

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

CRA-827-SB-2002

Date of decision: 28.01.2015

Makhan

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr. Jitender Dhanda, Advocate
for the appellant.

Mr. Pawan Kumar, Assistant Advocate General,
Haryana.

Jitendra Chauhan, J.

1. This appeal has been filed against the judgment/order dated 13/15.3.2002, whereby learned Additional Sessions Judge, Hisar (hereinafter referred as "trial Court") convicted the appellant for the offences under Sections 450/376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of two years and also to pay a fine of Rs.1,000/- for the offence under Section 450 of the Indian Penal Code and in default of payment of fine, to further undergo rigorous imprisonment for 15 days. The appellant was also sentenced to undergo rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.2,000/- for the offence under Section 376 of the Indian Penal Code and in default of payment of fine, to further undergo rigorous imprisonment for one month. Both the sentences were ordered to run concurrently.

2. The case of the prosecution, as projected in para 2 of the

Trial Court judgment, is that:

“The prosecutrix Kamlesh Rani lodged a complaint with the police on 18.11.2000 on the allegation that she is resident of village Siswal. The prosecutrix is of the age of 15/16 years and she is unmarried and remains at the house for attending the daily chores. They are six sisters and two brothers. The elder brother Pirthi Singh is a jeep driver. Three sisters are elder to the prosecutrix whereas the remaining two sisters and one brother is younger to her. On 17.11.2000, her father Bhup Singh and her sisters had gone to work on the field of Prem Bania. Only the prosecutrix and his younger brother Vinod Kumar were present in the house whereas all the other family members had gone out to work. The younger brother Vinod Kumar was suffering from fever and he was sleeping inside the house.

On 17.11.2000 at about 2.00/2.30 p.m., the prosecutrix was taking bath in the bathroom constructed inside her house when accused Makhan son of Ram Chander who lives in the neighbourhood entered into the house of the prosecutrix. The accused then entered into the bathroom and gagged the mouth of the prosecutrix and pulled her down on the ground inside the bathroom. The accused removed his pant and committed rape upon the prosecutrix against her will. The accused had pressed the mouth of the prosecutrix by one hand. The prosecutrix somehow succeeded in pushing aside the hand of accused Makhan and shouted for help. On hearing the shouts of the prosecutrix Vinod Kumar awoke and he rushed on the spot. Accused Makhan Lal on

seeing Vinod Kumar fled away from there. In the meantime, Bhanti Devi, the mother of the prosecutrix, returned back to the house after bringing grass from the fields. The whole incident was narrated by the prosecutrix to her mother Bhanti Devi. In the evening, Bhup Singh also returned back to the house and the incident was also narrated to him. Sarpanch of Gram Panchayat Siswal on coming to know about the rape also came to the house of the prosecutrix and he advised to call a biradari panchayat. However, accused Makhan Lal etc. did not come present in the biradari panchayat. The prosecutrix along with her mother Bhanti Devi approached the police and lodged the complaint.

The prosecutrix was medically examined in General Hospital, Adampur. The vaginal swab, pubic hairs and the salwar of the prosecutrix were taken into possession by the doctor after properly sealing the same and the same were handed over to the I.O. The same were sent to the FSL Madhuban for analysis. The IO also prepared site plan of the place of occurrence. The accused was also arrested and he was also got medico-legally examined whereby he was declared fit to commit sexual inter-course. After completion of investigation, challan was filed in the court subject to receiving of report from FSL. However, afterwards report of FSL was also received whereby human semen was detected on the salwar. However, semen was not detected on the vaginal swab and pubic hairs.”

3. The accused -appellant was charge-sheeted for the offence punishable under Sections 450/376 of the Indian Penal Code to which he

pleaded not guilty and claimed trial.

4. In support of its case, the prosecution examined Dr.Saroj Bhukal as PW1, Dr.Krishan Kumar as PW2, Inspector Raja Ram as PW3, Constable Ramesh Chander as PW4, Constable Mohan Lal as PW5, Head Constable Suresh Kumar as PW6, Subhash Chander, Draftsman as PW7, Kamlesh Rani as PW8, Vinod as PW9 and ASI Siri Bhagwan as PW10.

PW1 Dr. Saroj Bhukal, Medical Officer, Health Medical Centre, Ambala who had conducted the medico-legal examination of the prosecutrix and testified that the prosecutrix habitual to intercourse as hymen was old, healed and ruptured.

PW8 Prosecutrix testified the whole incident that how and in what manner the accused committed rape upon her.

PW10 ASI Siri Bhagwan, Investigating Officer stated that on 18.11.2000 he was posted at Police Station, Adampur and on that day he recorded the statement of prosecutrix Ex.PK and got her medico-legally examined in Government Hospital, Adampur vide his request Ex.PA. He also prepared the rough site plan Ex.PM of the place of occurrence and recorded the statement of the witnesses under Section 161 Cr.P.C. He testified the whole investigation as carried out by him.

5. Statement of the accused-appellant was recorded under Section 313 of the Code of Criminal Procedure in which he denied the allegations of the prosecution and pleaded his false implication. In defence, the accusedappellant examined Munish Kumar as DW1, Sushila Verma as DW2 and Ram Chander as DW3.

6. After hearing the learned counsel for the parties, the learned

Trial Court convicted and sentenced the appellant as indicated in the outset of this judgment.

7. Hence the present appeal.

8. The appeal was admitted on 5.8.2002 and sentence of the appellant was suspended vide order dated 23.4.2004.

9. This appeal came up for hearing before this Bench on 05.08.2010. The learned counsel for the appellant did not challenge the judgment and order of conviction/sentence on its merits, but prayed that a lenient view may be taken in the matter of sentence considering the facts as recorded in Para No.13 of the judgment dated 05.08.2010. Keeping in view the peculiar facts and circumstances of the case, this Bench considering the facts that FIR in the instant case was registered on 18.11.2000; the appellant had suffered protracted trial; had already undergone two years, three months and ten days, had not misused the concession of bail; had no previous antecedents and that he is not a habitual offender, reduced the sentence of imprisonment to the period already undergone and enhanced the fine of Rs.25,000/- besides the fine already paid and out of it, an amount of Rs.20,000/- was ordered to be paid to the complainant as compensation and the remaining amount of Rs.5,000/- was ordered to go to the State exchequer as litigation expenses.

10. Aggrieved against the judgment of reduction of sentence, the State of Haryana went in Criminal Appeal No.1484 of 2014 (SLP (Crl.) No.2616/2011) in the Supreme Court. Vide order dated 18.07.2014, the Hon'ble Supreme Court allowed the State appeal, set aside the impugned

judgment and remanded the appeal to this Court with a request to dispose it of on merits within six months.

11. Learned counsel for the appellant *inter alia* contended that it is a case of consent, the age of the prosecutrix is not proved on record, there are material discrepancies in the statements of the witnesses and that the judgment and conviction and sentence is based on surmises and conjectures and may be set aside.

12. On the other hand the learned State counsel contended that the prosecution has fully proved its case

13. I have heard the learned counsel for the appellant, the learned State counsel and perused the trial Court record with their able assistance.

14. In this case, the defence has brought on record, the school leaving certificate of the prosecutrix, wherein her date of birth is recorded as 03.02.1981. The prosecutrix herself claimed to be minor and an illiterate. DW-1 Munish Kumar brought the school record and proved her date of birth as per school leaving certificate. The prosecutrix at the time of MLR Ex.PB and lodging of the complaint in the police, gave her age as 15-16 years. Except school leaving certificate Ex.D1 there is no other document available on record. Her mother Banti Devi was cited as a witnesses and later on given up. The oral statement of the prosecutrix regarding age of the prosecutrix are discarded holding that her date of birth was 03.02.1981. When the prosecutrix is telling lie on one material point, then her statement is to be carefully scrutinized on other aspect of the matter, because she appended to be a tutored witness.

15. Though the delay in lodging the FIR is such like cases is understandable, but where the prosecutrix is tutored witness, this Court will have to see as to whether the delay is satisfactorily explained or not. If there is any delay, what would be its effect? The alleged rape was committed on 17.11.2000 at 2/2.30 P.M that too in the thickly populated area. First Information Report was lodged on the next date at about 5.00 P.M. There is delay of about 27 hours in lodging the First Information Report. The date of incident is given by prosecutrix in her statement in Court is 16.11.2000, while her mother stated it on 17.11.2000. The prosecutrix explained the delay by stating that Sarpanch on coming to know about the incident approached them and suggested to convene a Panchayat. Accordingly, a Panchayat was convened, but neither the accused nor any of his family member appeared before the Panchayat till 3.00 P.M. So, she reported the matter to the police. Surprisingly, the prosecution has not examined any of the member Panchayat to prove that in fact the Panchayat was convened. Even the father of the prosecutrix is not coming forward to support this fact. Even her father did not accompany the prosecutrix and her mother to the police. On the other hand, the Sarpanch of the village appeared as DW-3 and denied the factum of calling of any Biradri Panchayat. This fact shows that the prosecutrix has concocted a false story of convening a Panchayat by his father is only to cover the delay, which may be due to weaving a story against the accused-appellant.

16. Regarding improbability of the prosecutrix version, the place of rape is stated to be a without door bathroom at noon time. PW-7

Subash Chander prepared scaled site plan Ex.PJ on 30.11.2000 at the spot under the instruction of PW-9 Vinod Kumar in the presence of the prosecutrix, the mother of the prosecutrix and the Investigating Officer. As per site plan Ex.PJ the size of the bath room is 3 ½ feet x 3 ½ feet. Bucket filled water was also lying inside it. PW-8 the prosecutrix deposed that she was made to lie on the ground, her mouth was gagged tight and she was raped though she tried to push away the accused. The dimensions shown in the scaled site plan Ex.PJ, if relied, makes the version narrated by the prosecutrix highly improbable. None of the parents of the prosecutrix have come forward to support the prosecutrix version. The prosecutrix took bath after rape, did not inform anyone, did not make any attempt to inform the neighbourers or to call her mother, who came there of her own after about an hour and thereafter her mother did not make any attempt to call her husband from the fields, goes to prove that the entire story was scripted subsequently.

17. Now, this Court is going to examine the presence of PW-9 brother of the prosecutrix at the time of commission of offence at the house, the place of occurrence. He is a student of 6th class studying in Senior Secondary School, Siswal. DW-2 Sushila Verma proved attendance register EX.D2 to prove the presence of PW-9 Vinod, on 17.11.2000 in the school. The name of PW-9 Vinod is recorded at Sr. No.31 and his admission No. is 6295. DW-2, Sushila Verma is English teacher. It is neither alleged nor proved that the witness took leave from the school for second half day. When his presence at the school is proved by his teacher at the school and in the absence of any evidence of leave

from the school, his presence at the place of occurrence at the relevant time becomes doubtful. He being the brother of the prosecutrix has been ascribed a role in the story by the persecution.

18. PW-1 Dr. Saroj Bhukal conducted Ex.PB MLR of the prosecutrix on 18.11.2000 at 7.00 P.M, with history of rape on 17.11.2000 about two months ago. There was no external mark found on the body of the prosecutrix. There were no injury to labia majora of mynora. Vagina easily admitted two fingers. Keeping in view the medical evidence fact is proved that the prosecutrix was consenting party to the rape. Generally, it is seen that when the sexual act is exposed or come to light the girl show disagreement to such sexual act to show her innocent face in the society without caring for the implications of her sexual partner. In this case, the sole statement of PW-8 the prosecutrix is found to be unbelievable, untrustworthy and unreliable, on the basis of which no conviction can be recorded.

19. The cumulative effect of the above discussion is that the prosecution has failed to prove its case against the accused-appellant beyond reasonable doubt. So, this appeal is allowed, judgment of conviction and sentence is set aside, and the accused-appellant is acquitted of the charge framed against him by giving him the benefit of doubt.

28.01.2015

Naveen

(JITENDRA CHAUHAN)
JUDGE