

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-1918-SB-2010 (O&M)

Date of decision: 20.05.2015

Sandeep

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH

1. *Whether Reporters of the local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

PRESENT: Mr. Amandeep S. Rai, Advocate Amicus Curiae
for the appellant.

Ms. Dimple Jain, AAG, Haryana.

R.P. NAGRATH, J.

The instant appeal is directed against the judgment of conviction dated 24.02.2010 and order of sentence dated 25.02.2010 whereby the appellant was convicted under Sections 376(2)(f) of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of ₹ 10,000/-, in default of payment of fine to further undergo rigorous imprisonment for six months.

2. The charge against the appellant was that he committed rape on the prosecutrix, a 7 years old girl child. For offence under Section 376 (2)(f) IPC the minimum punishment provided is 10 years rigorous imprisonment being a girl below 12 years of age. The mother of the

prosecutrix presented complaint Ex. P-1 before the police on 19.12.2008.

3. The prosecution story, briefly stated, is that the complainant has three children and the prosecutrix is youngest of them. The family of the complainant resides in a Dhani of village Pabra. (Dhani in this part of State is understood as cluster of few houses ancillary to the village for those who want to live in the proximity of their fields). On the fateful day, husband of the complainant had gone to Hisar for check up of his brother who suffered paralysis attack. All the children of the complainant were studying in a nearby school falling in village Kandool. The prosecutrix who was studying in the Ist Standard in Government School, Kandool used to return home earlier to other children of the complainant because she was studying in the lowest standard.

4. On 15.12.2008, the prosecutrix returned home at about 2.30 p.m. and she was crying. She was holding her salwar in her hand which was stained with blood. The girl narrated to her mother that a boy took her inside the fields and beat her. The name of boy was not known to the victim but she told her mother that she could recognize the culprit. Message was sent to husband of the complainant telephonically. It is further stated that complainant had been going village Kandool daily to locate the culprit and on 18.12.2008, while they were returning home in the evening, that she saw three boys standing there out of whom the appellant was recognized by daughter of the complainant as the boy who sexually assaulted the victim. When the appellant was confronted by the complainant, he got perplexed. On 19.12.2008 in the morning, father of the appellant along with 2 or 3 more persons came to the house of

complainant and requested the parents of prosecutrix for pardon to which the family did not agree. A written complaint Ex. P-1 was made to police on 19.12.2008 and FIR Ex. P-15 was registered on that basis. The girl was medically examined in Civil Hospital, Hisar. The appellant was arrested on 21.12.2008 and on his medical examination conducted by PW-3 Dr. Dalel Singh, nothing was found to suggest that he was not capable of performing sexual intercourse. Copy of his medical examination report is Ex. P-3.

5. On 19.12.2008, father of the prosecutrix handed over salwar of the victim which she was wearing at the time of incident for which the sealed parcel bearing seal impression 'PR' of the Investigating Officer was prepared and taken into possession vide memo Ex. P-12. The rough site plan of the place of occurrence Ex. P-16 was also prepared. The underwear which the appellant was wearing at the time of his arrest was prepared into sealed parcel by the doctor and handed over to the police. These parcels were sent for examination to Forensic Science Laboratory for which the prosecution examined PW-11 Constable Rajinder Singh and PW-12 HC Ashok Kumar who had tendered their affidavits Ex. P-23 and P-22 respectively. As per report Ex. P-5, blood was found on the Pyjama of the victim and also on the vaginal swab and this was found to be human blood. Semen was also detected on the underwear of the appellant sent for examination. There was, however, no semen detected on the Pyjama and vaginal swab.

6. The case was committed to the Sessions Court for trial. The prosecution examined 12 witnesses. During his examination under

Section 313 Cr.P.C., the appellant denied all the incriminating circumstances appearing in the prosecution evidence against him. He pleaded that there was a dispute between the appellant and family of the prosecutrix regarding payments of agricultural labour charges. The appellant in defence examined his father as DW-1.

7. I have heard learned counsel for the appellant, learned State counsel and also extensively gone through the record with their able assistance.

8. Learned appellant's counsel challenged the conviction of the appellant *inter alia* on the grounds (a) that there is a huge delay in lodging the FIR; (b) that there was a motive for the witnesses to falsely implicate the appellant and (c) that identity of the culprit who committed rape has not been cogently established.

9. On the other hand, learned State counsel supported the findings of learned trial Court that the evidence is quite cogent and convincing and there was no scope of false implication of the appellant especially when there is categorical statement by the victim who was just about 7 years old at the time of incident.

10. The first and the foremost issue would be whether the prosecutrix was sexually ravished on 15.12.2008. The most important is the statement of prosecutrix herself examined as PW-2. She stated that while returning home from school, the appellant took her to the Mustard fields and committed sexual intercourse with her. Thereafter, she returned home and her mother washed her legs as the same were stained with blood. She further stated that her salwar was also stained with

blood.

11. There is absolutely no scope of attacking the above statement of prosecutrix as the girl being sexually ravished is supported by the medical evidence. Dr. Kiran Goyal was examined as PW-6. The doctor prepared the MLR of prosecutrix Ex. P-8. On examination of the prosecutrix on 20.12.2008 it was found as under:-

“(a) to (f) xxx xxx xxx xxx

g. No secondary sexual characters were developed.

When examined, a small module in both breasts were present.

h. Labia Majora inflammed and tender on examination.

i. A tear of size 2 cm x 1 cm deep over the posterior fourchette present.

j. No fresh bleeding present, tenderness present, old clotted blood present along with margins.

k. Hymen absent, vagina admits a tip of little finger with a lot of tenderness.

l. xxx xxx xxx xxx”

12. The above-stated findings of the doctor are stated in her affidavit Ex. P-9. The factum of the girl being raped in the manner stated in the prosecution story and testified by the prosecutrix and her mother was in fact not challenged except for contending that identity of the culprit is not established. It was suggested to the mother of prosecutrix examined as PW-1 that some unknown person had committed rape on

her daughter. PW-1 also denied the suggestion that the appellant was named because of some altercation with regard to dispute of payment of labour charges. There is absolutely nothing on record for supporting the above contention and it is not even comprehended that family of the prosecutrix would use a small child of 7 years of age to falsely involve some person for the heinous crime against the person of child. Such an incident would always leave an un-ending trauma on the mind of girl that it would not be possible for her to forget the sordid incident which would leave the impression throughout her life resulting into total hatred towards the society and advancement of her mental faculties. The prosecutrix succinctly remembered the whole incident despite the expiry of about 8 months which is the period that elapsed between the incident and her examination in the Court. The prosecutrix even denied categorically that some un-known person committed rape on her and she is falsely naming the appellant at the instance of her family members.

13. A seven years old child was undergoing the agony of this pain as the doctor found a tear of size 2 cm x 1 cm deep over the posterior fourchette present and tenderness also present and old clotted blood was also present along with tenderness. Labia Majora inflamed and it was found tender on examination. The kind of brutal act on the part of accused with such a small child is apparent from the aforesaid opinion of the doctor on medical examination of the girl after 5 days of the occurrence.

14. Now, the remaining question was with regard to identity of the culprit. The delay in lodging the FIR is absolutely immaterial in this

case because a girl child of 7 years of age was raped and the rapist was not known to her. The version of prosecution as set up in the complaint and as testified by her mother as PW-1 is apparently the result of normal sequence of events.

15. In consonance with the prosecution story, mother of the prosecutrix as PW-1 stated that she was taking her daughter for 2-3 days continuously to village Kandool so that the boy could be identified. After 3-4 days, the prosecutrix pointed out the appellant as culprit who was standing along with three boys near a tractor-trolley loaded with earth. Thereafter, the complaint was made and the girl was medically examined. According to the story stated in the complaint, the boy was identified on 18.12.2008.

16. PW-1 reiterated that on 19.12.2008 prior to visiting the police station, father of the appellant came along with two others and sought apology for the mistake committed by the appellant. DW-1 Satbir father of the appellant stated that he had gone to the house of the family of prosecutrix for demanding labour charges. At that moment, father of the prosecutrix stated that an untoward incident had happened with his daughter and, therefore, DW-1 came back from there. This defence version would bring support to the story of prosecution that father of the appellant had come to the house of complainant and admitted the folly of his son. In the chief examination, DW-1 even stated that after discussing with father of prosecutrix he returned home but could not say if the version about untowards incident with the girl was truthful or false though his son was implicated later on.

17. I am of the considered view that the delay was simply because of the insensitive attitude of the local police in recording the FIR immediately because the culprit was not known. Anyhow, the delay has been properly explained by PW-1 mother of the prosecutrix in her testimony as well as in the complaint Ex. P-1.

18. In **State of Punjab Vs. Gurmit Singh, 1996 (2) SCC 384**, the Hon'ble Supreme Court held that the Courts cannot overlook the fact that in sexual offences delay in lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

19. Hon'ble Supreme Court in **State of U.P. Vs. Manoj Kumar Pandey, 2009 (1) SCC 72**, observed that normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape. This was held to be a consistent view. Therefore, the delay in lodging FIR in the present case absolutely has no impact on the version of prosecution as fully testified by the prosecutrix and supported by the enormous evidence. In fact there was no question put to the prosecutrix appearing as PW-2 to bring any contradiction in the evidence as compared to the explanation furnished by PW-1 that the victim was taken by her mother to Kandool village in search of culprit for 2/3 days.

20. The next question would be how much value is to be attached to the statement of a child witness. PW-2 the victim was questioned generally by the learned trial Judge who certified that the child was giving spontaneous answers to the questions put to her though she was not aware about the time sense. She was able to understand that it is good to speak truth and certified that the victim was a competent witness. It was further observed that the child was unable to tell the names of her father's brother(s). There is nothing unusual in that as in the village life the elders in the family i.e. brothers of father are usually referred as '*chacha & taya*'. PW-2 narrated the incident in the manner it happened. In cross-examination, the prosecutrix stated that she was returning home from school all alone. The appellant took her to the nearby Sarson (mustard) fields. The height of crop was about the height of man. There were flowers on the mustard plants. PW-2 stated that she did not put her salwar while returning to home and this was exactly the version of PW-1 in the complaint that her daughter was holding salwar in her hand when she returned home. PW-1 stated in cross-examination that she was wearing school uniform at that time colour of which was pigeon.

21. The site plan Ex. P-16 prepared by the Investigating Officer would also show the presence of mustard crop in the field of Tek Ram, where the occurrence took place. Father of prosecutrix as PW-8 stated in the cross-examination that the place of incident is the field of Tek Ram which is near his house. PW-8 further stated that the place of occurrence was surrounded by mustard crop though at the place of occurrence there

was no such crop. The parents of prosecutrix have been extensively cross-examined and there was absolutely nothing to suggest false implication of the appellant. The responses to various questions in cross-examination are so natural that there is no scope of finding any suspicion in the story.

22. It is a well settled principle that evidence of a child witness cannot be rejected unless the same is tutored or unless the same is unreliable. In Dattu Ramrao Sakhare and others Vs. State of Maharashtra, (1997) 5 SCC 341, the Hon'ble Supreme Court observed as under:-

“5. ...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such

a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the evidence of Sarubai (PW 2).”

23. In **Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat, (2004) 1 Supreme Court Cases 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and Intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shake and moulded, but it is also an accepted norm that, if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

24. Even in the instant case, testimony of prosecutrix who is a child witness has the credibility which reveals a truthful approach and has

the ring of truth. There are no exaggerations and she has stuck to her statement made during investigation in all material particulars. Learned trial Court, thus, was justified in placing implicit reliance on the testimony of the prosecutrix supported by both of her parents.

25. In Suryanarayana Vs. State of Karnataka, 2001 (9) SCC 129, the Hon'ble Supreme Court held as under:-

“5. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The witness of PW2 cannot be discarded only on the ground of her being of Teen age. The fact of PW2 being a child witness would require the court to scrutinize her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend

credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.”

26. In view of the above discussion, there is absolutely no scope of interference by this Court. The sentence awarded to the appellant is minimum as provided under Section 376 (2) (f) IPC. There is no merit in the instant appeal and the same is dismissed.

May 20, 2015
rishu

(R.P. NAGRATH)
JUDGE