

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-1118-SB-2011 (O&M)

Date of Decision: 27.05.2015

Pardeep

...Appellant(s)

Versus

State of Haryana

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the digest?

Present: Mr. Amit Khatkar, Advocate
for the appellant.

Mr. S.S. Pannu, D.A.G, Punjab
counsel for the respondent-State.

ANITA CHAUDHRY, J.

1. This criminal appeal is directed against the judgment dated 31.03.2010, passed by the Additional Sessions Judge, Jind who convicted the appellant under Section 376 (2)(g) and sentenced him to undergo rigorous imprisonment for a period of 10 years along with a fine of Rs.5,000/-. In default of payment of fine, he was to undergo further simple imprisonment for a period of 6 months.

2. In order to appreciate the merits of the case, the factual matrix is necessary. The prosecutrix PW4 daughter of Guddi PW5 is a resident of village Naguran. For the last about two months, the prosecutrix had been sleeping in her grand parent's house which adjoins their house. The prosecutrix left her house at 9:00 PM. and had reached the gate of the adjoining house when Pardeep and Sonu came in the street.

Sonu caught the girl while Pardeep dragged her to his house and raped her. Sonu issued threats and thereafter left. The victim returned to sleep in her grand mother's house later that night. She did not disclose the incident to anyone for two days. Mustering courage she revealed the incident to her mother on the second day. The incident was reported to police on 27.01.2009. The prosecutrix was medically examined. Her statement under Section 164 Cr.P.C. was recorded. Both Sonu and Pardeep were arrested. Sonu was found to be a juvenile. A separate challan against him was filed.

3. Upon committal of the case, charge was framed under Section 376(g) IPC. The accused pleaded not guilty and claimed to be tried. The prosecution, in order to bring home the guilt of the accused mainly relied upon the statement of the prosecutrix, her mother, the Medical Officers and the Investigating Officer who had recorded the statement under Section 164 Cr.P.C. During his statement under Section 313 Cr.P.C., the accused denied all the incriminating circumstances appearing against him. However, he did not choose to lead any evidence in defence. The defence of the accused was of total denial and false implication.

4. After hearing the parties and on assessment of the oral as well as documentary evidence, the Additional Sessions Judge, vide judgment under appeal held that the prosecution had proved the case and repelled the contention

that there was delay in lodging the FIR or that story was improbable. The learned Sessions Judge was of the opinion that the accused was guilty of the charges levelled against him and in that view of the matter, he convicted the appellant for the offence punishable under Section 376 (2)(g) IPC and sentenced him to undergo the sentence as stated above.

5. I have heard learned counsel for the parties.

6. The learned counsel for the appellant contended that the judgment under appeal was perverse and the statements of the prosecutrix & her mother were in contradiction to each other and the statement made by the mother exposed the prosecution story and throws up a different picture. It was urged that the house of the grand mother adjoins the complainant's house and the house of the accused is two streets away and it was not possible for two men to gag and drag a young woman at 9:00 P.M. from the gate of her house without injury or being noted and the site plan would reveal that both the houses have a common wall. It was urged that the girl was over 16 years of age and no semen was found in the vaginal swabs and had the incident occurred, the family would have noticed some change in her conduct and that would have aroused suspicion. It was urged that it was un-natural that she would come and sleep and be normal the next day. It was urged that the statement given by the mother tells us a different story when she admitted that she had followed her daughter that night and when she

did not find her daughter, she went to the house of Pardeep to look for her daughter. It was urged that the mother could not have known that her daughter was at Pardeep's house. It was contended that Guddi had stated that the grand parents of Pardeep were present in the house. It was urged that the girl had gone on her own and the medical evidence indicates that the prosecutrix had been indulging in sexual acts and it was a case of consent and she was over 16 years and less than 17 years and thus could give consent and no offence was committed.

7. Per contra, the learned State counsel sought to justify the judgment and contended that the judgment under appeal did not suffer from any perversity or illegality and the learned Addl. Sessions Judge on proper appreciation of oral and documentary evidence had recorded a finding which was sound and reasonable and it did not warrant interference. It was urged that delay in lodging the FIR was specifically explained and the girl was shy and with great courage had confided in her mother.

8. As noticed above, the incident took place on 25.01.2009 at about 9:00 PM. The FIR was lodged two days later at 8:50 PM. The reason for the delay given by the prosecutrix was that she could not disclose the incident to her family out of shame.

9. No doubt, delay in lodging the complaint by itself is not fatal to the case of the prosecution unless from the circumstances it can be deduced that the delay is on account

of projecting a coloured version. In sexual offences one can understand that there would be initial hesitation of the victim to report the matter to the police as it may affect her family life and the family's reputation. Very often in such cases it is after considerable persuasion, the prosecutrix may be persuaded to disclose the true facts. These are cases where the initial hesitation of the prosecutrix may provide a good explanation for the delay in lodging the report. In the ultimate analysis what is the effect of delay in lodging the report, is a matter of appreciation of evidence and the Court has to consider the delay in the background of facts and circumstances of each case.

10. Different cases have different facts and it is the totality of the evidence and the impact that it has on the mind of the Court that is important.

11. Examining the evidence now, it is found on perusal of the site plan Ex.PA that the house of the grand mother of the prosecutrix adjoins the house of the complainant. There is a common wall in between. The prosecutrix was gagged and dragged when she was in front of her grand mother's house. She was taken to a house which falls on Nagura Road and is two streets away. The house of Pardeep and Sonu are adjacent to each other. In between the house of the prosecutrix and the house of the accused, there are two other properties and two streets. The Chopal in the village has to be crossed to reach the street.

12. The prosecutrix had maintained her statement before the Magistrate under Section 164 Cr.P.C. and then in the Court after the charge was framed. The victim had disclosed that she did not speak about the incident to anyone nor she took bath for two days. She stated that Sonu had threatened her and had a knife in his hand and she was raped by Pardeep and they left her at 2:00 A.M. She had stated that the incident was narrated to her parents only on 27.01.2009 in the morning around 10:00 A.M. She had been sleeping in the house of her grand mother for the last one month. She admitted that the house of her uncle was on the other side and there were three houses in between the house of her grand mother and that of the accused. She admitted that the villagers were going and coming in the village at that hour. She stated that both her grand parents were sleeping when she returned. She stated that she could not raise any noise as her mouth was gagged. She stated that her grand mother did not inquire from her parents as to why she had not reached. She stated that she opened the door and went in.

13. Guddi PW5, mother of the prosecutrix made a short statement that her daughter had been going to sleep at of her grand mother's house for the past two months and Pardeep and Sonu took her forcibly to their house and her daughter disclosed that she had been raped and they went and reported the matter to the police. In the cross-examination, she admitted that she used to ensure that her

daughter reached the grand mother's house and her mother-in-law used to inform that the girl had reached. On the day of occurrence she admitted that she went to the house of her mother-in-law to inquire about her daughter and when she did not find her. She told her husband, mother-in-law and her father-in-law and they went to search for her in Pardeep's house and they found her there and his grand parents were also present.

The cross-examination reveals and brings up certain facts which suggest that the incident did not occur in the manner which is being projected by the prosecution. The mother admitted that she used to ensure that the girl reached her granny's house and that night, the mother found that her daughter had not reached and she informed her husband and her father-in-law and all of them went to Pardeep's house, which means that they knew that the girl had been secretly meeting the boy. Otherwise she would not have directly gone to the boys' house. It has come out in the statement of the mother that the grand parents of Pardeep were also present in the house. She stated that they had convened a Panchayat in the village and thereafter, had reported the matter to the police. She had also stated that Pardeep and his aunt had also gone to the police station. She admitted that prior to the present occurrence, the family of the accused had a quarrel with them and they had given them a beating and the police had arrived in the village after the first encounter.

14. Joginder PW6, father of the prosecutrix maintained the same story as given by the prosecutrix. He stated that the house of the accused was in another street and the distance between his house and Pardeep's house was about one Kila and there were other houses in between. This witness contradicted his wife when he stated that neither he nor his wife used to ensure their daughter's arrival.

15. Dr. Sujata Bansal PW15 had examined the prosecutrix. The following were noted:-

- No history of changing the clothes after the act.
- No history of discharge per vaginum present even before the act.
- Axillary and pubic hair well developed. Breasts in the stage of developing.
- No sign of external injury was seen on the whole body i.e. face, neck, chest/breasts, hands, arms, thighs, or external genitalia.
- On per vaginum examination, vaginal swabs were taken before doing per vaginum examination. Mild discharge per vaginum was present which was white in colour. No sign of bleeding per vaginum was present. Pubic hair were non matted. Vagina was roomy. Two fingers could be easily inserted in the vagina. Carunculae were present. Vaginal rugosities were present. Pubic hair were non-matted. No sign of internal injury was present. Uterus size was normal and antverted.
- Possibility of intercourse cannot be ruled out but final report was subjected to FSL report.

16. As per FSL report, human semen was detected on the salwar and underwear. However, no semen could be detected on the rest of the exhibits i.e. the vaginal swabs.

17. The mother of the prosecutrix has made some damning revelations which throws up entirely different version. She has admitted that previously an altercation had taken place between the two families. Of course, the reason for that was not disclosed. She had also admitted that she and her family had come to know the same evening that her daughter had not reached the grand mother's house. The mother admits that they went directly to the house of Pardeep and found her there. She admits that the grand parents of the boy were also present at that time. From this admission and the fact that there was no injury external or internal on the prosecutrix, it indicates that there was something between prosecutrix and the accused.

18. From the evidence, it stands established that the girl was more than 16 years, though less than 18 years. Section 375 of IPC, defines rape. According to this Section, a man is said to commit rape if he has sexual intercourse with the women against her will and without her consent. However as per sixthly of this Section, if act of sexual intercourse has been committed even with the consent of woman below 16 years of age, it would constitute rape punishable under Section 376 of IPC. In other words, as per the Section, consent given by a woman below 16 years is no consent in the eye of law and as a corollary woman aged more than 16 years though a minor is capable of giving consent and if the circumstances indicate such consent by woman aged more than 16 years, the act complained would

not constitute as rape within the meaning of Section 375 of IPC.

19. The prosecutrix was more than 16 years. She was capable of giving consent. If the evidence of the prosecutrix and her mother is read together, it indicates that the prosecutrix and the accused were together even in late hours in the night. Though, the incident had occurred on 25.01.2009 and the parents and the whole family knew of it but they did not lodge the report. The medical examination conducted on the prosecutrix did not indicate evidence of recent sexual intercourse. However, the medical examination indicates that the girl was sexually alive. Thus, in the light of the discussion above, the possibility of the alleged incident having taken place in the manner projected by the prosecution appears to be doubtful. No doubt, the victim in her evidence before the Court had stated on oath that she was subjected to rape and in a catena of decisions, it has been held that in sexual offences, evidence of the victim is not required to be corroborated. However, that is not the absolute rule.

20. In ***Vijayan v. State of Kerala, [(2008) 14 SCC 763]***, the Apex Court has held thus in para 5;

" 5. x x x x x x x In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for 31 rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony. X x x x x x x "

21. In *Tameezuddin v. State (NCT of Delhi)*, [(2009)

15 SCC 566], the Apex Court has observed thus:

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

22. In *Dinesh Jaiswal v. State of Madhya Pradesh*, [(2010) 3 SCC 232], the Apex court referring to the 32 principle that the evidence of the prosecutrix is liable to be believed save in exceptional circumstances and had observed thus:

"10. Mr C.D. Singh has however placed reliance on Moti Lal case to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances.

There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

23. The testimony of the victim does not inspire confidence. The version given by the mother totally contradicts the prosecution story. A conviction cannot be based on the sole evidence of the victim. The story projected by the prosecution does not inspire confidence. The story is improbable and belies logic. The observations made by the Court below is the result of improper appreciation of evidence.

24. In view of the discussion above, the finding recorded by the Court below is set aside. The appeal is allowed. The judgment of conviction and order of sentence

under challenge is set aside. The accused-appellant is acquitted of the charges. The fine amount if deposited would be refunded. Lower Court record be sent back.

(ANITA CHAUDHRY)
JUDGE

27.05.2015
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