

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

**CRA-S-346-SB-2000 (O&M)
Date of Decision: 20.01.2016**

Avtar Singh

...Appellant(s)

Versus

State of Punjab

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

Present: Mr. P.S. Hundal, Sr. Advocate with
Mr. Dinesh Trehan, Advocate
for the appellant.

Mr. V.P.S. Sidhu, AAG, Punjab,
counsel for the respondent-State.

ANITA CHAUDHRY, J.

1. The appellant was sentenced to undergo 10 years' imprisonment for commission of offence under Section 376 IPC along with fine of Rs.5,000/-. He was also sentenced to undergo 5 years' imprisonment for commission of offence under Section 366 IPC along with fine of Rs.5,000/-. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 3 months under both the heads.

2. Avtar Singh and Hardayal Singh were tried in FIR No.177 of 1997, registered under Sections 366 and 376 IPC at police Station Jandial. Initially, the challan was presented

only against Avtar Singh but subsequently after trial had begun, an application under Section 319 Cr.P.C. was filed and Hardayal Singh was summoned. The trial ended in the acquittal of Hardayal Singh while Avtar Singh was convicted and sentenced here-in-above.

3. Gurpal Singh complainant gave a complaint Ex.PA to the police that his daughter was abducted by Avtar Singh. He had alleged that his daughter was missing from the house for about 10 days and if the daughter gave birth to the child then the government would be responsible. He had named Avtar Singh for enticing his daughter.

4. The girl was recovered after 11 days and Section 376 IPC was added. Avtar Singh was arrested on 05.09.1997.

5. Investigations were completed and challan was presented against Avtar Singh. Subsequently, Hardayal Singh was summoned under Section 319 Cr.P.C. The prosecutrix in the Court had stated that Hardayal Singh was known as Sahib Singh. Charge was framed under Section 366, 376 IPC to which, they pleaded not guilty. The prosecution examined the prosecutrix who was the main witness for the prosecution besides her father, Medical Officers, the Head Master and the Police Officers.

6. In the statement under Section 313 Cr.P.C., the accused denied the allegations. It was pleaded that the prosecutrix was a part of the Bhajan Mandli. Accused Hardayal Singh stated that he was not called by the name of

Sahib Singh and he was falsely implicated and he had been named because he refused to make her a part of the Bhajan Mandli. Avtar Singh took the defence that the girl used to go outside the village even outside the State of Punjab for Kirtan and she was used to going alone to different Gurudwaras and on pilgrimage. By way of defence, they had examined the Sarpanch and the Head Master.

7. The trial Court after examining the evidence acquitted Hardayal Singh and convicted Avtar Singh under the various Sections mentioned here-in-before. Aggrieved by the same, this appeal has been preferred.

8. The counsel for the appellant had urged that it was a case of consent and the girl was major and she had travelled to different parts of the country and was out for a number of days and had stayed with the appellant in a Gurudwara and a strange story was made up by her, which was not believable. It was urged that the medical had been done after one month and nine days of her recovery and the accused was arrested on 05.09.1997 and there could be no coitus after 05.09.1997 and the prosecutrix was medically examined on 15.09.1997 and spermatozoa was found which says it all. It was urged that the Medical Officer had stated that the life of a spermatozoa at the most remains for 72 hours and there could be no physical contact with the accused after 05.09.1997 and it was a case of outright acquittal and the trial Court had gone wrong in recording his conviction.

9. The prosecutrix is admittedly over 18 years of age. She along with her sister and nephew had gone to village Malowal to see the other sister. On the return journey that afternoon, they were coming on foot when a van came from behind. The prosecutrix in her statement in the Court had stated that Sahib Singh, Avtar Singh and two more persons were inside the van and Avtar Singh was holding a pistol and she was made to sit in the van forcibly and some intoxicant was administered and she gained consciousness at a Gurudwara at Gwalior. She had stated that they remained at the Gurudwara for four days and on pistol point, she was raped by Avtar and Sahib Singh. She had further disclosed that both these persons had promised to leave her at her village but they did not get her back and instead took her to Gurudwara Dumbra where a room was taken and threats were extended and she was confined for 3/4 days. She stated that both the accused took away her jewellery and forcibly removed her ear-rings. She stated that one night both Avtar Singh and Sahib Singh left her sleeping. She raised alarm and told the whole story to the Granthi. The Granthi asked her to keep quiet and told her if somebody from the village would come then he would send her back. The Granthi sent her back with Jaswinder Singh and she was left with the Sarpanch. She stated that she was medically examined after 1 month and 9 days. She was confronted with some photographs which she admitted to be hers but stated that the photographs were taken forcibly. She stated

that four persons had forcibly taken her to a studio at gun point where the photographs were taken. She denied that she used to perform Jagrata/Religious songs in the houses or was a part of Bhajan Mandli. She admitted to have travelled by foot and then by bus to different places. She stated that all the while she was under threat and all these facts were disclosed to the police. She stated that she was lastly raped on 05.08.1997 by the accused.

10. In the first statement made to the police Mark-P, the prosecutrix had admitted that she was a member of the Bhajan Mandli and used to go from village to village for singing religious songs. Admittedly she is major. The prosecutrix had travelled some part on foot. She had travelled with the accused by bus and had stayed at different Gurudwaras. She remained outside her village till 18.08.1997. The medical examination was got done after one month. The prosecutrix was categorical that the accused had lastly raped her on 15.08.1997. The trial Court had acquitted Sahib Singh as it found no evidence against him. Avtar Singh was arrested on 05.09.1997. The prosecutrix was medically examined on 15.09.1997. The medical evidence is contrary to the case set up by the prosecution. The Medical Officer was categorical that the life of spermatozoa is 72 hours and not more than that. He had also stated that marks of abrasion can also remain after 24 hours.

11. Avtar was examined by Dr. Manjit Singh PW-8 on 15.09.1997 i.e. one month after the last incident narrated by

the prosecutrix. The Medical Officer did not find any injury. The FSL report, however, found spermatozoa. The prosecution has not been able to explain the presence of semen from the swab taken on 15.09.1997. No DNA examination was carried out and it only suggests that it was not the accused who was responsible and the prosecutrix was in some relationship. The life of the spermatozoa is only 72 hours. The appellant had been arrested on 05.09.1997.

12. The prosecutrix remained at the Gurudwara for 4 to 5 days. She had gone with the accused to Gwalior and it is a clear case of consent. There was no threat. Had it been so, the victim would have made a complaint in the Gurudwara. It is matter of common knowledge that there are number of people who visit the Gurudwara daily. The rooms are occupied by visitors. The story put up by the prosecution is highly improbable. The medical evidence belies the case set up by the prosecution. No doubt, the statement of the prosecutrix is sufficient to nail the accused and the evidence of the prosecutrix has to be given pre-dominant consideration but to hold that the statement has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal case. I am of the view that the story projected by the prosecutrix is indeed improbable.

13. In *Vijayan v. State of Kerala*, [(2008) 14 SCC 763], the Apex Court has held thus in para 5:-

" 5. x x x x x x x In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for 31 rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony. X x x x x x x "

14. In Tameezuddin v. State (NCT of Delhi), [(2009) 15 SCC 566], the Apex Court has observed thus:-

" 9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable."

15. In Dinesh Jaiswal v. State of Madhya Pradesh, [(2010) 3 SCC 232], the Apex court referring to the principle that the evidence of the prosecutrix is liable to be believed save in exceptional circumstances had observed thus:

"10. Mr C.D. Singh has however placed reliance on Moti Lal case to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances.

There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

16. The testimony of the victim in this case does not inspire confidence. The version given by the mother totally contradicts the prosecution story. A conviction cannot be based on the sole evidence of the victim. The story projected by the prosecution does not inspire confidence. The story is improbable and belies logic. The observations made by the Court below is a result of improper appreciation of evidence.

17. In view of the discussion above, the finding recorded by the Court below is set aside. The appeal is allowed. The judgment of conviction and order of sentence under challenge is set aside. The accused-appellant is acquitted of the charges. The fine amount if deposited would be refunded. Lower Court record be sent back.

(ANITA CHAUDHRY)
JUDGE

20.01.2016
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