



REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 13th DAY OF SEPTEMBER, 2022

BEFORE

HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN

&

HON'BLE MR. JUSTICE VIRENDER SINGH

CRIMINAL APPEAL No. 152 of 2021

Between:

STATE OF HIMACHAL PRADESH

...APPELLANT

**(BY MR. J.S. GULERIA,
DEPUTY ADVOCATE
GENERAL)**

AND

**SHIV LAL @ CHAMPI,
S/O SH. AMAR LAL,
R/O VILLAGE BASSI
SALAR, P.O SAI,
TEHSIL BADDI,
POLICE STATION
BAROTIWALA,
DISTRICT SOLAN,
H.P.**

...RESPONDENT

**(BY MR. MUKUL SOOD,
ADVOCATE, AS LEGAL
AID COUNSEL)**

RESERVED ON

:

30.08.2022

This Criminal Appeal coming on for orders this day, Hon'ble Mr. Justice Virender Singh, delivered the following:

J U D G M E N T

State of Himachal Pradesh has preferred the present appeal under section 378 of the Code of Criminal Procedure (hereinafter referred to as CrPC) against the judgment, dated 20th November, 2020, passed by the learned Additional District & Sessions Judge, Fast Track Special Court Solan, District Solan, H.P. (hereinafter referred to as 'the trial Court').

2. By virtue of the judgment, dated 20th November, 2020 (hereinafter referred to as 'the impugned judgment'), respondent-Shiv Lal @ Champi (hereinafter referred to as 'the accused') has been acquitted from charges framed against him, for the commission of offences punishable under Sections 363, 366, 376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act').

3. Brief facts, as emerge from the report under Section 173 (2) of the CrPC, are summed up as under:

On 25th August, 2014, the complainant approached the In-charge, Police Post Kishangarh with the complaint that her

daughter (name withheld) (hereinafter referred to as 'the child victim') had left the home without informing her. The efforts to trace the child victim were made but, her whereabouts could not be ascertained. The complainant had expressed her suspicion that the accused had enticed away the child victim. Lastly, she had stated that the age of the child victim was about 17 years and prayed that the action be taken. The said complaint was forwarded to SHO, Police Station Kasauli, District Solan, where the case under Sections 363 and 366A IPC was registered. Thereafter, the police machinery swung into motion.

4. As per the documentary evidence collected by the prosecution, the date of birth of the child victim was found to be 22nd February, 1997. Efforts to trace the child victim were made but, her whereabouts could not be ascertained. Thereafter, on 5th October, 2014, the child victim was found alongwith her new born baby at Dhakru Majra in the rented accommodation of the accused.

5. Thereafter, the statement of the child victim was recorded and Section 376 IPC and Section 4 of the POCSO Act were added in this case. The accused was arrested on 6th October, 2014. During the investigation, the DNA profiling of the child

victim, accused and their new born baby was got conducted and the statement of the child victim was got recorded under Section 164 CrPC.

6. After the investigation, the police submitted the charge sheet against the accused under Sections 363, 366, 376 IPC and Section 4 of the POCSO Act.

7. After complying with the provisions of Section 207 CrPC, the learned trial Court found a *prima facie* case against the accused for commission of offences punishable under Sections 363, 366, 376 IPC read with Section 4 of the POCSO Act.

8. The accused was accordingly charge-sheeted.

9. When the charges, so framed, were put to the accused, he had pleaded not guilty and claimed to be tried. Since, the accused had not admitted his guilt, as such, the prosecution was directed to adduce the evidence. Consequently, the prosecution has examined as many as 12 witnesses.

10. After the closure of the evidence, the entire incriminating evidence, appearing against the accused, was put to him, in his statement recorded under Section 313 CrPC. The accused has denied the entire prosecution case and took the

defence that he is innocent. However, the accused has not opted to adduce any evidence in his defence.

11. The learned trial Court, after hearing the arguments of the learned Public Prosecutor, as well as the learned defence counsel, has acquitted the accused from the charges framed against him vide the impugned judgment, dated 20th November, 2020.

12. Feeling aggrieved, the State has preferred the present appeal before this Court challenging the impugned judgment, *inter alia*, on the grounds that the learned trial Court has not considered the evidence in the right perspective and has wrongly discarded the testimony of the prosecution witnesses.

13. Highlighting the statement of the mother of the child victim (the complainant) and the fact that the child victim was found in the room of the accused alongwith a baby in her lap, the main ground of attack by the appellant is that the complainant had specifically deposed that the child victim had left the house without telling anything whereupon, the missing report Ex. PW-1/B was lodged. According to the appellant, these facts have not rightly been considered by the learned trial Court in the present case.

14. Placing much reliance on the DNA report, it has been argued by Mr. J.S. Guleria, learned Deputy Advocate General, that the judgment of acquittal may kindly be set aside by convicting the accused, for the commission of offences, for which, he has been charge-sheeted in this case.

15. The prayer, so made by the learned Deputy Advocate General, has been opposed by Mr. Mukul Sood, learned counsel appearing for the accused, on the ground that there is no evidence on record to even connect the accused with the alleged crime, what to talk about proving the case by the prosecution beyond any shadow of doubt.

16. The contention of the learned Deputy Advocate General has also been opposed on the ground that there is nothing on the file to show that it was the accused, who had enticed away the child victim from her home.

17. Lastly, supporting the impugned judgment of acquittal, it has been argued that no conviction can be based solely on the DNA report, as the child victim has represented/misrepresented to the accused that she is major and her statement, on oath, has not even been controverted by the learned Public Prosecutor, by cross-examining the child victim.

18. We have heard the learned counsel for the parties and perused the record carefully.

19. PW-1 is the mother of the child victim. PW-2 is the owner of the house, from where, the child victim was recovered. PW-3 is the child victim. PW-4 Dr. Supriya, PW-5 Dr. C.L. Bhardwaj and PW-6 Dr. Ashok Handa are the Doctors, who had conducted the medico-legal examination of the child victim as well as the accused. Apart from this, PW-4 Dr. Supriya had also collected the blood samples of the child victim, accused as well as their new born baby on the F.T.A. cards and handed over the same to the police for D.N.A. profiling.

20. PW-7 Suresh Kumar, Panchayat Secretary, had handed over the birth certificate of the child victim to the police and also supplied the abstract of the Parivar Register, according to which, the date of birth of the child victim is 22nd February, 1997.

21. PW-8 Rama Nand is the Head Teacher of the School where the child victim had studied up to 4th September, 2004. According to him, the date of birth of the child victim is 22nd February, 1997.

22. Rest of the witnesses are connected to the investigation of the case.

23. The accused, in the present case, has been charge-sheeted for the commission of offence punishable under Sections 363, 366, 376 IPC read with Section 4 of the POCSO Act.

24. It is no longer *res integra* that the Appellate Court should be slow in reversing the judgment of acquittal unless and until the findings are recorded that the approach adopted by the learned trial Court is “perverse” as with the acquittal of the accused, the presumption of innocence, which was in his favour has now doubled.

25. In view of the above, this Court now proceeds to discuss the evidence of the child victim as well as her mother as both of them had been cited as star witnesses by the prosecution to prove the charges framed against the accused, in this case.

26. The mother of the child victim had put into motion the criminal machinery by moving the complaint Ex. PW-1/A before the police, wherein, she has levelled the allegations that the child victim was enticed away by the accused, but, while appearing in the witness box, has diluted her stand against the accused by stating that she did not recollect the date, when she had lodged the complaint with the police. However, she has deposed that the child victim was about 17½ years of age at that time. She has

admitted her signatures over the complaint Ex. PW-1/A. When the child victim was recovered from the house of PW-2, she was carrying one baby in her lap and the child victim had disclosed to this witness that the baby was born out of the wedlock of the accused with her. In Police Station Kasauli, the custody of the child victim was handed over to this witness. Lastly, this witness had deposed that she did not know who had taken away the child victim.

27. Since the star witness of the prosecution, i.e. the complainant, has not supported the case, which she had set up in the complaint to the police, as such, the learned Public Prosecutor had been permitted to cross-examine this witness. Despite all the best efforts made by the learned Public Prosecutor, nothing material could be elicited from this witness. Interestingly, in the further cross-examination by the learned Public Prosecutor, she has moved a step further by disowning the contents of the complaint Ex. PW-1/A by stating that she did not know who had written these contents.

28. The child victim, when appeared in the witness box as PW-3, not only exonerated the accused from the allegations levelled against him, but, also damaged the case of the

prosecution beyond any repair. According to her, she had joined the company of the accused voluntarily by requesting the accused to take her away, in order to solemnize marriage with her. Consequently, the accused reached at Patta and thereafter, they had gone to Baddi and stayed in a rented accommodation there.

29. The child victim had disclosed her relations with the accused to her mother, but her proposal to solemnize the marriage with the accused was turned down by her mother.

30. On 2nd October, 2014, she had given birth to a male child. She had disclosed her age as 17 ½ years and stated that now she is the mother of two children. She has owned the statement Ex. PW-3/A made before the Judicial Magistrate, recorded under Section 164 CrPC.

31. In her cross-examination by the learned defence counsel, the child witness has disclosed that the accused is from Scheduled Caste category and she is from General category. By reiterating the stand that she had joined the company of the accused voluntarily, she has admitted her relations with the accused and also exonerated him by stating that she had represented herself to be a major to the accused.

32. PW-2 witnessed the recovery of the child victim alongwith her baby from his room, which was allegedly rented out by him.

33. As stated above, the blood samples of the child victim, accused and their baby were collected by the prosecution during the investigation of the case. As per the report Ex. PA, the Expert has opined that the child victim is the biological mother whereas the accused is the biological father of the baby.

34. The accused, in the present case, has been charge-sheeted under Sections 363, 366 and 376 IPC. There is not even an iota of evidence on record to show that the accused was, in any way, instrumental in enticing away the accused from the custody of her parents. The child victim has categorically stated that she had voluntarily gone with the accused, in order to solemnize marriage with him. Apart from this, the stand of the child victim that she had represented herself to be major at the relevant time, is a fact which has rightly been considered by the learned trial Court.

35. The accused, in the present case, has also been charge-sheeted for the offence punishable under Section 4 of the POCSO Act. It has been argued on behalf of the appellant that the

accused could not rebut the presumption, which is against him, as per the provisions of Sections 29 and 30 of the POCSO Act.

36. For the application of Sections 29 and 30 of the POCSO Act, it was the *sine quo non* for the prosecution to prove the guilt of the accused beyond any shadow of doubt. Mere framing the charge under Section 4 of the POCSO Act is not sufficient to draw the presumption, as provided under Sections 29 and 30 of the POCSO Act against the accused.

37. In this case, it can be said that there is no evidence to connect the accused with the crime, for which, he has been charge-sheeted, in this case, as the mother of the child victim has disowned the contents of the complaint Ex. PW-1/A and she has successfully exonerated the accused by stating that she was not aware as to who had taken away the child victim. The child victim, whose date of birth has been proved from the documentary evidence as 22nd February, 1997, has also not supported the case of the prosecution. She has solemnized the marriage with the accused.

38. According to PW-5, the child victim had given birth to a male child on 2nd October, 2014.

39. The child victim when appeared in the witness box as PW-3 has introduced a new story, which is in contradiction to the prosecution case. She has deposed that he had joined the company of the accused, by referring him as her husband voluntarily. Not only this, she has also destroyed the case of the prosecution by deposing that she had called the accused and told him to take her in order to solemnize marriage with the child victim. Consequently, accused met him at Patta. Thereafter, they had gone to Baddi. She has given her age as 17½ years, when she had voluntarily joined the company of the accused.

40. Interestingly, when this witness has not supported the case of the prosecution, then neither any request has been made by the learned Public Prosecutor, in this case, to declare this witness as hostile nor the request has been made to cross-examine this witness. However, when this witness has been cross-examined by the learned defence counsel, she moved a step further by deposing that the missing report lodged by her mother was false and further exonerated the accused that she had disclosed to the accused that she was major.

41. There is no dispute with regard to the age of the child victim. There is not even a word in the depositions of PW-3 as well

as her mother, from which, an inference could be drawn that child victim left the house at the instance or even the suggestion of the accused. Whatsoever act has been committed by the accused with the child victim, which has resulted into her pregnancy, those acts seem to be done under the bonafide belief that child victim is major. It is not the defence of the accused that the child victim was major, but, it has voluntarily been deposed by the child victim that she had represented herself to be major before the accused. The child victim had passed her matriculation examination. She is not illiterate, and the fact, that she had accompanied the accused voluntarily, is a fact which demonstrates her own desire to be the wife of the accused. Not only this, she has represented/mis-represented before the accused that she has attained the majority.

42. In such a situation, merely on the basis of DNA report, no culpability of the accused can be said to be established, while holding so, the view of this Court is being guided by the decision of Hon'ble Supreme Court in a case titled as **Pattu Rajan versus State of Tamil Nadu, (2019) 4 Supreme Court Cases 771**. The relevant para 52 of the judgment is reproduced as under:-

"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case,

depending on facts and circumstances and the weight accorded to other evidence on record, whether the contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

43. In view of the above, since the ingredients of the offences, for which the accused has been charge-sheeted, have not been proved in this case, as such, the learned Deputy Advocate General could not make out a case for interference in the impugned judgment. Hence, this Court is in full agreement with the conclusion drawn by the learned trial Court and the findings of the learned trial Court, from any stretch of imagination, cannot be said to be “perverse”.

44. The appeal is accordingly dismissed. Bail bonds discharged.

45. Record be sent back.

46. Before parting with the judgment, this Court must record its deep concern about the manner, in which, the proceedings were conducted before the learned trial Court. The POCSO Act has been enacted by the legislature to protect the

interest of child victims by including certain safeguards in it. Those safeguards were incorporated in the Act to protect the child victim as well as her family from exposure, as sometimes, the child victim, as well as their parents, do not prefer to go the police station and to report the crime. Reporting such crimes to the police are still considered to be stigmatic in the tradition bound conservative society of our country. That is why, certain duties have been cast upon the Special Courts to ensure that the identity of the child victim shall not be disclosed, at any time, during the course of investigation or trial. No doubt, a relaxation has been given where such disclosure is in the interest of the child. Section 33 of the Act contains those procedures and powers of the Special Courts, which are reproduced as under:-

“33. Procedure and powers of Special Court. -

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) *The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.*

(5) *The Special Court shall ensure that the child is not called repeatedly to testify in the court.*

(6) *The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.*

(7) *The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:*

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.-For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) *In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.*

(9) *Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session."*

47. Their Lordships of Hon'ble Supreme Court in a case titled as **Eera through Dr. Manjula Krippendorf versus State (NCT of Delhi) and another, (2017) 15 Supreme Court**

Cases 133, have also reiterated the purpose of the POCSO Act and observed as under:

“20. ... the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing childfriendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.”

48. When an enactment mandates that a certain procedure is to be followed during the trial, then it was obligatory upon the trial Court to follow the said procedure scrupulously. In this case, the said procedure has not only been violated, but even in the judgment, the name of the mother of the child victim has duly

been reflected. Perusal of the record shows that the proceedings, in this case, were not conducted in camera, which is mandated by Section 37 of the POCSO Act, which is reproduced as under:-

“Trials to be conducted in camera. -

The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974).”

49. Perusal of the order sheets, passed in this case, right from 4th July, 2016, when the charges were framed against the accused till the arguments were heard, reveals that the proceedings were never conducted in “camera”. Even, while recording the evidence of PW-1, who is complainant as well as mother of the child victim, and PW-3, the child victim, the mandatory provisions of Section 33(7) of the POCSO Act have not been complied with. Rather, in a casual manner, the complete address of the complainant as well as her daughter (child victim), displaying/demonstrating their identity, has been mentioned in their deposition.

50. In such a situation, this Court is constrained to issue the following directions:-

- (i) Every effort should be made by the Special Judge(s), as well as, by the police, to ensure that during the course of investigation or trial, the identity of the child victim shall not be disclosed, unless it is in the interest of the child.
- (ii) The trial of the case should be held in camera, as mandated by Section 37 of the POCSO Act.
- (iii) While recording the statement(s), the Special Judge(s) shall ensure that the identity of the child victim, as well as the identity of his/her family, school, relatives or neighborhood or any other information by which his/her identity could be revealed, shall not be disclosed.
- (iv) While recording the statement(s) of the child victim, his/her relatives, the Special Judge(s) would be at liberty to give a fictitious name(s) to them and before doing so, the Special Judge(s) is at liberty to satisfy itself about the identity of the child victim as well as the witnesses from the report under Section 173(2) of the Code of Criminal Procedure. Such satisfaction should be recorded in the proceedings of the case.
- (v) As per Instructions No. HHC/Admn./Instructions/2018-33, dated 12th July, 2018, issued by the High Court of Himachal Pradesh, all the judgments are to be uploaded on the

website of the District Court(s). As such, the Special Judge(s), dealing with the cases under POCSO Act, are directed to ensure that the judgments, so rendered by them, do not contain the particulars, from which the identity, as mandated in terms of Section 33 (7) of the POCSO Act, of the child, could be ascertained.

- (vi) It is expected from the Special Judge(s), dealing with the cases under POCSO Act, that they will strictly adhere to the provisions of the POCSO Act, in letter and spirit.

**(Tarlok Singh Chauhan)
Judge**

**(Virender Singh)
Judge**

September 13, 2022

(rajni)