

211 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-2-2022 (O&M)
Reserved on: 13.09.2024
Pronounced on: 17.09.2024

Surinder Singh alias VickyAppellant

Versus

State of Punjab and another ...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. G.P.S. Bal, Advocate
for the appellant.

Mr. Ashok Kumar Khubbar, Advocate
for respondent No.2-complainant.

Mr. Rishabh Singla, AAG Punjab.

HARPREET SINGH BRAR, J.

1. The present appeal is preferred against judgment of conviction and order of sentence dated 06.12.2021 passed by the learned Special Court, S.A.S. Nagar (Mohali) in the case stemming from FIR No. 86 dated 02.05.2018 registered under Sections 376, 376(2)(I), 376(2)(n) of the Indian Penal Code, 1860 (hereinafter ‘IPC’) and Sections 3, 4, 6 of the Protection of Children against Sexual Offences Act, 2012 (hereinafter ‘POCSO Act’) AT Police Station Sohana, District S.A.S. Nagar. The appellant was sentenced as follows:

Offence under	Sentence
Section 6 POCSO Act	Rigorous imprisonment of ten years and a fine of Rs. 20,000/-, in default of which further simple imprisonment of six months.

FACTUAL BACKGROUND

2. Succinctly, the facts, as alleged in the prosecution version, are that the prosecutrix was a 10th grade student in Government Senior Secondary



School, Kurdi. Her father passed away in the year 2006 and for the last 10 years, she was staying in Shahpur Kandi with her *bua* (paternal aunt). The appellant-accused, who happens to be the son of the *bua* of the prosecutrix, raped her many times since she was 5 years old. When she turned 10 years old, she disclosed the same to her *bua* but she refused to believe her and accused her of having an illicit relationship with her uncle. Thereafter, Amandeep Singh, brother of the prosecutrix, took her with him to village Sekhon Majra. The appellant also moved to the same village and continued sexually assaulting her.

3. Anita Rani, a teacher at the Government Senior Secondary School, Kurdi, noticed that the prosecutrix appeared to be depressed. When she enquired about her well being, the prosecutrix revealed her ordeal. Thereafter, Anita Rani took the prosecutrix to the Principal, who intimated the police, thereby setting the criminal justice dispensation system in motion.

4. On assessing all the material available on the record, the learned trial Court convicted the appellant vide impugned judgment dated 06.12.2024. Aggrieved by the same, the appellant has approached this Court by way of the present appeal.

CONTENTIONS

5. Learned counsel for the appellant *inter alia* contended that the learned trial Court has fallen into grave error by convicting the appellant. A perusal of the medico-legal report reflects that no injuries, internal or external, were observed on the person of the prosecutrix. In fact, the medical evidence does not support the case of the prosecution at all. Further, the prosecutrix has failed to specify the time when she was allegedly sexually assaulted by the appellant. All the private prosecution witnesses either deposed qua age of the prosecutrix or have presented hearsay versions. Moreover, DW-1 and DW-2



have deposed against the prosecution, in spite of being real brothers of the prosecutrix. It is evident that the prosecutrix only implicated the appellant in the present case to avoid being reprimanded as love letters were recovered from her bag. In her statement dated 19.12.2022 (Annexure A-1), the prosecutrix has admitted that the present case was registered only on the asking of her teacher namely Anita. There is no cogent evidence available on the record to indicate culpability on the part of the appellant. Therefore, he deserves to be acquitted of the charges framed against him.

6. Learned counsel for respondent No.2 submitted the prosecutrix has turned major now and a compromise has been affected between the parties as reflected in her affidavit dated 19.12.2022 (Annexure A-1). She has further stated that she would have no objections if the present appeal is allowed and the appellant is acquitted.

7. Learned State counsel submitted that that the appellant and the prosecutrix are cousins, who were raised together in the same house. The appellant took unfair advantage of the young age of the prosecutrix and sexually assaulted her multiple times over the last decade. The prosecutrix was 5 years old when the appellant started misbehaving with her. When she tried to approach her *bua* to inform her of the appellant's behaviour, she as well as her grandmother refused to believe her. As such, the learned trial Court has correctly convicted the appellant and no interference by this Court is warranted. He further submitted that the appellant has undergone 6 years 3 months and 20 days out of the total sentence of 10 years imposed upon him.

OBSERVATIONS AND ANALYSIS

8. Having heard the learned counsel for the parties and after perusing the record of the case, it transpires that the appellant and the prosecutrix are



first cousins and were raised in the same house by the *bua* of the prosecutrix after the demise of the father of the prosecutrix. While a compromise has been effected between the parties as evident from the affidavit dated 19.12.2022 (Annexure A-1) of the prosecutrix, this Court cannot take the same into consideration and the appeal must be decided on merits.

9. In order to attract the presumption under Section 29 and 30 of the POCSO Act, it is of the utmost importance that the victim is proved to be a child in terms of Section 2(d) of the POCSO Act. In order to prove the minority of the prosecutrix, the prosecution examined PW13- Kiran Jyoti, Principal, Government Model School, R.S.D. Shahpur Kandi Township, Pathankot, who brought forth the admission and withdrawal register (Es. P13/2), the admission form(Ex. PW13/3) and school leaving certificate (Ex. P13/4). All the said documents reflect the date of birth of the prosecutrix as 21.05.2001, which makes her about 17 years old at the time of registration of FIR(supra). However, in her cross-examination, PW13-Kiran Jyoti categorically admitted that she has not seen the birth certificate issued by the Registrar of Births and Deaths. The prosecution cannot be allowed to take advantage of a document they have not relied upon or proved on the record. As such, it remains unproven that the entry qua date of birth of the prosecutrix was made in the school record after looking at a credible source of information in terms of Section 94 of the Juvenile Justice Act, 2015, as stipulated by a two Judge bench of the Hon'ble Supreme Court in ***P. Yuvaprakash vs. State rep. by Inspector of Police 2023 AIR SC 3525***. Speaking through Justice S. Ravindra Bhatt the following was observed:

“12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:



"94. Presumption and determination of age. –

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(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) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

"(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".

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. **Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.**" (emphasis added)

Reliance in this regard can also be placed on the judgment rendered by a Division Bench of this Court in ***Terry Saroya vs. State of Punjab and another 2023 (4) R.C.R. (Criminal) 176.***

10. Pertinently, the Hon'ble Supreme Court has dealt with the issue of determination of age of the prosecutrix from school records in ***Birad Mal Singhvi vs. Anand Purohit, (1988) Supp SCC 604***, wherein it was observed that the date of birth in the register of a school would not have any evidentiary value without the testimony of the person making the entry or the person who gave the date of birth.



“14. ...The date of birth mentioned in the scholar’s register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar’s register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar’s register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.”

11. In view of the discussion above, it is evident that the minority of the prosecutrix remains unproven. As such, the presumption under Section 29 and 30 of the POCSO Act is not attracted. Consequently, it is on the prosecution to establish its case beyond reasonable doubt, which it has failed to accomplish. The prosecutrix, in the medical examination report for victims of sexual abuse (Ex. P8/2), has stated that she had a sexual relationship with the appellant twice, once in 2011 and once in March, 2017, which curiously lacks any specificity. Dr. Tamana, Medical Officer, who appeared as PW8, deposed that no spermatozoa were detected in the vulval and vaginal swabs. She stated that the possibility of sexual assault cannot be ruled out only in view of the history presented by the prosecutrix herself. Moreover, no injuries were observed on the person of the prosecutrix at the time of the examination.

12. Further still, the prosecutrix alleges that the first incident is from the year 2011, when she was 10 years old. At that time, the appellant himself would be 13 years old, as such it is highly improbable that such an incident could occur between them. Moreover, admittedly, the prosecutrix informed her *bua* and grandmother of the alleged incident, however, neither of them have been cited or examined as witnesses. In fact, DW1- Amandeep Singh, who is the real brother of the prosecutrix has deposed that their *bua* had found some



love letters with his sister because of which she was sent to Sekhon Majra. The appellant also found some love letters in the bag of the prosecutrix and scolded her for the same. As a retaliation, the prosecutrix threatened him with dire consequences if he reveals the same to their family. This version has also been corroborated by DW2-Mandeep Singh, who is also a real brother of the prosecutrix. It is highly unlikely that the real brothers of the prosecutrix would present a false version to the detriment of their sister, especially in a matter of such serious nature.

13. The prosecution case is only kept alive by the testimony of the prosecutrix. While it is trite law that an accused can be convicted for commission of a sexual offence solely on the basis of the testimony of the prosecutrix, however, the same must be of sterling quality. In the matter at hand, the prosecutrix has not provided any specific details with regard to the date and time of the occurrence of the alleged incidents. Moreover, the alleged incidents pertain to the years 2011 and 2017, but the FIR(supra) was only registered in the year 2018 i.e. after a significant delay for which no reasonable explanation is forthcoming on behalf of the prosecution. Consequently, the deposition of the prosecutrix does not inspire confidence of this Court which leads it to the conclusion that the prosecution has failed to prove its case beyond the shadow of a reasonable doubt. A two Judge bench of the Hon'ble Supreme Court in ***Tameezuddin @ Tammu vs. State of (NCT) of Delhi (2012) 15 SCC 566*** has held as follows:

“7. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

CONCLUSION

14. In view of the discussion made hereinabove, the present appeal is allowed and the appellant is acquitted of the charges framed against him. The bail bonds and surety bonds of the appellant stand discharged.

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

(HARPREET SINGH BRAR)
JUDGE

17.09.2024
Neha

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