

2024:PHHC:019670-DB

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

CRM-A-1911-MA-2018
Reserved on: 23.01.2024
Pronounced on: 09.02.2024

State of Haryana

....Applicant

Versus

Chamkila

....Respondent

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

Present: Mr. Manish Dadwal, AAG, Haryana for the applicant.
Mr. Gaurav Vir Singh Behl, Advocate, as Amicus
Curiae for the respondent.

SUDHIR SINGH, J.

The instant application seeking leave to appeal is preferred against the judgment dated 22.02.2018 passed by the learned Judge, Special Court, Fatehabad, whereby respondent has been acquitted of the charges under Section 376(2)(f) of IPC and Section 5(m) punishable under Section 6 of the Protection of the Children from Sexual Offence Act, 2012.

2. Vide order dated 05.12.2018, the lower Court record was called for. The same was received on 22.11.2023.

3. The prosecution case, as per the complaint of the complainant-Father of the prosecutrix recorded by P/SI Saravjeet Kaur (PW-12), is that the complainant along with his two unmarried brothers namely, Chamkila and Kala lived together and they used to earn their livelihood by playing Dhol and dancing in marriages. It was stated that on 11.01.2016, the complainant's daughter (prosecutrix) and the complainant's brother Chamkila were returning from village Rattangarh in the evening, where they had gone to beg for food. Later on, the

prosecutrix told the complainant's wife that when she was returning from the said village, her uncle took her to a tubewell near village Kamana and had forcibly committed rape upon her. The complainant's wife, who was blind, did not share these facts with him and only told him about it next morning i.e. 12.01.2016 when his daughter had experienced pain. The complainant got his daughter admitted to the Government Hospital, Ratia, and filed his complaint with the police.

4. Based on the aforesaid complaint, FIR No. 23 dated 12.01.2016 under Sections 376(2)(i) IPC and Section 6 of the POCSO Act, 2012, at P.S. Ratia, was registered. After investigation, the chargesheet was submitted, whereafter cognizance was taken. Thereafter, charges were framed against the respondent-accused to which he pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined thirteen witnesses, namely, Dr. Dolly Gambhir, M.O. (PW-1), Dr. Sheenu Gupta, M.O. (PW-2), E/ASI Suraj Bhan (PW-3), ASI Sushma (PW-4), Jaggu Ram Patwari (PW-5), E/ASI Bahadur Singh (PW-6), ASI Satpal Singh (PW-7), Inspector Rupesh (PW-8), EHC Subhash Chander (PW-9), ASI Mahabir Parshad (PW-10), HC Kanta (PW-11), PSI Saravjeet Kaur (PW-12) and Prosecutrix as PW-13. In support of its case, the prosecution had also produced documentary evidence in the form of Ex.P1 MLR of prosecutrix, Ex. P2 sealed parcel containing salwar, lady shirt, and one shawl, Ex. P3 sealed parcel with seal of FSL containing 2 microscopic glass slides described as vulval swab, Ex. P4 sealed

parcel with seal of FSL containing one test tube of blood sample, Ex. P5 MLR of accused- Chamkila, Ex. P6 sealed parcel with seal of FSL containing one dirty mustard coloured pant, P7 sealed parcel with seal of FSL containing cotton wool swab stick, Ex. P8 disclosure statement of accused, Ex. P9 Demarcation Memo, Ex. P10 Recovery Memo, Ex. P11 Scaled Site Plan, Ex. P12 Affidavit, Ex. P13 FSL Report, Madhuban, Ex. P14 F.I.R., Ex. P15 Endorsement, Ex. P16 Recovery Memo, Ex. P17 Endorsement, Ex. P18 Statement of father of victim, Ex. P19 Endorsement on statement, Ex. P20 Rough Site Plan, Ex. P21 Arrest Memo, Ex. P22 Application for ossification test, Ex. P23 order of Illaqa Magistrate and Ex. P24 certificate of board of Doctors. The defence did not lead any oral or documentary evidence in support of its case. After the conclusion of the trial, the learned Trial Court acquitted the respondent-accused.

6. The grounds considered by the learned Trial Court for acquitting the Respondent are as under:-

- i) There was an unexplained delay of about 21 hours in lodging the FIR. It was highly unusual that when the prosecutrix told her mother about the alleged incident during the night of 11.01.2016, her mother would wait till the next morning to tell the same to her husband.
- ii) The FIR was lodged on the complaint of the father of the victim –prosecutrix, but he was not examined as a witness by the prosecution.
- iii) The statement of the prosecutrix was not recorded by the Investigating Officer, even when she was declared fit to make the same. Further, there was a discrepancy as to the place of recording of the statement of the prosecutrix which showed that proper investigation had not been conducted by the police.

- iv) Human semen even though, detected on the salwar of the victim, vulval swab of the prosecutrix, and on the pants of the accused, vide FSL Report Ex. P13, but no DNA test was conducted to confirm as to whom the said semen belonged. Thus, the same cannot be linked with the accused in any manner.
- v) There were no injury marks present on any external part of the genital region of the victim, and there was no pain on separation of thighs which further proved that the prosecutrix was not sexually assaulted.
- vi) The evidence of other prosecution witnesses was only formal in nature and their testimonies did not connect the accused with the commission of the offence.

7. The learned State counsel, 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, which was further corroborated by the presence of semen of the respondent-accused on the salwar, vulval swabs of the victim and the pants of the accused, there was no occasion for the trial Court, to discard the prosecution case. He has further submitted that merely because no DNA test was conducted to confirm the matching of the semen of the respondent-accused, is no ground to hold that the prosecution has failed to prove its case against the respondent-accused. It is yet further submitted that the finding of the trial Court that there was delay in lodging the FIR, is not sustainable as in such like cases, the parents of the victim, hesitate in reporting the matter immediately due to social stigma.

8. After hearing the arguments advanced by the learned counsel appearing for both the parties and upon marshaling the

material available on the record, the following issue arise for consideration before this Court:-

“Whether in the absence of any clinical finding by the PW-1-Dr.Dolly Gambhir, regarding the commission of rape/penetrative sexual assault upon the prosecutrix, the appellant can be held guilty of committing the alleged offence?

9. With reference to medical evidence, while evaluating report of the medical examination conducted by Dr. Dolly Gambhir (PW1), several key points come to light. The gynecological examination would show that the hymen was found intact; no external injury marks were present on any external part of the genital region and there was no pain on separation of the thighs. Even in her cross-examination, PW1 deposed that no external injury marks were present on any external part of the genital region. This indicates that the medical report does not provide a conclusive evidence of the commission of rape. Even though the FSL Report Ex. P13 indicates the presence of human semen on the salwar, vulval swab of the victim as well as the pants of the accused, yet no DNA test was conducted to analyze or cross-match the semen samples found with that of the respondent-accused. The Hon’ble Apex Court in Krishan Kumar Malik Vs. State of Haryana, 2011(3)RCR(CrL.) 589 (SC), ruled that failure to send male semen found on the undergarments of the prosecutrix to a forensic laboratory for DNA testing/analysis would be deemed fatal to the prosecution's case. Considering these facts, the ocular testimony of the victim is not substantiated by the available medical or forensic evidence. It is imperative, at this point, to consider the

significant precedents set by the Hon'ble Supreme Court in the case of Ram Narain Singh Vs. State of Punjab, (1975) 4 SCC 497 and Amar Singh & Ors. Vs. State of Punjab, AIR 1987 SC 826, wherein the Hon'ble Supreme Court, held that inconsistency between the ocular and medical evidence is a fundamental defect in the prosecution case, and unless reasonably explained, it is sufficient to discredit the entire case. Upon a careful perusal of the available records, it becomes evident that the prosecution's case rests solely on the deposition of the prosecutrix. It is relevant to consider the fact that the victim failed to provide the specific date of the alleged occurrence. Though the victim in her deposition before the Court stated that wrong act was done with her, yet nothing was deposed regarding the overt act as to what and how the alleged act occurred. Notably, in the present case, the FIR was registered on the statement of the father of the prosecutrix but the fact remains that even though the prosecutrix was declared fit to make her statement, the same was never recorded by the Investigating Officer. The learned trial Court has noticed in detail that the testimony of PW13-prosecutrix suffers from anomalies and does not inspire confidence.

10. Still further, a perusal of the trial Court record would show that in the list of witnesses, the prosecution had proposed the complainant and his wife Veena (both of them are parents of the prosecutrix) at Serial No. 13 and 17. However, the prosecution had failed to examine them as prosecution witnesses despite the fact thatailable warrants had been

issued to secure their presence. The Hon'ble Supreme Court in Takhaji Hiraji Vs. Thakore Kubersing Chamansing, (2001) 6 SCC 145, has observed that the non-examination of a material witness, who could provide essential information or fill gaps in the prosecution's case, may lead the Court to draw an adverse inference against the prosecution.

11. Thus, there is no conclusive proof in the instant case, more so supported by any clinical finding that the respondent-accused had committed rape upon the prosecutrix. Still further, there are material contradictions in the prosecution case and the material witnesses i.e. the complainant, father of the prosecutrix and her mother, were not examined by the prosecution. Accordingly, the issue is decided in negative.

12. 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 Surajpal Singh &Ors. Vs. The State, 1952 SCR 193, has held as under:-

"..the High Court has full power to review the evidence upon which the order of acquittal was founded. But it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had

the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

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

13. 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.

14. 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

(Harsh Bunger)
Judge

09.02.2024
Mahavir/ds

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