

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

Criminal Appeal No.614-DB of 2009

Date of Decision: March 2, 2015

Sohan Singh @ Neela

...Appellant

Versus

State of Punjab

...Respondent

**CORAM:HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

Present: Mr. Abhay Pal Singh Gill, Amicus Curiae,
for the appellant.

Ms. Manjari Nehru Kaul, Addl. AG, Punjab.

Amol Rattan Singh, J.

This appeal has been filed by Sohan Singh @ Neela against his conviction, passed by the learned Additional Sessions Judge, Moga, for an offence punishable under Section 376 of the IPC and his consequent sentencing to imprisonment for life and payment of a fine of Rs.5000/-, in default of which he is to undergo further sentence of one years' rigorous imprisonment. The judgment of the learned trial Court is dated 05.05.2009.

2. The facts giving rise to the criminal proceedings originate from the complaint of one Charanjit Kaur wife of Ajit Singh, resident of Patti Lohat Badhi, village Lapon, District Moga, on 08.04.2008.

[Note:-From this point on, we are reproducing our own translation of the original complaint, Ex.P1, from its vernacular version, as

we are finding too many errors in the translated version when we compare it with its vernacular version.]

3. She stated before ASI Jarnail Singh, Incharge, Police-Post, Lopon, falling under Police Station Badhni Kalan, at 5:00 PM, at the Civil Hospital, Moga, that she is a resident of the above given address, doing house-hold work and that her husband is an employee with the Food Corporation of India, doing labour work at Ajitwal; and that she has six daughters and one son, with the youngest daughter, Karamjit Kaur, aged about 2½ years, with one son younger to her, aged about 3 months.

The statement goes on to say that Bansa Singh son of Karnail Singh, has his residential house in front of her house and that her husband, as usual, had gone for his duty to Ajitwal and that she was present in her house with her “Jethani” (sister-in-law) Nachhattar Kaur and her sister-in-laws' son, Paramjit Singh and that they were sitting and talking.

Her daughter, Karamjit Kaur, was playing in the street and while playing entered the house of Bansa Singh, and at 12:30 PM (as given in the original statement in Punjabi- Ex.P1 before the trial Court, thus wrongly given as 12:00 noon in the translation before this Court), she heard shrieks of her daughter, Karamjit Kaur, coming from the house of Bansa Singh.

As per her statement (Ex.P1), the complainant, her “Jethani” and her “Jethanis” son immediately ran into the house of Bansa Singh and from the “residential room”, which had its door closed, they heard the shrieks of her daughter. On opening the door, she found that Sohan Singh @ Neela (appellant in this appeal), son of Bansa Singh, had put her daughter on a cot lying in the room and was raping her after having pulled off her shorts (“Nikkar”). Upon seeing them, Sohan Singh ran away out of fear, after

putting on his under-wear.

It is further stated in the complaint that at that time no-one was present in the house and that her daughter was shrieking and her shorts ("Nikkar") had been taken off and blood was oozing from her private parts. Upon seeing this, they quickly pulled on the shorts of Karamjit Kaur and took her home and rung up the complainants' husband, Ajit Singh and told him about the entire occurrence.

Seeing that her daughters' condition was very bad, she took her to the Government Dispensary, where her husband Ajit Singh also reached and where the doctor, upon seeing her daughters' condition, referred her to the Civil Hospital, Moga. Thereafter, they arranged for a vehicle and brought her for treatment to the Civil Hospital at Moga and got her admitted there. The doctor present there conducted medical-examination upon her.

The complaint finally states that Sohan Singh @ Neela had committed rape upon her daughter, Karamjit Kaur, and that action should be taken against him.

The statement was signed by the complainant in Gurmukhi, though not in a fluent hand.

4. As per police proceedings recorded on Ex.P1, the complaint was recorded after ASI Jarnail Singh received a written communication from the doctor at the Government Dispensary, at Loapon, to the effect that Karamjit Kaur, daughter of Ajit Singh had come to the dispensary and had been referred to the Civil Hospital, Moga, for treatment. Upon receiving the communication, the ASI, alongwith HCs Manjit Singh, Sukhdev Singh, Sarabjit Singh and Constable Sukhwinder Singh, arrived at the Civil Hospital for further proceedings, where the doctors' communication,

No.600, dated 08.04.2008, and the MLR in respect of Karamjit Kaur, was received from the doctor present there. Thereafter, the ASI went to the bed of Karamjit Kaur and recorded the above-said statement, which, as per record, was read-over to her and understood by her, after which she put her signatures to it.

5. An offence punishable under Section 376 IPC having been made out, the statement was sent through HC Sukhdev Singh to the Police Station, for registration of the case and for further intimation by way of special reports to higher authorities. Thereupon, FIR NO.37 dated 08.04.2008 came to be registered at Police Station Badhni Kalan, District Moga, in respect of the aforesaid offence, at 6:10 PM.

6. As is discernible from the order committing the case to the Court of Sessions and as can be seen from the arrest memo, Ex.P3, the appellant is stated to have been arrested on 09.04.2008 by Sub-Inspector Bhupinder Singh, SHO of the aforesaid Police Station, in the presence of ASI Jarnail Singh aforesaid, Constable Manjit Singh and the husband of the complainant, Ajit Singh.

The arrest memo also states that the accused was informed of his rights and his signatures were also obtained on the arrest memo.

7. After his arrest, in the presence of the same witnesses, the accused is stated to have been taken to a secluded place (Punjabi reads as “Parde wich”) and checked and his under-wear was removed. The colour of the under-wear and the recovery memo (Ex.P2) is given as light magenta, with elastic on it, upon which blood and semen stains were present. A separate parcel is stated to have been made of the under-wear and sealed with the Mark “BS” by the SHO and a separate sample seal prepared. The

seal, after use, is stated to have been handed over to ASI Jarnail Singh and the parcel of the under-wear and the sample seal was taken into police custody as proof, vide the aforesaid memo.

Nothing valuable was recovered from the appellant during his personal search, admittedly, as per the memo of such search, Ex.P10.

Prior to that, on 08.04.2008, the site plan of the place of occurrence is shown to have been prepared by ASI Jarnail Singh, Incharge, Police Post Lapon, which was exhibited as Ex.P7, before the trial Court.

8. On 10.04.2008, the Investigating Officer/ShO, Sub-Inspector Bhupinder Singh, made an application to the Senior Medical Officer, CHC, Badhni Kalan, to medically examine the appellant, to determine as to whether he was capable of committing rape or not and as per the report of Dr. Ajit Singh, Medical Officer, he had examined him and found him physically fit to perform sex and his sexual organs were found to be fully developed. (The application and the report are on record as Ex.P11 and Ex.P11/A, respectively.)

9. The report under Section 173 Cr. P.C. having been filed in respect of the commission of an offence punishable under Section 376 IPC, against the appellant, by the police, the case was committed to the Court of Sessions, vide order dated 08.07.2008 by the learned CJM, Moga, upon which the charge was framed by the learned Additional Sessions Judge, Moga, on 14.08.2008, to which the appellant pleaded not guilty and claimed trial.

10. Before the trial Court, the following documents were exhibited:-

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|----|---------------|--------------------------|
| a) | Ruqa and FIR | : Ex.P1, Ex.P1/A & Ex.P6 |
| b) | Recovery memo | : Ex.P2 |
| c) | Arrest memo | : Ex.P3 |

- d) Affidavit of Ct.Harbhajan Singh : Ex.P4
- e) Ruqa to Police Post : Ex.P5
- f) Site plan : Ex.P7
- g) MLR of Karamjit Kaur : Ex.P8
- h) Ruqa to SHO : Ex.P9
- i) Personal search memo : Ex.P10
- j) Ruqa to SMO : Ex.P11 and Ex.P11/A
- k) Birth Certificate of Karamjit Kaur : Ex.P12
- l) Affidavit of HC Sukhraj Singh : Ex.P13
- m) Affidavit of Ct. Sukhwinder Singh : Ex.P14
- n) Forensic Science Lab report : Ex.P15

11. Coming to the testimony of the witnesses before the trial Court, PW1 was the complainant, Charanjit Kaur, who largely deposed in tune with her complaint. During her examination-in-chief, she also identified the appellant and stated that he had raped her daughter. She also identified the signatures on the complaint, to be her own.

However, during her cross-examination, at one point, she stated that she alone went to the house of the accused on hearing shrieks of her daughter and that Paramjit Singh did not accompany her.

Other than the fact that this is directly in contravention to what she stated in her complaint, it also is apparently in contradiction to her statement during her examination-in-chief, where she has, at the relevant places, stated that “we immediately ran to the house of the present accused” and when “we opened the door of the room of the house of the accused, we saw”. Thereafter also, she has stated that “we took my daughter to our house”. The Punjabi version of her testimony also shows that she had referred, in plural, with regard to the persons going to the house of the appellant.

Other than the above, during cross-examination, she gave the direction of the house of the accused to be to the North side of her house and stated that it was at a distance of 40/50 feet from her house. She also stated that her children had started speaking in the age group of 2 to 2½ years and that her daughter, Karamjit Kaur, had also started speaking at about the same age. She further stated that her daughter could speak and make them understand things properly.

She further stated that she was 'gossiping' with her sister-in-law while sitting in the room and further stated that Paramjit Singh, son of her sister-in-law, is married and had three children.

She further admitted that the appellant is handicapped in the left arm and leg from the "very beginning", but can otherwise walk properly and can also run. She denied the suggestion that he cannot walk and run.

As per the record, at this stage, the learned Public Prosecutor made a request to the trial Court to observe the physical condition of the accused and, as per the observation recorded by the learned trial Court, the accused could walk properly and very well and there was no handicap so as to disable him from running, other than the fact that he had a stiff arm.

In her cross-examination, PW1 then described the house of the appellant and the street leading up to her house and also stated that the children from adjoining houses used to play in the street, plying small bicycles, though as per the witness, her daughter was not allowed by other children to sit on their cycles. She denied the suggestion that while playing in the street, the other children allowed her daughter to sit on their bicycle and her daughter fell down from the bicycle and received injuries on her private parts. The witness described the street to be paved with bricks.

She further stated during cross-examination, that Gurdial Singh was the “Massar” (maternal aunts' husband) of her husband and that he (Gurdial Singh) had gone to Canada, but when the occurrence took place he was in India and that he had pursued their case by spending money from his pocket.

She did not remember the exact date and month of the occurrence. Further, she stated that she stayed only for one minute in her house after bringing her daughter from the house of the appellant, after which “we immediately rushed to the hospital”.

She next stated that they went on foot to the village dispensary and when they shifted her daughter to the Civil Hospital at Moga, they went on a Taxi and reached the hospital between 12 O' clock to 1:00 PM.

Further in her cross-examination, this witness stated that her husband was at Ajitwal at the time of occurrence and that he was called through a telephonic message after which he arrived at Loapon, from where they jointly came to the Civil Hospital, Moga.

She further stated that they had no quarrel or dispute with the accused, prior to the occurrence. She specifically denied the suggestion that they had a dispute with him.

She next stated that the house of one Marra Singh was in front of her house, who also had small children, but that her daughter never used to go to the house of neighbours while playing, though she volunteered thereafter, that the accused had an attraction towards her child and therefore her child used to go with him to play.

12. The next witness was the husband of the complainant, Ajit Singh, also shown to be 40 years old, employed with the Food Corporation of

India.

This witness deposed that on 08.04.2008, he went to Ajitwal to attend his duties, where he received a telephonic message from his wife that his daughter had been raped by Sohan Singh @ Neela, after which he rushed to his village.

He stated that his daughter was in the house and that “we immediately removed to her to Civil Hospital, Loapon”.

PW2 further stated that as the condition of his daughter was precarious, the doctor referred her to Civil Hospital, Moga, where they took her and where she was medically examined and treated.

He further stated that after registration of the case, the police nabbed the accused on 09.04.2008 and that the blood stained under-wear of the accused was taken into possession by the police in his presence. As per this witness, the under-wear also had stains of semen on it and was put into a sealed parcel, after which he attested to the memo, Ex.P2, under his signatures. He also testified that the arrest memo of the accused was attested by him, which he stated was Ex.P3 and identified his signatures on the same. He further stated that his statement was also recorded by the police.

In cross-examination, PW2 stated that he reached his house within 20 minutes of receipt of the message and that he took his daughter and wife to the hospital on his motorcycle.

He further stated that the doctor did not give any first-aid to the victim in the village dispensary, but handed over a reference slip to take her to the Civil Hospital at Moga.

The witness next stated that his “Massar”, Gurdial Singh, was not

called to the village dispensary, but was called to Civil Hospital, Moga.

He stated that though he had not seen the occurrence, it was disclosed to him by his wife and further stated that the children of the adjoining houses used to play with his children in the street.

He also denied the suggestion that his child had fallen from the bicycle, while playing in the street, and had received injuries. He also denied the suggestion that the accused had himself brought his daughter in a injured condition to their house after the accident.

13. PW3 was Constable Harbhajan Singh of Police Post Lapon, who tendered his affidavit in evidence, as Ex.P4 and testified his signatures on the same.

A perusal of the said document shows that this witness stated that on 21.04.2008, MHC Sukhraj Singh, of Police Station Badhni Kalan, had called him from the Police Post to the Police Station and had handed over to him the parcel containing the under-wear with blood and semen with the seal "BS" on it, as also one parcel containing a female under-wear ("Kacchhi") stained with blood and semen, with the seal "AG" on it.

As per the affidavit, this witness was told by MHC Sukhraj Singh, to take the parcels to the FSL at Chandigarh, and to deposit them and had also allotted a docket number to the same.

The affidavit next states that PW3 took the parcels to the FSL, Chandigarh, on 22.04.2008 and handed them over to the concerned officer who checked the docket and thereafter told him to obtain the sample seal of the seal "AG", and to deposit it. Thereafter, this witness, as per his statement in writing, went to the Civil Hospital, Moga, on 23.04.2008 and obtained the said sample seal from the doctor and thereafter deposited the

same at FSL, Chandigarh and obtained a receipt which he handed over to MHC Sukhraj Singh, on return.

The affidavit finally states that as long as the case property remained with this witness, he neither tampered with it nor allowed anybody to do so.

14. PW4 was ASI Jarnail Singh, Incharge, Police Post Lapon, who stated that on 08.04.2008 he was present at the Police Post when he received one "ruqa" (written communication) from the Medical Officer, Lapon, Ex.P5, upon which he reached Civil Hospital, Moga, where Charanjit Kaur, complainant, met him and made her statement, which was Ex.P1, upon which he made his endorsement, Ex.P1/A, on the basis of which the FIR, Ex.P6, was registered by ASI Satpal Singh, whose signatures he identified.

He next stated that he had directed the MHC of the Police Station to send the special report to the senior officers and that after medical examination of the victim, Constable Sukhwinder Singh produced before him vaginal swabs given by the Medical Officer.

The witness then stated that on the same day, he went to the place of occurrence and prepared a rough site plan, Ex.P7 and also recorded the statements of Ajit Singh, Paramjit Singh and Nachhattar Singh and on return to the Police Station, deposited the material with MHC Sukhraj Singh.

On cross-examination, he stated that he received the "ruqa", Ex.P5, at about 3:30 PM and reached the Civil Hospital at about 4:00 PM. He further stated that at the time of recording of the statement of Charanjit Kaur, her husband, Ajit Singh, was also present there, though he (PW4) did

not know whether Gurdial Singh, uncle of Ajit Singh, was present there or not.

He further stated that he recorded the statement of Ajit Singh under Section 161 Cr. P.C., at the Civil Hospital itself. He denied the suggestion that he had deliberately avoided recording the statement of the victim-child.

The witness next stated that he prepared the rough site plan at 6:30 PM and that many respectables of the area were present when he reached the place of occurrence. He stated that though he joined them in the investigation, but their separate statements were not recorded.

Thereafter, the statement of this witness, in cross-examination, was that the house of the accused falls towards the South-East side from the house of the complainant as per the site plan, Ex.P7. He next stated that the accused was arrested on the next day and was not arrested from his house. He denied the suggestion that the accused was taken into illegal custody on the same day, from his house. He also denied the suggestion that the accused had been falsely implicated in the case, by taking bribe from the relative of the complainant party.

15. Dr. Jyoti, Medical Officer, Civil Hospital, Moga, appeared as PW5 before the trial Court and stated that on 08.04.2008, she medically examined Karamjit Kaur daughter of Ajit Singh, aged about 2½ years, who was brought by her father and was examined by her at 3:40 PM. She stated that the child was fully conscious and was aware of her surroundings.

She next stated that on external examination, no laceration was seen and no blood staining was present on the external genitalia and no hair or foreign particle was present.

She further stated that the victim was wearing a “Nikkar”, which was blood stained though the clothing was not torn.

The labia majora was normal but the hymen was ruptured. She further stated that there was no injury on her body.

The doctor then stated that two vaginal swabs were taken, which were sealed and sent for chemical examination. The police, as per this witness, was advised to collect the sealed parcel and the sealed envelope for chemical examination, immediately.

She next stated that she had received the carbon copy of the original MLR which was prepared “in the same process”, and was in her handwriting and bore her signatures, which she identified.

She further stated that she had not received the report of the Chemical-Examiner till date and that she had gone through the MLR. She further stated that it was a case of rape and that she sent information to the Police Station of Badhni Kalan, vide her letter, Ex.P9 upon which she also identified her signatures. The material objects, i.e. the swabs were stated by this witness to have been taken from her by Constable Sukhwinder Singh, on the same day.

In cross-examination, she stated that she had not brought the original MLR in the Court, but the carbon copy was prepared “in the same process” though she had not mentioned the duration of injuries in the MLR.

She next stated during cross-examination, that the private organs of the child were not fully developed. She also stated that the rupture of hymen was irregular and therefore, she did not mention the dimensions.

Further during her cross-examination, the doctor stated that if a child falls from a bicycle on a brick-paved road, such type of an injury

cannot be ruled out.

She also stated that at the time of medical-examination, the victim was feeling pain at the seat of the injury.

16. SI Bhupinder Singh appeared as PW6 before the trial Court and stated that on 09.04.2008, he was posted as SHO, Police Station Badhni Kalan and on that day, the investigation of the case was handed over to him, after which he, alongwith other police officials, went to village Lapon and came to know that accused Sohan Singh was present in the area of Rasoolpur, after which the police party went there and formally arrested the appellant and recorded the grounds of arrest in the memo which was prepared in the presence of the accused and signed by him and attested by ASI Jarnail Singh, HC Manjit Singh and Ajit Singh, father of the victim. The rest of his testimony, in his examination-in-chief, describes the sequence of events with regard to recovery of the under-wear of the accused, converting it into a parcel, sealing with the seal of this witness and the deposit of the same with the MHC. He also stated that he recorded the statements of the witnesses and that nothing was recovered from the personal search of the accused.

On cross-examination, he stated that the accused was arrested at 1:00 PM, at the turning point of Rasoolpur and was not accompanied by anyone at that time. He (the accused) was then taken to Police Station Badhni Kalan, where they reached at about 3:30/4:00 PM. He gave the distance of the place of arrest to be 12/13 kms from the Police Station.

During cross-examination, he further stated that the accused was made to take off his under-wear at the place of his arrest by taking him to one side, behind the vehicle.

He further stated that no sample of blood or semen was taken for comparison.

He last stated that he had not seen the parcel of under-wear of the accused.

17. PW7 was Dr. Ajit Singh, Medical Officer, Rural Hospital, Lapon, who stated that on 10.04.2008, while he was posted as Medical-Officer in CHC Badhni Kalan, he had received an application from the SHO, Police Station Badhni Kalan, which he identified as Ex.P11, upon which he examined Sohan Singh, whom he identified in Court and stated that he was found physically fit to perform sex and on examination, his sex organs were found to be fully developed. He identified his report Ex.P11/A.

In cross-examination, he stated that he does not know the accused personally and that the village Numberdar or the Chowkidar of the village of the accused were not present at the time. He further stated that he did not notice any external injury on the genitals or private parts of the accused. He also stated that there was no redness on the protruding part of the penis. He also stated that he did not ask the accused to give his semen (sample) as it was not required and that he was also not asked by the police to check the under-garments of the accused.

18. PW8 was Jaswant Singh, Panchayat Secretary, Nihal Singh Wala, who stated that he had brought the register of the Chowkidar of village Lopo, in which entries regarding births and deaths are made and that as per this register, the birth of Karamjit Kaur, daughter of Ajit Singh and Charanjit Kaur, had been registered and she was shown to be born on 30.07.2004. He further stated that the attested copy of the birth certificate is Ex.P12. He further stated that such register is maintained by the Chowkidar

in the ordinary course of his official duties, while working under the department.

On cross-examination, he stated that he did not know the persons named in the certificate, personally.

19. PW9 was HC Sukhraj Singh of Police Station Badhni Kalan, who tendered his affidavit, Ex.P13 and identified his signatures on the same.

As per the said affidavit, on 08.04.2008, ASI Jarnail Singh had handed over a parcel of one “lady under-wear” (“Kacchhi”) to him, sealed by the doctor with mark “AG” and that SI Bhupinder Singh, SHO, on 09.04.2008 deposited with him, in the “Malkhana”, one parcel of under-wear stained with blood and semen, sealed with letters “BS”.

The affidavit next states that on 10.04.2008, one plastic box duly sealed by the doctor with five stamps, one parcel of lady under-wear (“Kacchhi”) and one envelope duly sealed by the doctor, “through RC No.89/08 dated 10.04.2008”, were handed over to Constable Sukhwinder Singh, who was directed by him to deposit the property in the office of the Chemical Examiner, Kharar. He (Sukhwinder Singh) is stated, as per the affidavit, to have then deposited the return road receipt and aforesaid parcel of “lady under-wear” with this witness (PW9) on 11.04.2008 and told him that it was to be deposited with the FSL at Chandigarh.

Thereafter, as per the affidavit, on 21.04.2008 the aforesaid parcel of under-wear, stained with blood and semen, duly sealed with letters “BS”, and a “lady under-wear”, duly sealed with letters “Dr. AG”, was handed over to him (Sukhwinder Singh) through road receipt No.95/08 and after depositing these on 24.04.2008, he handed over the road receipt to PW9.

As usual the affidavit ends with the statement that the case

property remained with the deponent and was not allowed to be tampered with.

20. The last witness, i.e. PW10, Constable Sukhwinder Singh of Police Post Lapon, also tendered his affidavit, Ex.P14, in evidence, and identified his signatures on the same. As per this affidavit, this witness came to Police Station Badhni Kalan on 10.04.2008, in connection with official work and on that day, MHC Sukhraj Singh handed over to him one plastic box sealed by the doctor “through road receipt No.89/08, dated 10.04.2008” and one envelope duly sealed by the doctor and directed him to deposit the case property in the office of the Chemical Examiner, Kharar, for examination and that he (PW10) deposited the same in the office of Chemical Examiner and obtained a “receipt on road” and handed over the same to MHC Sukhraj Singh.

He also stated that as long as the case property remained with him, he neither tampered with the same, nor allowed anybody to do so.

This witness, obviously, has not given the entire picture as regards the return of the parcel containing under-wear to HC Sukhraj Singh (PW9) with the statement that it was to be deposited (not with the Chemical Examiner at Kharar) but with the Forensic Science Laboratory at Chandigarh.

It further needs to be noted here that the affidavit of HC Sukhraj Singh (Ex.P13), has been translated a little differently in the original trial Court record, the record before this Court and, since there was some confusion even with regard to the original affidavit written in Gurmukhi, another translation was got made by this Court from the Translator in the High Court, which again shows a couple of words in the original to be

illegible.

However, examination of the affidavits of all three witnesses, i.e. PW5, PW9 and PW10 indicate that vaginal swabs taken by PW5 (Dr. Jyoti), were handed over by Constable Sukhwinder Singh (PW10) with the Chemical Examiner at Kharar but there is no report on record on the outcome of any analysis made in that Laboratory.

The parcels containing under-wear were returned by Constable Sukhwinder Singh to HC Sukhraj Singh on 11.04.2008, as per the affidavit of HC Sukhraj Singh and, as per the affidavit of Constable Harbhajan Singh (PW3), the said parcels of under-wear were sent to the FSL at Chandigarh on 21.04.2015, were taken there actually on 22.04.2008 but were returned as the sample seal of the Doctor was not there. Consequently, the sample seal was collected from the hospital at Moga on 23.04.2008 and the case property deposited at the FSL, Chandigarh on 23.04.2008, as stated in this witness' affidavit (Ex.P4).

21. The prosecution gave up HC Manjit Singh as a prosecution witness, being unnecessary.

22. In his statement under Section 313 Cr. P.C., the appellant stated that he was innocent and had been falsely implicated in the case at the instance of Gurdial Singh, uncle of the husband of the complainant, who is a permanent resident of Canada and who had “greased the palms of the police officials” and got a false case planted upon him.

Though the accused stated that he wished to lead evidence in defence, no such evidence was led by him.

23. Mr. Abhay Pal Singh Gill, learned counsel appearing for the appellant, as Amicus Curiae appointed by this Court, submitted that firstly,

there is an obvious delay in depositing the case property with the Forensic Science Laboratory at Chandigarh, because the occurrence being of 08.04.2008, the parcels stated to be containing the under-wear of the deceased and the victim were sent only on 21.04.2008, on which date they were returned by the Laboratory with the direction that the sample seal of the doctor, mark "AG", be obtained, where after the said was obtained by Constable Harbhajan Singh and eventually, the case property was deposited only on 23.04.2008. Therefore, the analysis obviously could not have been conducted in a scientific manner, and, in fact, it is nowhere on record that the case property was kept in a conducive environment in the police "Malkhana", to ensure that the chemical properties of the blood and semen stains stated to be present, are maintained.

Learned counsel next submitted that PW1, i.e. the complainant, Charanjit Kaur, mother of the child, made irreconcilable improvements in her testimony before the Court, upon what she had stated in her complaint. He pointed out that whereas in her complaint, upon which the FIR was registered, she, her sister-in-law ("Jethani") Nachhattar Kaur and Nachhattar Kaur's son, Paramjit Singh, heard the cries of her daughter coming from the house of the appellant and they all went to his house and saw he was committing the rape upon the child; in cross-examination before the trial Court, she stated that she alone went to the house of the accused on hearing the shrieks of her daughter.

Thus, as per learned counsel, the very basis of the FIR was completely shaken by this statement which could not, therefore, be relied upon to uphold the conviction of the appellant.

Mr. Gill next submitted that neither Nachhattar Kaur nor Paramjit

Singh appeared as prosecution witnesses and, in fact, though both of them were originally listed as witnesses, they were given up as having been won over.

[Note:- It is seen that though there is no statement on record of the trial Court showing that Paramjit Singh was given up, however, a perusal of the trial Court record shows that both these persons were actually listed as witnesses, but as per statement of the learned Public Prosecutor dated 13.09.2008, Balvir Singh and Nachhattar Kaur were given up as having been won over, though Nachhattar Kaur is wrongly recorded as Nachhattar Singh in the order of the trial Court and it seems Balbir Singh has been wrongly shown to have been given up because a perusal of the list of witnesses does not show him to have been listed as such and, in fact, Nachhattar Kaur wife of Balvir and Paramjit Singh son of Balbir Singh are so listed. Therefore, possibly, the name of Paramjit Singh has been erroneously omitted and his fathers' name, Balbir Singh, recorded in the said order of the trial Court, as having been given up.]

Mr. Gill submitted that therefore, considering that these two witnesses were the sister-in-law and nephew of the complainant and aunt and cousin of the child, their being given up, obviously shows that the entire story with regard to the complainant and her sister-in-law and the latter's son having gone together and found the appellant committing rape upon the child, was not believable.

Learned counsel next submitted that even as per the medico-legal report (MLR), duly supported by the testimony of Dr. Jyoti, no laceration was seen on external examination of the child and apart from the rupture of her hymen, no other injury was seen on her body and even no blood staining

was present on the external genitalia, even though her “Nikkar” was blood stained. Learned counsel also pointed out that as per the doctors' statement, the clothing was also not torn.

24. Mr. Gill next submitted that the version given by the complainant, originally, was further not believable, as it would not be possible for a man/boy, 18-19 years old, who admittedly was in a semi-naked state, to run away in the presence of two ladies and a grown up man, (Paramjit Singh), especially when it was admitted even in the complainants' original statement that he first wore his under-wear and thereafter ran away. Therefore, as per the learned counsel, the story was concocted; because otherwise three persons would not have allowed the appellant to have run away in such a situation.

25. In view of the above, learned counsel for the appellant submitted, that the defence taken before the trial Court, that the child had actually fallen down from a bicycle and had ruptured her hymen, was a perfectly plausible explanation, and that is in fact, what would have happened.

Upon query, as to why the appellant would be victimised to such an extent so as to falsely implicate him in a rape case, by the complainant and her husband, Mr. Gill pointed to the statement made by the appellant under Section 313 Cr. P.C., to the effect that he was so implicated at the instance of Gurdial Singh, uncle of the father of the child, (PW2).

26. Per contra, Ms. Manjari Nehru Kaul, learned Additional Advocate General, appearing for the respondent-State, submitted that, firstly, there was no reasoning given, whatsoever, as to why the aforesaid Gurdial Singh would want to implicate the appellant falsely, with no suggestion of any pre-existing enmity even suggested by the appellant, who in any case did

not produce any defence to suggest enmity.

Learned State counsel candidly admitted that there was obviously an improvement/change in the statement of the complainant; however, Ms.Kaul submitted that this was obviously on account of the fact that the prosecution witnesses, namely Nachhattar Kaur and Paramjit Singh (wife and son of Balbir Singh), had been won over by the accused.

27. She next submitted that even as per the FSL report (Ex.P15), blood was found on the under-wear of both, the appellant, as also the child, and semen was also found on one of the two under-wears, further corroborating the case of the prosecution and the testimonies of PWs1 and 2.

As regards non-apprehension of the appellant on the spot by the complainant and her two relatives, Ms. Kaul submitted that the first reaction of the mother and immediate relatives would be to save the girl and only thereafter, to try and apprehend the accused, who, by that time, obviously ran away.

She further submitted that even as per the doctors' testimony, the girl was raped and it was only on a suggestion made during cross-examination, that PW5 (Dr. Jyoti), opined that the possibility of such type of an injury having been caused by falling from a bicycle on a brick-paved road, cannot be ruled out.

Thus, learned State counsel argued that in view of the essentially consistent testimonies of PWs1 and 2, on material particulars, as also the testimony of the doctor and the FSL report, the guilt of the appellant is well established and consequently his conviction and sentence need to be upheld.

28. Having considered the arguments of both learned counsel and having gone through the entire evidence on record, it is very obvious that there are some gaps in the prosecution evidence, as pointed out by the learned counsel for the appellant, and as is also seen from a perusal of the FSL report, though whether or not the appellant deserves the benefit of doubt on account of these, is what we shall discuss hereinafter.

29. First, coming to the FSL report, undoubtedly, the samples were submitted to the Laboratory, finally, only 15 days after the occurrence is stated to have taken place, i.e. the sealed parcels were submitted on 23.04.2008, after they were returned by the Chemical Examiner, Kharar, on 11.04.2008.

As to what happened to the two vaginal swabs, admittedly handed over to Constable Sukhwinder Singh (PW10) by the doctor (PW5), is not forthcoming anywhere on record. On the other hand, what is contained in the FSL report, is a reference to “two sealed parcels which were marked “A” and “B” in the Laboratory.”

As per the testimony of PW5 (Dr. Jyoti), she had given two vaginal swabs, which were sealed and sent for chemical examination, and as per the affidavit of Sukhwinder Singh (PW10), he was handed over one plastic box duly sealed by the doctor on 10.04.2008, by MHC Sukhraj Singh, alongwith one envelope, also duly sealed by the doctor, with the directions to deposit the same at the office of the Chemical Examiner, Kharar, which he did. Thereafter, the receipt thereof was given to MHC Sukhraj Singh. Yet, there is no report of the Chemical Examiner, Kharar, on record. Only the report of the FSL at Chandigarh, Ex.P15, is on record, as already noticed.

30. Strangely, as to which of the two parcels, “A” and “B”, as marked by the Laboratory, are relatable to the under-wear of the appellant, which is stated to have been recovered from him on 09.04.2008 by the Investigating Officer (PW6), and put it into a parcel, and sealed with the mark “BS”, is not given in the FSL report. As per the report, both parcels, Marks “A” and “B” contained under-wears, obviously meaning that one was of the appellant and the other of the child, of which the one contained in parcel “B” was stained with human semen. Though both the under-wears were stained with human blood, no demonstrable semen was detected on the exhibit contained in parcel “A”.

We can only presume that since the appellant is stated to have worn his under-wear immediately after being allegedly caught in the act of rape, the semen would be present on his under-wear and not on that of the child, which was allegedly pulled off and was put on her again, by the complainant, thus explaining the blood on it, as she was stated to have been bleeding from the vagina.

The said under-wear of the child, as per the affidavits of Constable Harbhajan Singh (PW3) and MHC Sukhraj Singh, was in a sealed packet containing the mark “AG”, prepared by the doctor.

31. As to why, all the case property, namely, the under-wear of the accused, the under-wear of the child and the vaginal swabs stated to have been taken, could not have been preserved in a more careful and scientific manner, so as to ensure that the blood and semen are duly preserved, is something that we fail to comprehend, when such methods of preservation are very commonly available.

32. Coming next to the improvement made by PW1 in her statement

before the Court, to the effect that she alone went to the house of the appellant when she heard the shrieks of her daughter, whereas she had categorically stated in her complaint- statement that she, her sister-in-law, Nachhattar Kaur and her nephew Paramjit Singh had all gone there, the two possibilities obviously are, that the first statement, to ASI Jarnail Singh (PW4), leading to the registration of the FIR, was not entirely correct and both Nachhattar Kaur and Paramjit Singh had been shown to be present only to strengthen the case of the prosecution; or, alternatively, when Nachhattar Kaur and her son Paramjit Singh, had been won over, PW1 changed her statement during cross-examination in Court, to state that she alone had gone to the appellants' house, even though in her examination-in-chief, she kept stating that "we had gone" etc., as already noticed by us earlier.

Next, again obviously, there is a contradiction in the statement between her husband (PW2) and her, to the limited extent that whereas her husband stated that they had gone to the Civil Hospital on a motorcycle, the complainant had stated in her cross-examination that they had gone by taxi.

However, the fact is that the complainants' husband was present in the Civil Hospital at 3:30 PM on the date of occurrence, as per the carbon copy of the MLR, Ex.P8 and as per the testimony of Dr. Jyoti, who stated that the child was brought by her father, Ajit Singh. The complainants' presence at the hospital is obviously not in doubt, since it was her statement made at the hospital, before ASI Jarnail Singh, which led to the filing of the FIR and no suggestion to the contrary has been made at any stage.

Thus, what can be seen from the statement of PW2, in his cross-examination, is that he stated that he took his daughter and wife to the Civil

Hospital, on his motorcycle. He has not specifically stated that it was the Civil Hospital at Moga to which he had taken them on the motorcycle. On the other hand his wife, PW1, has stated that she took her daughter to the village hospital, Lopen, on foot, where her husband also reached and from where they were referred to the Civil Hospital at Moga.

Obviously, there is a discrepancy to that extent, as PW2 stated that he reached his house and from there took his wife and daughter to the hospital, whereas PW1 stated that her husband came to the hospital itself at Lopen from where they went to Moga. However, we did not see what mileage can be derived from this inconsistency by the appellant, in view of the fact that PW2, Ajit Singh, did not once say that he saw the incident but only stated that he was told of the incident by his wife, after which he came to the village and thereafter went to the hospital.

We also do not see any great significance in the fact that the hospital at Lopen has been referred to as a Civil Hospital by PW2 but has been referred to as the Regional Hospital in Ex.'P5', which is the communication ("Ruqa") sent by the Medical Officer to the Police Post with regard to the child having been brought by her father, Ajit Singh, with the alleged history of sexual assault. No suggestion to the contrary was made to the doctor (also named Ajit Singh), who appeared as PW7. He (PW7) only testified to and was cross-examined with regard to his examination of the appellant, with regard to his ability to perform sexual intercourse.

Though, in this cross-examination, the doctor has also stated that there was no redness on the penis of the appellant, however, the examination was conducted on 10.04.2008, with the alleged assault having

taken place on 08.04.2008.

33. Coming to as to why the immediate relatives of the complainant, and the child, i.e. Nachhattar Kaur, and her son Paramjit Singh, did not testify in Court, of course, that did initially put us into a doubt, as to the possible false implication of the appellant by the complainant and her husband; however, on careful consideration of the matter, we cannot lose sight of the fact that the appellant and his father (not a witness on either side), are stated to be neighbours of the complainant and her relatives (Nachhattar Kaur & Paramjit Singh), and thus, their co-villagers, as is obvious from a perusal of the list of the witnesses annexed with the report under Section 173 Cr. P.C. in the trial Court record, which shows them to be residents of the same place as PWs1 and 2. Hence, the possibility of them having been won over, despite being allegedly immediate relatives, obviously cannot be ruled out. Also, the possibility of both these persons, i.e. Nachhattar Kaur and Paramjit Singh, having been shown as persons present at the spot along with the complainant could also have been done to 'pad up' the case at the initial stage, by the prosecution.

34. However, despite the above, we find no reason to disbelieve the case of the prosecution, as set up by the complainant and testified to by herself and her husband, i.e. parents of the victim aged 2½ to 4 years. We say this for the reasons that, firstly, of course, it is extremely unlikely that parents of a small girl child of that age would make their child a victim, only to falsely implicate some person out of any possible enmity, which again has not been even vaguely referred to by the appellant, even in his statement under Section 313 Cr. P.C. The allegation that he had been implicated at the instance of the uncle of PW2, i.e. one Gurdial Singh,

stated to be an NRI at Canada, may otherwise have been given some credence, given the obvious financial condition of the complainant and her husband, who is stated to be only a labourer, but for the fact that, even in his said statement, the appellant gave no reason, whatsoever, as to why Gurdial Singh would want to implicate him. Further, no defence was led in the trial Court, in the form of either production of the appellants' father or any relative or co-villager, as a witness to testify to the effect that Gurdial Singh had some kind of enmity with the appellant.

On the other hand, the complainant had truthfully admitted that Gurdial Singh was present in India at the time of occurrence and had spent money from his pocket to pursue their case, obviously because his (Gurdial Singhs') financial condition was better than that of the complainant and her husband. Such financial aid by Gurdial Singh does not, in any manner, in our considered opinion, point to any false implication of the appellant at his behest, especially, to repeat, when there was no ground for any enmity, even vaguely suggested.

35. Next, the production of the Secretary of the Gram Panchayat, as a prosecution witness, for placing on record the birth certificate of the child, is to be noticed by us, in view of the fact that the child was stated to be 2½ years old, by her mother, whereas the certificate showed her date of birth to be 30.07.2004, thus making her to be about more than 3½ years old. Though some inference may have been drawn for the defence, nothing substantial was established from the same, except that during the cross questioning of PW1, the age at which her child started speaking, was put to her and she had clearly stated that all her children, including the child in question, had started speaking in the age group of 2 to 4 years and that the

said child could communicate what she wanted to convey.

In this regard, a question was also put to PW4, ASI Jarnail Singh that he had deliberately not recorded the statement of the child, in hospital.

We do not see any material significance in the same, as the child would have been in physical and mental distress, as even the doctor testified that she was in pain. As such, non-recording of the statement of a child less than four years of age, at the time of the occurrence, or her non-examination as a witness, also does not detract from the prosecution case, in our opinion.

36. As regards non-production of the report of the chemical examiner on the examination conducted on the vaginal swabs taken from the child, and non comparison of such swabs with the semen detected on the underwear of the appellant, though the investigating agency needs to be castigated on this issue, however having considered the entire testimony hereinabove, we do not find this otherwise inexplicable lapse to be fatal to the prosecutions' case.

37. Hence, keeping the entire circumstances in mind, in the light of the evidence and the discussion on it, as given up by us hereinabove, we find no error in the judgment of the learned trial Court, in convicting the appellant for an offence punishable under Section 376 (2) (f) of the IPC.

38. Coming to the sentence imposed upon the appellant, to undergo imprisonment for life and to pay a fine of Rs. 5,000/-, in default of which he is to further undergo rigorous imprisonment for one year, we, despite the fact that a small child, almost an infant of about 3 years of age, has been subjected to rape, also find that the appellant is a slightly handicapped person shown to be 18 years of age. Though, at the initial stage of the trial, an issue was raised with regard to him being a juvenile, no proof with

regard thereto was produced in Court. Hence, he was found to be of the age of 18 years and sentenced as an adult.

However, keeping in view his own young age, but not detracting from the heinousness of the crime committed, given the age of the child, we are forced to say that there is mitigating circumstance in favour of the appellant, on account of his age at the time of occurrence, seen with his slight handicap, as admitted to by the complainant. Hence, keeping in view the same, we reduce the sentence imposed upon the appellant from that of imprisonment for life, to rigorous imprisonment for a term of 12 years and maintain the fine imposed upon him of Rs. 5,000/-, in default of payment of which he would undergo imprisonment for another period of 6 months. In addition, we also order him to pay some compensation to the parents of the victim, i.e. PW1 and PW2, to the extent of Rs. 25,000/-, in default of payment of which he would undergo imprisonment for a further period of one year.

39. The appeal is accordingly dismissed qua the conviction of the appellant by the trial Court, but with a reduction in sentence, which shall be now, as has been imposed hereinabove.

March 2, 2015
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(RAJIVE BHALLA)
JUDGE

(AMOL RATTAN SINGH)
JUDGE