

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-446-SB-2009

Date of decision: 01.04.2015

Bharat Kumar @ Titu

..... Appellant

Versus

State of Punjab

..... 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. Sachin Sharma, Advocate for the appellant.

Mr. Gurveer Sidhu, AAG, Punjab.

R.P. NAGRATH, J.

The appellant faced trial of the charge under Section 376 of the Indian Penal Code (IPC) for committing rape on his step daughter (prosecutrix). The circumstances of the case would suggest that the police did not show sensitivity in recording FIR for such a sensational incident. The Investigating Agency in fact swung into action on receiving information from the hospital, after the girl was medico-legally examined under the orders of learned Judicial Magistrate Ist Class, Amritsar.

2. PW-2 Dr. Jaswinder Kaur was a member of the Medical Board constituted by Senior Medical Officer (SMO), Amritsar, for conducting medico-legal examination of the prosecutrix. Ex. PB/2 is the application dated 04.01.2007 made to the Judicial Magistrate Ist Class,

Amritsar, stating therein that an application was filed by mother of prosecutrix to DIG, Border Range, Amritsar, which was marked to Senior Superintendent of Police, Amritsar who in turn referred it to the SHO, Police Station 'B' Division, Amritsar but no action was being taken thereon. It was stated that the appellant who is step father of the prosecutrix committed rape on her on 23.12.2006 and also a number of times before that. The learned Magistrate, before whom the application was filed, passed an order on 06.01.2007, directing issuance of medico-legal report under the Rules. On the said application being presented before the Civil Surgeon, Amritsar, the order Ex. PB/3 was passed directing the Senior Medical Officer (SMO), Amritsar to constitute a Board of Doctors.

3. The Board of Doctors conducted medico-legal examination of the prosecutrix on 09.01.2007. The vaginal swabs one from the lower vagina and the other from upper vagina were taken and the same were sent in a sealed parcel to the office of Chemical Examiner, Patiala for examination. As per report Ex. PB/1 dated 09.02.2007 sent by the Assistant Chemical Examiner to Government of Punjab, Patiala, no spermatozoa were found on the above exhibits. The doctor (PW-2) formed an opinion that the child had been subjected to sexual intercourse.

4. Ex. PD the statement of the prosecutrix was recorded by Sub-Inspector Jagdish Chander (PW-6) of Police Station 'B' Division, Amritsar on 10.01.2007. PW-6 stated that the contents of Ex. PD were read over and explained to the prosecutrix and she put her signatures on the same admitting the same as correct. The girl was accompanied by her mother

when she met the police party on the Sultanwind Road where her statement was recorded. Ex. PD/2 is the formal FIR recorded on the statement Ex. PD. The Investigating Officer also visited the spot and prepared the rough site plan Ex. PE. The appellant was arrested on 11.01.2007.

5. The learned Judicial Magistrate, committed the case to Sessions Court for trial. The charge was framed against the appellant as aforesaid. The prosecution examined 6 witnesses in support of his case.

6. The appellant was examined under Section 313 Cr.P.C. He admitted that his wife (PW-5) was earlier married to one Ashok Kumar and had two children from the previous marriage out of whom one was the prosecutrix. As per the prosecution story the girl was 11½ years old but the appellant denied about knowledge of age of the prosecutrix. The appellant, however, admitted that there was a dispute of PW-5 with her previous husband which resulted into break in marriage and also that he solemnized marriage with PW-5 after that. It is also admitted by the appellant that the couple shifted from Delhi to Amritsar along with both the children. The appellant further admitted that they started residing in the house which his wife (PW-5) had purchased after selling the house in Delhi. The circumstances appearing in the evidence about allegations of rape were denied by the appellant. The appellant did not lead any evidence in defence.

7. The learned trial Court recorded conviction of the appellant under Section 376 (2) (f) IPC and awarded him the sentence to undergo rigorous imprisonment for a period of 10 years and to pay a fine of

₹ 5000/- and in default to further undergo rigorous imprisonment for a period six months.

8. I have heard learned counsel for the appellant, learned State counsel and also perused the records carefully.

9. Learned appellant's counsel challenged the conviction of appellant *inter alia* on the grounds (i) that there was no authentic evidence to prove the age of prosecutrix to be below 12 years; (ii) that there are serious infirmities in the evidence with regard to the medico-legal examination of the prosecutrix and further that no real attempt was made to bring forth the correct version by examining the prosecutrix under Section 164 Cr.P.C.; (iii) that evidence of the prosecution is quite inconsistent; and (iv) that there is huge delay in lodging FIR with the police.

10. On the other hand learned State counsel supported the judgment of trial Court by contending that charge against the accused was fool-proof and being in the dominating position having guardianship of the minor child does not deserve any leniency in the punishment.

11. On the first issue, the prosecutrix herself as PW-4 stated that she was 11 years old and studying in 5th standard. Even her mother as PW-5 testified the age prosecutrix as 11½ years on the date when she was examined on 28.05.2007 by the trial Court. PW-6 SI Jagdish Chander stated in the cross-examination that he did not collect school certificate of the girl in proof of her age at the time of occurrence. There was obviously no reason for the Investigating Agency in not collecting the documentary proof of age of the girl.

12. PW-2 Dr. Jaswinder Kaur who conducted medico-legal examination of the prosecutrix had advised her X-ray examination for the bone age confirmation.

13. PW-1 Dr. Poonam Ohri, the radiologist conducted the radiological examination of the prosecutrix on 10.01.2007 for bone age confirmation. The X-ray examination was conducted on 13 different factors and as per ossification data the doctor found age of prosecutrix to be between 13 to 16 years. Ex. PA is the report and X-ray films are Ex. PA/1 to PA/3.

14. There is in fact no documentary evidence of the office of Registrar, Births and Deaths, Delhi where the girl was born. In cross-examination, PW-5 stated that she had obtained divorce from her previous husband in the year 2005 but they were residing separately for about 7 years before the divorce. As per statement of the prosecutrix Ex. PD recorded by the police, her brother was about 10 years old at the time of recording the FIR. According to PW-5, her daughter was studying in 3rd or 4th standard in Delhi where they were residing in the year 2005. The school certificate according to her was not produced before the police.

15. In Sunil Vs. State of Haryana, (2010) 1 SCC 742, Hon'ble Supreme Court observed that doctor who examined the prosecutrix referred her for ossification test to the Dental Surgeon and the Radiologist. It was held that failure of getting the prosecutrix examined from the Dental Surgeon and Radiologist despite the fact that she was referred to them by the doctor for that purpose is a serious flaw in the prosecution version. Hon'ble Supreme Court did not lay down as a rule

that all these tests must be performed in all cases but in the absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped in arriving at a conclusion regarding the age of prosecutrix. It was further observed that the prosecution also failed to produce the Admission Form which would have been a primary evidence regarding the age of prosecutrix. The School Leaving Certificate produced by the prosecution was also procured 6 days after the incident and 3 days after the arrest of appellant. It was held that in a criminal case, conviction of the appellant cannot be based on an approximate date which is not supported by record.

16. In view of the above, I would concur with the conclusion of the learned trial Court that the prosecutrix was below 16 years of age at the time of occurrence. Opinion of the Radiologist is quite categorical in stating the age of prosecutrix to be ranging from 13 to 16 years and that was on the basis of bone age of various parts of body and in view of the aforesaid description of range, it was not possible to say that age could also vary 1-2 years on the either side as already the upper and lower range of age was reported by the doctor based on various factors. The girl was studying in 5th standard when she was examined in the Court.

17. Anyhow, the responses of PW-4, the prosecutrix, in cross-examination would make it absolutely clear that she is worldly wise and those responses would not have come from a child who was just about 11½ years old. In cross-examination, PW-4 stated that her real father used to maltreat her mother. She denied the suggestion that her mother had levelled allegations of committing rape on PW-4, by her real father.

She further stated that PW-5 had performed marriage with the appellant for which PW-4 was not consulted. She even did not know if her mother had entered into marriage with the appellant but the appellant was residing with them. She denied the suggestion that she had disliked the marriage of her mother with the appellant. She further stated that her father, namely; the appellant used to misappropriate whole of the income from the shop owned by her mother. She further stated that earlier the accused was arrested at the instance of her mother as he used to supply the sale proceeds to his parents. She further stated that her mother got the appellant released from police custody and at that time she warned him to behave properly and should not ruin the matrimonial life. The above answers can come from a vigilant girl who was definitely about 13 years or 14 years of age.

18. It may be seen that the girl was in 3rd or 4th standard in the year 2005 as testified by PW-5. In view of the testimony of PW-4, PW-5 and the medical report on ossification test, I am of the considered view that there was no scope of contending that the girl was more than 16 years of age at the time of occurrence. So the above discussion concludes the issue with regard to age of prosecutrix to be above 12 years but definitely below 16 years, at the time of occurrence.

19. The next question would be whether the prosecutrix was subjected to rape. There is the testimony of PW-4, the prosecutrix herself. According to her, about 4 months before registration of the FIR, her mother had gone to her maternal uncle's house as maternal grand-father of the prosecutrix had died. In the absence of her mother, while she was

lying on her bed at about 8/9 AM the appellant came and slept with her on the bed. PW-4 further stated that accused put off her slacks and committed rape on her against her wishes. It may be noted that the appellant was about 23 or 24 years of age at the time of incident.

20. PW-3 Dr. Manjit Singh medically examined the appellant on 12.01.2007 describing his age as 24 years and found that the appellant was physically capable of performing sexual intercourse. Ex. PC is the report prepared by PW-3.

21. PW-4 the prosecutrix further stated that when the appellant committed rape on her she started weeping and the appellant told her that in case she discloses the incident to anyone, he would kill her mother. She further stated that the appellant used to commit rape upon her after intervals. When her mother got suspicious and asked the appellant about it, he flatly refused for having indulged in any such act. PW-4 further stated that her mother sent the appellant to purchase medicines and during that time she narrated to her the incidents of her rape by the accused. She also stated that her mother approached the police but no action was taken and ultimately, an application was filed before the Magistrate, for her medico-legal examination. PW-5 mother of the prosecutrix corroborated the above version.

22. The medical evidence led through PW-2 Dr. Jaswinder Kaur fully supports the version brought forth by PW-4 and PW-5. The doctor stated that on P/V examination, hymen was torn, margins were healed, nodematous, no bleeding per vagina. In the opinion of doctor, as per clinical examination, the child was subjected to sexual intercourse. PW-4

the prosecutrix was present in the Court when statement of PW-2 Dr. Jaswinder Kaur was recorded. Ex. PB is the copy of medico-legal report of the prosecutrix. The girl had been residing with her parents in the house and there is no question that a girl of such a small age would falsely involve her step father for the offence of rape. She rather did not speak out instantly against the appellant because of the circumstances by which she was surrounded.

23. There is extensive cross-examination of the prosecutrix and her mother. There is no suspicious circumstances to bring doubt to the story. While she was raped, she raised noise but the accused gagged her mouth. She stated that she did not disclose these facts to the police but this will not bring any suspicion to the testimony of PW-4 as role of the police has been quite insensitive to such a serious offence to register FIR and extend help to the helpless ladies.

24. Some of the responses given by PW-4 in the cross-examination would also make her testimony quite truthful. PW-4 stated that she told the appellant that she would disclose this incident to her mother but the appellant stated that her mother remains ill, so she should keep quiet. PW-4 rather stated that she was beaten up by her mother even for having not disclosed about the incident of rape to her.

25. The statement of PW-5 fully supports the version of her daughter. The material part of her testimony reads as under:-

“About 4/5 months prior to the registration of the FIR, my maternal uncle had expired and I had gone to his house. My daughter and husband were in the

house. I returned at about 12 Noon, but my daughter Swati did not disclose me anything. My daughter and the accused had gone to the shop, situated at Tej Nagar. Both of them did not return for more than two and a half hours. I sent my son to the shop, but both did not return. I asked Swati but she did not disclose anything. She disclosed me that she was subjected to rape by the accused whenever I used to leave the house. She further disclosed that she was subjected to rape for the first time when I went to mourn the death of my maternal uncle.....”

26. It has emerged in the cross-examination of PW-5 that the accused was working in the shop of PW-5 while they were staying in Delhi. PW-5 stated that accused was working in her shop on the payment of ₹ 3000/- per month as salary. From there it seems that they developed a relationship and ultimately after the divorce of PW-5 with her previous husband that she performed marriage with the appellant and they shifted to Amritsar.

27. PW-5 stated in her cross-examination that one Chhinda had tried to molest her at the instance of appellant. She further stated that a complaint was lodged against the aforesaid person who confessed his guilt and the matter was compromised. She further stated that she also lodged a complaint against a neighbourer who had scaled the roof of her house and the SHO also misbehaved with her. The above statement is quite consistent with the responses given by PW-4 in her cross-

examination. PW-4 stated that some persons molested her mother who registered a case against one Chhinda for the incident. Even a neighbourer was also arrested by the police on the complainant of her mother on the allegation of molesting her. Both PW-4 and PW-5 were examined on the same day and such a synchronisation on these important factors would suggest that these ladies are not trying to conceal the truth from the Court.

28. Learned counsel for the appellant vehemently contended that there was huge delay in lodging the FIR and further that authenticity to the order of Judicial Magistrate Ist Class, Amritsar, on the application for conducting medico-legal examination has not been verified. PW-2 Dr. Jaswinder Kaur does not know about the authenticity of this order nor PW-6 the Investigating Officer made any verification from the Court. For the latter contention, I am of the view that there is no reason for doubting the authenticity of application made before the Judicial Magistrate Ist Class, Amritsar as there is the testimony of PW-5 on the subject. The appellant has not even summoned any official of the Court of Judicial Magistrate Ist Class, Amritsar, to challenge the authenticity of the orders passed by the Judicial Magistrate Ist Class, Amritsar. PW-5 rather categorically stated that she had filed the application before Sh. Sanjay Agnihotri, the learned Judicial Magistrate Ist Class, Amritsar for medico-legal examination of the girl.

29. On the point of delay, the learned State counsel relied upon **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 the lodging of 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 offences is generally lodged. In the instant case, even the manner in which the prosecutrix was made to reveal the whole facts to her mother especially in view of the dominating authority of the appellant being her step father; the age difference between the appellant and prosecutrix's mother who is about 7/8 years elder to appellant and the manner in which mother of the prosecutrix faced difficulties to get medical examination of the girl by approaching the Court of Judicial Magistrate, are the valid reasons in explaining the delay of reporting the matter to police counted from the date when the appellant for the first time committed rape on the prosecutrix. So far as the report of Chemical Examiner is concerned wherein no spermatozoa were detected, it is quite obvious that after a lapse of so many days of the last act of sexual intercourse that the girl was medically examined. PW-2 Dr. Jaswinder Kaur who medico-legally examined the prosecutrix stated that the alleged assault took place about 15 days before she was medically examined.

30. In Gurmit Singh's case (supra) Hon'ble Supreme Court further held as under:-

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just

to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its

judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and

circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind a probable".

31. It is a settled principle that a doubt is understood in the criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females.

32. In **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, (1983) 3 SCC 217**, the Hon'ble Supreme Court held that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Hon'ble Supreme Court further deprecated that viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion.

33 I thus, find that there is no infirmity in the judgment of learned trial Court and the conclusions arrived at are affirmed.

34. I would, however, find that the conviction of appellant by the learned trial Court under Section 376 (2) (f) IPC cannot be sustained. Section 376 (2) (f) IPC as in force before the Amendment Act No. 13 of 2013 related to commission of rape on a woman when she is under 12 years of age and providing minimum sentence of 10 years of rigorous

imprisonment. The trial Court held that age of the prosecutrix being below 16 years at that time and her consent was not at all relevant. It has been found by me that the prosecutrix was about 13 to 14 years old but definitely below 16 years. Therefore, conviction of the appellant is recorded under Section 376 IPC instead of under Section 376 (2) (f) IPC. The appellant has already undergone 09 years 02 months and 03 days of imprisonment as per the custody certificate dated 25.03.2015 placed on record by the learned State counsel including the remissions earned by him with actual period to be undergone by him to be about 07 years and 09 months.

35. In view of the aforesaid finding of converting the conviction of appellant from offence under Section 376 (2) (f) IPC to Section 376 IPC and keeping in view the age of appellant at the time of incident, I find it would be appropriate to reduce the sentence of appellant from 10 years rigorous imprisonment which was obviously the minimum sentence as provided under Section 376 (2) (f) IPC to 09 years and 04 months under Section 376 IPC maintaining the amount of fine imposed by the learned trial Court but the default clause to undergo rigorous imprisonment for six months for non-payment of fine is reduced to 3 months rigorous imprisonment.

36. With the aforesaid modification in the conviction of the appellant from Section 376 (2) (f) IPC to Section 376 IPC and also in the quantum of sentence, the instant appeal is dismissed on merits.

April 01, 2015

rishu

**(R.P. NAGRATH)
JUDGE**