

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-3042-SB of 2010

DATE OF DECISION: MARCH 17, 2015

MALKIT SINGH @ MEETA

...APPELLANT

VERSUS

STATE OF PUNJAB

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. R.N.SINGAL, ADVOCATE FOR THE APPELLANT.
MRS. RITU PUNJ, ADDL.A.G., PUNJAB.

M. JEYAPPAUL, J.

1. Accused Malkit Singh @ Meeta who was convicted under Section 376 IPC and sentenced to undergo RI for 10 years and to pay a fine of 5000/- and in default of payment of fine, to further undergo R.I. for 2 years, has challenged the above judgement of conviction and sentence passed by the trial Court.

2. It is the case of the prosecution that on 19.8.2009, at about 12.00 noon in the area of village Mehma Sawai, accused Malkit Singh @ Meeta committed rape upon the prosecutrix who was a minor, aged about 11 years and thereby, committed an offence punishable under Section 376 IPC.

3. PW4 Dr.Nidhi Gupta and PW13 Dr.Vijay Mittal, having examined the mental status of the prosecutrix, opined that the prosecutrix was afflicted with moderate mental retardation.

4. The prosecutrix was examined as PW2. Having put some questions to the prosecutrix to assess her understanding capacity, the

Sessions Court examined her as a witness, having found that she was fit enough to give evidence. PW2 has deposed that the accused took her to the cotton field and removed his pyjama and kurta and committed wrong thing at her private part. The accused also put his private part in her private part. Blood also came out from her private part.

5. PW1 Veerpal Kaur, the mother of the prosecutrix, has stated that she rushed to the cotton field based on the information furnished by Baljit Kaur and found the accused running away tying the string of his pyjama. She found her daughter lying naked. She also witnessed semen on the private part of her daughter. She put a chunni to cover her daughter. Thereafter, she lodged a complaint with the police.

6. PW3 Ram Singh is the uncle of the prosecutrix. He has deposed that he saw the accused holding the prosecutrix by her arm and taking her towards the cotton field. He proceeded to the cotton field on seeing women gathered over there and found the accused running away tying the string of his pyjama. The prosecutrix was found naked with bleeding. It was only PW1 Veerpal Kaur who put chunni on PW2.

7. PW8 Dr.Monica Sharma, examined the prosecutrix on 19.8.2009 and deposed that the prosecutrix was brought by her mother and her uncle. She had not attained puberty. She had changed clothes after the alleged occurrence. On examination, PW8 found no external injury mark over the breast and other parts of the body. On local examination, hymenal opening did not admit the tip of little finger. No visible external bleeding was found. There was no mark of injury over the genital organ. There was no pubic hair. She handed over the patient's external vulval swabs to the

police officials of Police Station Nahianwala for chemical examination. The Chemical Examiner's report would disclose that spermatozoa was found on the vulval swabs and the inner garment of the prosecutrix. She opined based thereupon that possibility of molestation/sexual assault could not be ruled out.

8. PW5 Dr.Ravinder Singh medico-legally examined the accused and certified that there was nothing to suggest that the accused was not capable of performing sexual intercourse.

9. The accused set up a plea in his statement under Section 313 Cr.P.C. that on account of property dispute, a false case was foisted on him.

10. On the side of the defence, two witnesses were examined. DW1 Kewal Singh has deposed that there was a land dispute between the complainant and the accused. DW2 Baljinder Singh has also stated that there was a land dispute between the complainant and the accused. He admitted that the prosecutrix was a mentally retarded minor.

11. The trial Court having relied upon the evidence adduced on the side of the prosecution, came to the conclusion that the prosecution established the charge under Section 376 IPC.

12. It is the consistent case of the prosecution that PW2 was 10 or 11 years old at the time when the occurrence took place. The age of the prosecutrix was not seriously challenged by the accused. PW4 Dr.Nidhi Gupta and PW13 Dr.Vijay Mittal have categorically opined on examination of the prosecutrix that she was afflicted with moderate mental retardation.

13. It was submitted by learned counsel appearing for the appellant

that the age of the prosecutrix was not established. It was also submitted that the prosecutrix was examined long after the occurrence under Section 164 Cr.P.C. and therefore, there was every possibility for implicating the accused falsely. Learned counsel appearing for the appellant also submitted a decision of the Hon'ble Supreme Court in *Sudershan Kumar vs. State of Himachal Pradesh, 2015 (1) RCR (Criminal) 496*, wherein it has been held that an unexplained delay of 77 days in lodging the first information report shakes the very credibility of the deposition of the witness concerned.

14. Normally in a case of rape, taking into consideration the consequence of prosecuting the accused, family of the prosecutrix takes sufficiently long time to set the law in motion. The case cited above was not one of rape. Further, the delay in the above case was not explained by the prosecution. But, in the instant case, the mother of the prosecutrix without any delay set the law in motion by lodging a complaint. But the prosecutrix was examined long after the occurrence under Section 164 Cr.P.C. by the learned Judicial Magistrate. The prosecution has established that the prosecutrix was afflicted with moderate mental retardation. No wonder, the investigating official had waited for some time to subject the prosecutrix to examination. The sequence of occurrence had been amply put forth in the complaint lodged by the mother of the prosecutrix immediately after the occurrence. Therefore, the delay in examination of prosecutrix in the above facts and circumstances does not affect the case of the prosecution.

15. As far as the age of the prosecutrix is concerned, there was no serious challenge made by the accused. The prosecution has come out with

consistent evidence that the prosecutrix was just 10 or 11 years of age at the time when the occurrence took place. Therefore, it cannot be held that the prosecution failed to establish the age of the prosecutrix.

16. PW3 Ram Singh, who is the uncle of the prosecutrix was examined by the investigating official only on 30.10.2009, long after the occurrence. Further, his behaviour is found to be abnormal. Therefore, in my view, his testimony lacks credibility.

17. The prosecutrix who was examined as PW2 categorically deposed that the accused who took her to the cotton field did wrong with her private part after removing his pyjama and kurta. She has also deposed that the accused put his private part in her private part. Blood came out of her private part. There was no reason to reject the evidence of PW2 who was under partial mental retardation at the time when the occurrence took place.

18. It is a well settled position of law that the evidence of the prosecutrix can be the sole basis, if at all it is found to be credible and trustworthy, to record conviction. In the instant case, the evidence of PW1 Veerpal Kaur would also go to corroborate the evidence of PW2. PW1 being the mother of the prosecutrix, rushed to the cotton field on hearing the information that the accused had taken the prosecutrix to cotton field and found the accused fleeing. He was also found tying the strings of his pyjama at the time when he was fleeing. On arrival at the scene of occurrence, she found her daughter in a naked condition. It is very important to note that she had also spotted semen in the private part of her

daughter.

19. It was then submitted by learned counsel appearing for the appellant that a false case was foisted on the appellant on account of some property dispute.

20. I am unable to subscribe to the submission made by the learned counsel appearing for the appellant. No mother would have chosen to damage the reputation of her mentally retarded child just to wreak vengeance against the accused, as there was some property dispute with him. Further, in my view, the evidence of DW1 and DW2 is not sufficient to establish that the accused had some property dispute with the complainant.

21. As per the evidence of PW5 Dr.Ravinder Singh, the accused was capable of performing intercourse. PW8 Dr.Monica Sharma had collected vulval swabs and sent them for examination. Even though a little finger could not enter into the hymen, she has opined based on the FSL report that the possibility of molestation/sexual abuse cannot be ruled out.

22. PW2 has deposed that the accused had put his private part in her private part. There was also bleeding in her private part. But it is found in the statement under Section 164 Cr.P.C. that the prosecutrix had not stated that accused put his private part in her private part and blood came out of her private part. The evidence of PW1 Veerpal Kaur would go to establish that infact semen was found in the private part of the prosecutrix. The vulval swab collected from the inner garment and sent for examination did contain spermatozoa as per the FSL report.

23. The above facts and circumstances would go to establish that infact the accused had penetrated partially his private part into the private part of the prosecutrix and discharged his semen in her private part and thereby he committed rape. As per the explanation found under Section 375 Cr.P.C., penetration is sufficient to constitute the sexual intercourse necessary to constitute the offence of rape. In other words, the full-fledged sexual intercourse is not the requirement to constitute the offence defined under Section 375 IPC.

24. In *Aman Kumar and another vs. State of Haryana, 2004 (1) RCR (Criminal) 925*, the Hon'ble Supreme Court has held that it is not necessary that there should be a complete penetration of the penis with the emission of semen rupturing the hymen to constitute the offence of rape. In the instant case, though the hymen was not ruptured, the semen was found emitted in the private part of the prosecutrix. Further, partial penetration also has been demonstrated by the facts and circumstances set out in this case. Therefore, I am of the considered view, that the prosecutrix has established beyond reasonable doubt that the accused committed the offence of rape.

25. Of course, learned counsel appearing for the appellant would submit that it may be a case of attempting to commit rape, but not certainly an offence of rape. In the face of evidence of the prosecutrix, her mother and the medical evidence on record, I find that the above submission is completely meritless.

26. In the above facts and circumstances, the judgement of

conviction and sentence passed by the trial Court is confirmed and the appeal stands dismissed.

March 17, 2015
Gulati

(M. JEYAPPAUL)
JUDGE