hon'ble Apex Court that an entry of the date of birth, as recorded in the School Register, is relevant and admissible in evidence under

Section 35 of the Indian Evidence Act. However, such entry would be of no evidentiary value in the absence of the material on the basis of which the age was recorded. There is nothing on record as to on what basis the date of birth in the School record was got recorded. The school records, produced by the prosecution, thus, provides virtually no help in affirming the victim's date of birth. The Hon'ble Supreme Court in Narbada Devi Gupta Vs. Birendra Kumar Jaiswal, 2003 (8) SCC 745, has observed as under:-

"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."

16. Admittedly, the admission form (Ex. P14) bears the signatures of the father of the victim. However, for reasons best known to the prosecution, the father of the victim who was the best witness to prove the said document was not examined. The prosecution having failed to prove the age of the victim to be minor, issue No.1 is answered in negative.

17. Coming to Issue No. II, it may be noticed that present case had been instituted on the basis of the complaint filed by the victim herself before the police authorities. We are conscious of the legal position that if evidence of the victim-prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material terms. The Hon'ble Supreme Court in the case of Rai Sandeep Vs. State (NCT of

Delhi], (2012) 8 SCC 21, has observed in paragraph no.22 as under:-

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre 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 every one 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 such similar tests to be applied, can it 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.”

Hence, the evidence of the victim in a case of rape is of the same value as that of injured witness and holds a great value. Corroboration for the victim's testimony would not be insisted upon, provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence. However, in the present case, there are several contradictions/inconsistencies in the version of the victim (PW-2) regarding the manner of occurrence committed, as well as the place and time of occurrence of the alleged offence. PW-2 victim in her initial complaint Ex. P1 stated that she was forcibly raped upon in Sector 56 park, Chandigarh, but no particulars of date, month, and year were mentioned, whereas in her statement under Section 164 Cr.P.C., she stated that she was raped in the year 2018, but while appearing before the Court as PW-2, she deposed that she was raped in the night in November 2019 in the Sector 56 park. The victim had herself claimed that she was having friendly relations with the accused, who had promised to marry her and had developed forcible physical relations with her. At the same time, she took the stand that she was raped by the accused under the threat of making her photographs and recordings public. Thus, the victim, as noticed by the learned trial Court, had taken self-contradictory stands concerning the occurrence of the crime. Furthermore, the victim also claimed ignorance qua the filing of complaints by her mother, Mark DE/DC, dated 09.04.2019, and Mark DB, dated 04.08.2020, concerning harassment and molestation of the victim by the accused. But there was no mention about the rape in the said

complaints. The testimony of the victim (PW-2) suffers from serious contradictions and does not inspire confidence qua the alleged occurrence. There is no medical evidence to establish that the victim had suffered any such sexual assault alleged to be committed by the accused. In reference to the medical/scientific evidence, upon evaluating the FSL Report Ex. PW10/1, it is clear that no human semen was detected on the swab obtained from the victim during her medico-legal examination. This indicates that even the medical report does not provide conclusive evidence of the commission of rape. Therefore, sufficient evidence is not available to corroborate the prosecution's version.

18. Thus, there is no conclusive proof in the instant case, more so supported by any clinical finding that the accused had committed rape upon the victim. Still further, as noticed above, there are material contradictions in the victim's testimony, and the prosecution has failed to prove the case beyond reasonable doubt. Accordingly, the Issue No. II is also decided in negative.

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 in the case of Prandas Vs. State, 1950 SCC 62, wherein it was observed as under:-

“15. In our opinion, the true position in regard to the jurisdiction of the High Court under Section 417 of the Criminal Procedure Code in an appeal from an order of acquittal has been stated in Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, (1933-34) 61 IA 398 : 1934 SCC OnLine PC 42] , in these words : (IA p. 404) “Sections 417, 418 and 423 of the Code [Ed. : Code of Criminal Procedure, 1898.] give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice.”

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 appeal is dismissed.

(Sudhir Singh)
Judge

(Harsh Bunger)
Judge

07.05.2024
ds/Mahavir

- *Whether speaking/reasoned:*

Yes/No
- *Whether reportable:*

Yes/No