

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRM-A-2815-2019(O&M)

Date of order: 19.03.2024

State of Haryana

.....Applicant(s)

Vs.

Joginder

.....Respondent(s)

CORAM: HON’BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr.S.K. Dagar, AAG Haryana.

Nidhi Gupta, J.

CRM-38763-2019

This is an application under Section 5 of Limitation Act read with Section 482 Cr.P.C. for condonation of delay of 101 days in filing the appeal.

After going through the contents of the application, which is supported by affidavit of Naresh Kumar, HPS, Dy. Superintendent of Police, Jhajjar at Beri, District Jhajjar, the same is allowed subject to all just exceptions and delay of 101 days in filing the present appeal is condoned.

MAIN CASE

Present application under Section 378(3) Cr.P.C. is filed by the State seeking grant of leave to file appeal against judgment of acquittal dated 01.05.2019 passed by learned Additional Sessions Judge, Jhajjar whereby the respondent/accused has been acquitted in case FIR No.440 dated 25.10.2017 registered under Sections 363 and 366-A IPC at Police Station Beri.

2. Brief facts of the case are that the present case has been registered on 25.10.2017 on the complaint of father of the victim alleging

that in the intervening night of 23/24.10.2017, he, along with his family members, was sleeping after taking meal. He alleged that in the morning of 24.10.2017, his minor daughter (victim) was not found in her room. He tried to locate her. He further alleged, that he came to know that his neighbour's son, namely Joginder s/o Bijender, had enticed his daughter (victim) on the pretext of marriage and had taken her away, he therefore prayed for taking legal action against the accused.

3. On the basis of the above said complaint, formal FIR no. 440 dated 25.10.2017 was registered under section 363, 366A IPC at Police Station Beri and investigation commenced. The certificate of date of birth of the victim was also taken into police possession. Respondent/Joginder was arrested and interrogated. During interrogation, respondent suffered his disclosure statement, but the victim and her parents refused for her medical examination. Statement of the victim under Section 164 Cr.P.C. was recorded before the Ld. Magistrate. Second accused, Ravinder was arrested and interrogated and after his disclosure statement, section 216 IPC was added.

4. Learned counsel for the applicant/State inter alia submits that FIR in the present case was registered on the basis of statement of father of the victim, who was 16-and-a-half years old at the time of offence. It is submitted that one of the grounds on which learned trial Court has acquitted the respondent is that the victim was major at the time of commission of offence. It is submitted that however, that is not the case, as borne out from the testimony of PW9 Surender, Record Clerk Birth and Death Registrar, CHC Dighal, who had brought the summoned record pertaining to certificate of date of birth of the victim (Ex. PW8/C) in which date of birth of the victim was mentioned as 21.02.2001. Learned counsel states that the date of incident was on the intervening night of 23/24.10.2017. As such, on the date of incident, the victim was about 16 years and 8 months old. Accordingly, learned trial Court has misread the evidence on record and therefore, the impugned order deserves to be set aside.

5. No other argument is made on behalf of the applicant.

6. I have heard learned counsel for the applicant and perused the case file in detail.

7. Perusal of record of the case shows that the victim was missing on the intervening night of 23/24.10.2017. FIR No.440 was registered by father of the victim on 25.10.2017 under Sections 363 and 366-A IPC at Police Station Beri. Thereafter, the victim was recovered on 26.01.2018. She was with the respondent/accused at the time of recovery.

8. Perusal of record further shows that the victim in her statement under Section 164 Cr.P.C. (Ex.PW14/A) as also in her testimony as PW15 has not supported the prosecution case. She has stated that she went willfully with the respondent; and he did not do anything wrong with her. It has also come on record that the victim refused to undergo medico-legal examination. As regards contention of the learned counsel for the applicant, that the learned trial Court has misread the evidence and the victim was minor at the time of commission of alleged offence, findings of the learned trial Court in this respect are contained in Para 16 of the impugned order and the same reads as under:-

“16. In the present case, accused has been charged for commission of the offences punishable under sections 363, 366-A, 216 of I.P.C. Suffice it to say, that the victim was alleged to be minor in the present case. It has been urged by learned defence counsel that no cogent and consistent evidence has been led by the prosecution to prove that was minor and below 18 years of age on the date of incident. It has been contended that no offence under Sections 363, 366-A of I.P.C. is made out in the present case. It has been urged that no reliance can be placed upon the entry made in the date of birth certificate (Ex.PW8/C) as the aforesaid certificate was only the photocopy of birth record of the victim and same was not proved by the prosecution by examining any witness for the reasons best known to it. I have duly gone through the contention of learned

defence counsel and same merit acceptance in view of the fact that to prove the minority of the victim prosecution has placed its reliance upon the birth certificate of the victim issued by the Registrar Birth & Death and the same was merely the photocopy of the birth certificate and no witness has been examined to prove the aforesaid birth certificate nor its original has been placed on record. Needless to say, that it is settled proposition of law that every document relied upon by the prosecution should be proved up to the hilt and as regard to the minority of the victim is concerned same has to be proved as per the Juvenile Justice Act. It is thus, held that victim was minor on the date of incident is not proved beyond reasonable doubt in the present case, as alleged. Hence, it is held that since victim was not proved to be minor in the present case and she herself stated before the learned Magistrate under Section 164 Cr.P.C. (Ex.PW14/A) and also before this court as PW15 that she left her house on her own and wanted to perform marriage with accused, thus no offence under Section 363 I.P.C. is made out against the accused and moreover, the victim has stated before the court that she was 18 years of age when she stepped into the witness box on 10.04.2019 and thus, she was on the verge of majority. Accordingly, it is held that there is no iota of evidence much prima facie on record to reflect that accused enticed the victim (a minor girl) out of lawful guardianship of her parents to bring the present case within the ambit of Section 363 I.P.C. Hence, it is held that prosecution has miserably failed to prove the enticing of victim by accused in the present case and thus, the charges under Section 363 I.P.C. does not proved beyond reasonable doubt in the present case."

9. At this stage, reference may also be made to the judgment of Kerala High Court in **Anoop vs. State of Kerala and others** **2022 SCC Online Ker2982**, wherein in para 40 it has been held as follows :-

“40. Therefore, on a profound consideration of the ground realities, the definition of ‘Child’ under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years. The Act can be amended to the effect that the age of the offender ought not to be more than five years or so than the consensual victim girl of 16 years or more. So that the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumable infatuation or innocence.”

10. At this stage reference may also be made to judgment of Madras High Court in **“Sabari @ Sabarinathan @ Sabarivasan Vs. Inspector of Police & Others” 2019 SCC OnLine Mad 18850: Law Finder doc Id # 1443121**, wherein it has been held that: -

“A. Indian Penal Code, 1860 Section 363 Protection of Children from Sexual Offences Act, 2012 Sections 5 and 6 Sexual assault - Conviction - Accused alleged to have kidnapped prosecutrix and committed sexual assault on her - Prosecutrix herself turned hostile and did not support case of prosecution - Nothing could be elicited from her even remotely in order to implicate accused with offences he was charged with - Evidence of grandparents and parents of prosecutrix does not unequivocally point to guilt of accused, since there was no direct evidence given by any of them as having seen accused and victim girl together - Girl having accepted that she knew accused being student of same school and she had no other relation with him - It was only case of presumption on part of relatives of victim girl that accused could have kidnapped her

and could have committed sexual assault on her - Accused acquitted.

*E. Protection of Children from Sexual Offences Act, 2012
Sections 43 and 44 Public awareness - Court expressed its concern about growing incidence of offences under POCSO Act and also rigorous imprisonment envisaged under Act - Some times such offences are slapped against teenagers - Act itself provide for wide publicity to its provisions to spread awareness among people about scope, import and object and ramification on its implementation - Spreading of awareness is to curb abominable menace of POCSO offences and also warn potential offenders that in case, they run afoul of Legislation they would face minimum of seven or ten years Rigorous Imprisonment - It is legally and socially imperative to ensure that awareness programmes reached people of State across Board in order to achieve ultimate aim of Society to be free from such crimes in future.*

*F. Protection of Children from Sexual Offences Act, 2012
Section 2(d) Child - Redefining - When girl below 18 years is involved in relationship with teen age boy or little over teen age it is always question mark as to how such relationship could be defined - Such relationship cannot be construed as unnatural one or alien to between relationship of opposite sexes - Where age of girl is below 18 years, even though she was capable of giving consent for relationship, being mentally matured, unfortunately, provisions of POCSO Act get attracted if such relationship transcends beyond platonic limits - On profound consideration of ground realities definition of Child in POCSO Act can be redefined as 16 instead of 18 - Any consensual sex after age of 16 or bodily contact or allied acts can be excluded from rigorous provisions of POCSO Act and such sexual assault, if it is so defined can be tried under more*

liberal provision - Respondents directed to take issue forward as they deem fit, as expeditiously as possible.”

11. Learned counsel for the applicant is unable to controvert the above said factual and legal position.
12. In view of the above, I find that no ground is made out to interfere in the impugned order. Present petition accordingly stands **dismissed**.
13. Pending application(s) if any also stand(s) disposed of.

19.03.2024

Sunena

Whether speaking/reasoned

Whether reportable

(Nidhi Gupta)

Judge

Yes/No

Yes/No