

In the High Court of Punjab and Haryana at Chandigarh

CRR-1956 of 2009

Date of Decision:25.2.2015

Pinki alias Rimpi

---Petitioner

versus

Bheema and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Mr.Manoj Tanwar, Advocate
for the petitioner**

**Mr.A.K.Walia, Advocate
for respondents No. 1 to 4**

**Mr. Ankur Jain, AAG, Punjab
for the State of Punjab**

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

REKHA MITTAL, J.

The present petition lays challenge to judgment dated 27.8.2008 passed by the Sessions Judge, Patiala whereby the accused have been acquitted of the offence punishable under Section 376 of the Indian Penal Code(in short "IPC").

The facts noticed from the judgment of the trial Court are that on 17.11.2014, the prosecutrix (name kept secret) aged about 14 years submitted an application to the Senior Superintendent of Police, Patiala that on instigation of Pala Singh, Kamo wife of Sanjiv Kumar called her to

some place, locked her inside a room where Bheema raped her about 05 months ago. Bheema, Kamo and Saroj had been pressurizing her to keep quiet otherwise she would face dire consequences. She is now pregnant by five months from accused Bheema. Formal FIR was registered and investigation was started. Bheema was arrested on 19.11.2004 and got medico legally examined. Matriculation certificate of the prosecutrix was taken into possession and as per the certificate, her age was 14 years and 06 months at the time of occurrence. Ossification test of the prosecutrix was got conducted from Rajindra Hospital, Patiala. Statements of the witnesses were recorded.

The prosecutrix, in her statement made before the police, stated that her parents are doing labour and used to go to fields for labour work. On instigation of Pala Singh, at about 12-00 noon, Kamo called her from her (prosecutrix's) house and took her to her (Kammo's) house. Bheema forcibly committed rape and threatened to kill her if she disclosed the incident to any one. She remained silent due to fear but when she came to know about pregnancy, she narrated the incident to her parents. She was medico legally examined from Model Town Dispensary, Patiala.

On completion of investigation, report under Section 173 of the Code of Criminal Procedure (in short "Cr.P.C.") was submitted against accused Bheema alone. After due compliance with the provisions of Section 207 Cr.P.C., the case was committed to the Court of Sessions. Bheema was charged for committing offence punishable under Section 376 IPC to which he pleaded not guilty and claimed trial.

After examination of the prosecutrix, Pala Singh, Kamo and

Saroj were summoned to face trial along with Bheema, in exercise of jurisdiction under Section 319 Cr.P.C. On appearance of additional accused, fresh charge was framed against all the accused whereby Bheema was charged for committing offence punishable under Section 376 IPC and the remaining accused namely Pala Singh, Kamo and Saroj were charged for offence punishable under Section 376 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

To prove its case, the prosecution examined as many as 09 witnesses namely Chanan Singh PW1, Dr. Sandeep Kaur PW2, the prosecutrix PW3, Bhag Chand PW4, Dr. Kanwarjit Singh Sandhu PW5, Dr. Tejinder Pal Singh Bajwa PW6, Shashi Kiran PW7, ASI Baldev Singh PW8 and Dr. Sanjay Sethi PW9.

Statements of the accused under Section 313 Cr.P.C. were recorded and they denied incriminating circumstances appearing against them and pleaded their false implication. Bheema accused took the plea, reads thus:-

“I am innocent. I have been falsely implicated in this case. I have never committed rape with this girl. I want to get conducted DNA test. The child which the girl is saying is not mine. I am ready to pay the charges for DNA test.”

The other accused raised plea that the girl was already pregnant and her parents wanted to marry the girl with Bheema and on refusal by his (Bheema's) family members, the accused have been falsely implicated in the crime. They examined Harinder Pal Singh, Election Kanongo DW1 and Bhupinder Singh DW2.

During the course of trial, Bheema filed an application for conducting DNA test of the prosecutrix, the child and Bheema and the application was allowed by the trial Court vide order dated 25.8.2007. Report Ex. DY was received from the Department of Immunopathology, PGI Chandigarh.

On appreciation of evidence adduced by the prosecution and in defence coupled with rival submissions made by counsel for the parties, the learned trial Court held in favour of the accused with the observations that the prosecution has failed to lead cogent evidence to prove its case beyond shadow of doubt. Hence, giving benefit of doubt to the accused, the accused were not held guilty of the charge framed against them.

Feeling aggrieved by the verdict of the learned trial Court, the present petition has been preferred by the victim(the prosecutrix).

Counsel for the petitioner has submitted that the judgment passed by the trial Court cannot be allowed to sustain as the trial Court has heavily relied upon the report Ex. DY submitted by the PGI, Chandigarh in regard to DNA conducted in pursuance of the order passed by the Court while disposing of the application filed by accused Bheema. It is vehemently argued that the learned trial Court failed to correctly appreciate that the PGI, Chandigarh conducted HLA testing and not DNA, therefore, the said report does not rule out possibility of Bheema being father of the child born out of sexual relationship between the prosecutrix and the accused. It is further argued that once the trial Court had directed for conducting DNA test, there was no reason for the PGI to conduct HLA testing and further for the Court to rely upon the said report instead of

insisting upon DNA test in strict compliance with the order dated 25.8.2007 passed by the Court by allowing application of Bheema for DNA testing. It is further argued that the report Ex. DY has caused a serious prejudice to the petitioner when otherwise the statement of the prosecutrix alone can form basis for conviction if found creditworthy and reliable. It is prayed that the judgment of the trial Court may be set aside and the matter is remitted for consideration afresh after necessary DNA test of the prosecutrix, child and the accused.

Counsel for the respondents, on the other hand, argued that the report Ex. DY pertains to low resolution DNA-based HLA typing of child Khushi, Bheema and the prosecutrix. At the time of drawing of blood samples, their fingerprints and photographs were also taken. As per analysis, it was conclusively held that Bheema is not father of the child. The learned trial Court has rightly relied upon report Ex. DY and appreciated other evidence adduced by the prosecution in right perspective to hold that the prosecution has failed to discharge its obligation to establish culpability of the accused beyond shadow of reasonable doubt. It is further argued that silence on the part of the prosecutrix, for a period of about 05 months to report the matter to any authority creates a serious doubt in the prosecution case and the learned trial Court has taken a serious view of the same. As per statement of the prosecutrix, she was 05 months pregnant when the matter was reported to the police. It is difficult to believe that parents of the girl, on their own, would not have noticed biological changes due to pregnancy and detect the same prior to alleged disclosure by the prosecutrix.

Another submission made by counsel is that in view of medical findings, the prosecutrix was in the habit of indulging in sexual relationship, therefore, possibility cannot be ruled out that she became pregnant due to sexual relationship with somebody else but implicated accused Bheema and others with an intent to put pressure upon the accused and their family members to agree for marriage of the prosecutrix with Bheema.

I have heard counsel for the parties and perused the records.

The learned trial Court in para 29 of the judgment has dealt with the doctor's report in view of medical examination of the victim conducted on 21.11.2004 and the DNA report submitted by the PGI. In the concluding part of para 29, the Court has held that there is nothing to disbelieve the report given by the experts of PGI, Chandigarh.

The crucial question which arises for consideration is whether the trial Court has correctly appreciated report Ex. DY to doubt the remaining evidence led by the prosecution.

Bheema accused filed the application for conducting DNA test of the prosecutrix, child and the accused, in August 2006. The application was allowed by the trial Court in August 2007 when the case was pending for defence evidence and the Civil Surgeon was directed to make arrangement for taking blood samples etc. for analysis. On receipt of report dated 12.11.2007 from the CMO, Patiala that facility of DNA test is not available in the office of Civil Surgeon, Patiala, the Court requested the Director, PGI Chandigarh for conducting the DNA test. The PGI, Chandigarh submitted the report Ex. DY and relevant extract therefrom

reads as follows:-

“ HLA TYPING REPORT

Low resolution DNA-based HLA typing of child Khushi, along with that of Mr. Bheema and Rimpily/Pinkey (d/o Sh. Bhag Chand and Smt. Bhanti) was performed. At the time of drawing of blood samples, their fingerprints and photographs were taken and are attached in the following page(s).

Analysis of the test results shows that Bheema is NOT the father of this child.

This above report has to be interpreted in the light of the following known and established facts:

Note: HLA eliminates 80% of the male population from being the possible father, and in some cases, it is possible to produce a probability of paternity of upto 90%. However, HLA testing cannot differentiate between related alleged fathers. The method of choice for paternity testing in DNA testing via RFLP which has a 99.99% (and higher) power of exclusion.

sd/-

sd/-

Dr. Biman Saikia Dr. Manni Luthra Guptasarma”

HLA stands for “Human Leukocyte Antigen”, whereas DNA is “Deoxyribo Nucleic Acid”. DNA is material that governs inheritance of eye colour, hair colour, stature, bone density and many other human traits.

Each of our body's cells contains a complete sample of our DNA. In the report Ex. DY. it was specifically mentioned that the report is to be interpreted in the light of following known and established facts which are described in the note appended to the report. In the Note, it is made clear that HLA eliminates 80% of the male population from being the possible father, and in some cases, it is possible to produce a probability of paternity upto 90%. However, HLA testing cannot differentiate between related alleged fathers. The method of choice for paternity testing in DNA testing via RFLP has a 99.99% (and higher) power of exclusion.

Once the trial Court, in view of the application filed by the accused, had directed DNA testing, there was no reason for the PGI to perform HLA test. The judgment passed by the trial Court does not make reference if the Court was really alive to the fact that the PGI has conducted HLA test and not DNA test. As the Court did not advert to this important aspect, there was no occasion for the Court to consider if HLA testing in place of DNA test can form basis for entertaining other evidence on record with suspicion. This apart, once the trial Court has directed conducting of DNA testing, there was no reason for the trial Court to rely upon HLA testing till the order passed by the trial Court was modified in accordance with law. It further appears that even the Director, PGI did not bother to inform the Court as to the circumstances under which the direction issued by the Court for conducting DNA test has not been complied with in letter and spirit.

The trial Court records make it evident that an application was filed by the public prosecutor for modification of the order dated 25.8.2007

(though wrongly written as order dated 7.2.2008) on the plea that the accused filed application for getting DNA test with a mala fide intention as his sister Saroj is working with Dr. Baldev, a private practitioner and brother of Dr. Baldev is working as a doctor in PGI Chandigarh and that is why the accused wanted the DNA test to be done at PGI Chandigarh. It was prayed that DNA test be got conducted from AIIMS, New Delhi. The application was dismissed by the Sessions Judge, Patiala vide order dated 10.3.2009. The apprehension expressed by the prosecution in the aforesaid circumstances, appears to be well founded as the doctors at PGI Chandigarh, in utter disregard of order of the Court conducted HLA testing in place of DNA test. The trial Court has relied upon the HLA test by understanding it to be DNA test, hence entertained doubt in story of the prosecution and statement of the prosecutrix, therefore, in my considered opinion, the judgment of the trial Court is based upon misreading of material evidence and cannot be allowed to sustain on this score alone.

In view of what has been discussed hereinabove, the petition is allowed, judgment passed by the trial Court is set aside and the matter is remitted to the trial Court for consideration afresh in the light of aforesaid observations. The trial Court shall be at liberty to get DNA test of the accused, the prosecutrix and the child conducted from any reputed medical/research institution. However, nothing stated in this order shall prejudice the Court in final adjudication on merits.

(REKHA MITTAL)
JUDGE

25.2.2015
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