

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA No.D-520-DB of 2013 (O & M)
Date of decision: 06.06.2016.

Charanjit Kumar

....Appellant

Vs.

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE S.S.SARON
HON'BLE MRS. JUSTICE RITU BAHRI

Present: Mr.Sanjeev Sharma, Advocate for the appellant.

Mr. P.P. S. Thethi, Addl. A.G., Punjab
for the State.

S.S.Saron,J.

The appeal has been filed by Charanjit Kumar (appellant) against the judgment of conviction and order of sentence dated 24.01.2013 passed by the learned Additional Sessions Judge, Moga whereby the appellant has been held guilty for the offence punishable under Section 376 of the Indian Penal Code ('IPC' - for short). He has been sentenced to undergo life imprisonment; besides, pay a fine of Rs.10,000/- and in default in payment thereof undergo further rigorous imprisonment for six months.

FIR (Ex.P3) in the case has been registered on the statement (Ex.P1) of Hira Lal (complainant) (PW-1), which was recorded by SI/SHO Balwant Singh (PW-3) on 12.08.2010. The complainant-Hira Lal stated that he was resident of village Sosan and aged about 36 years. He was serving as a 'sewadar' (peon) in the Co-operative Department at Moga. His marriage was solemnized

about 10 years earlier with Sonia daughter of Inderjit resident of Kotkapura. He had three daughters and a son. All his children were small. On the date of incident i.e. 12.08.2010 since he was on leave, he was present at his house. His daughter (prosecutrix), who was five years old, had gone from the house to a shop for getting a match box. She did not return back for quite some time. The complainant and his nephew Prem Kumar (PW-2) son of Sohan Lal then went from their house to search for her. When they reached near the house of Charanjit Kumar (appellant) of their village, then they heard shrieks of a child coming from his house. The time would be about 3.00 p.m. The complainant (Hira Lal) and his nephew Prem Kumar entered the house of Charanjit Kumar (appellant) and saw that he was committing rape on his daughter (prosecutrix). They both i.e. Hira Lal and Prem Kumar raised a hue and cry. Charanjit Kumar on seeing them pushed his way and ran away. The complainant and his nephew Prem Kumar (PW-2) then took care of his daughter. They saw that blood was oozing out from her vagina and her clothes were also stained with blood. They arranged a vehicle and got the prosecutrix admitted in the Civil Hospital, Moga. The doctors were treating her. The complainant - Hira Lal after leaving his wife and nephew Prem Kumar with his daughter and taking Buta Singh, Sarpanch with him was going to the Police Station for giving information that the police met him. His statement was recorded by SI/SHO Balwant Singh (PW-3), which he had heard. He was a claimant. Proceedings were asked to be initiated. The statement (Ex.P1) was signed by Hira Lal (complainant) and was attested by SI/SHO Balwant Singh, Police Station Sadar, Moga on 12.08.2010.

Police proceedings were recorded by SI/SHO Balwant Singh (PW-3) to the effect that he along with SI Ved Parkash, HC Jagdev Singh and others were on patrol. They were at the Bus Stand of village Duneke in a Government Vehicle No.PB-12-H-7227, which was being driven by HC Charan Singh. At that time Hira Lal (complainant) along with Buta Singh, Sarpanch resident of village Sosan met them. Hira Lal got his statement (Ex.P1) recorded with him which was written, read over and heard by him, besides, he was made to understand the same. He after hearing and accepting his statement as correct signed below it in Punjabi. SI/SHO Balwant Singh attested the same. From the statement of the complainant, a case for the commission of an offence under Section 376 IPC was made out. The statement (Ex.P1) for registration of a case (FIR) for the aforesaid offence against Charanjit (appellant) was being sent to the Police Station Sadar Moga through Constable Gurdev Singh. After registration of case, its number was asked to be intimated. The special reports were asked to be sent. The PCR (Police Control Room), Moga was asked to be informed by wireless message. SI/SHO Balwant Singh along with the accompanying police officials and by taking the complainant Hira Lal as also Sarpanch Buta Singh along was proceeding to the spot. The police proceedings were signed by SI/SHO Balwant Singh (PW-3) at Bus Stand Village Duneke at 5.30 p.m. on 12.08.2010.

Investigation in the case was conducted by SI/SHO Balwant Singh (PW-3). He reached the place of occurrence and inspected the same. He prepared rough site plan with correct marginal notes (Ex.P4) at the instance of Hira Lal (complainant). He also recorded the supplementary statement of complainant and

others witnesses. SI/SHO (PW-3) then along with the complainant went to the Civil Hospital, Moga where the doctor handed over to him the Medico Legal Report (MLR) of the prosecutrix and one box duly sealed with the seal of doctor containing swabs and one sealed envelope along with specimen seal, which were taken in possession vide recovery memo Ex.P5. The memo was signed by HC Jagdev Singh and SI Ved Parkash. Statements of Buta Singh and Prem Kumar (PW-2) were also recorded by the Investigating Officer (IO) at the spot in terms of Section 161 of the Code of Criminal Procedure ('Cr.P.C.' - for short).

The Investigating Officer (PW-3) on getting secret information arrested the accused in this case on the same day. On personal search of accused Rs.50/- along with one cell phone make 'Nokia' were recovered, which were taken in possession vide personal search memo Ex.P6. The memo was signed by the accused and the above said witnesses i.e. HC Jagdev Singh and SI Ved Parkash. The grounds of arrest memo (Ex.P7) was also prepared, which was signed by the accused and the above said witnesses. On return to the police station, the case property was deposited in an intact condition with MHC Mukhwinder Singh. The appellant was lodged in the police lock up. A scaled site plan (Ex.P8) was also got prepared by Balwant Singh SI/SHO from Gursewak Singh, Draftsman (PW-4). Statements of MHC Mukhwinder Singh and Constable Jagwinder Singh were also recorded under Section 161 Cr.P.C. The cell phone (MO-1) of the appellant and the envelope containing 'jamatalasi' (personal search) (MO-2) of the appellant were produced in the Court. The 'pajami' of the victim was not produced i.e. in Court by the concerned police station.

After completing the investigation, police report ('challan') was filed in the Court of the learned Additional Chief Judicial Magistrate, Moga on 02.05.2011. The learned Magistrate after hearing the contentions raised and perusing the material collected by the Investigating Agency vide order dated 02.05.2011 found the same to reveal that a prima facie case for the offence under Section 376 IPC was made out against the accused (appellant). The offence punishable under Section 376 IPC, however, was exclusively triable by the Court of learned Additional Sessions Judge (I), Moga. The appellant was directed to be produced before the Court of learned Additional Sessions Judge (I), Moga on 16.05.2011.

The learned Additional Sessions Judge, Moga to whom the case was assigned on 24.05.2011 charge-sheeted the appellant on the allegation that on 12.08.2010 at about 3.00 p.m. in the area of village Sosan, he committed rape on the prosecutrix, a minor girl aged about five years and thereby he committed an offence punishable under Section 376 IPC, which was within the cognizance of the said Court. The appellant it was directed be tried by the said Court for the aforesaid charge. The charge was read-over and explained to the appellant in Punjabi. He heard and understood the the charge. He pleaded not guilty to the charge and claimed trial.

The prosecution in order to establish its case examined as many as nine witnesses; besides, tendered documents in evidence. The statement of Charanjit Kumar (appellant) in terms of Section 313 Cr.P.C. was recorded. The substance of the evidence appearing against him was put to him. The appellant in his defence stated that he was innocent and had been falsely implicated in the case at the instance of Hira Lal complainant.

The learned Additional Sessions Judge, Moga after considering the evidence and material on record, convicted the appellant for the offence punishable under Section 376 IPC and sentenced him to undergo life imprisonment; besides, pay a fine of Rs.10,000/- and in default in payment thereof undergo rigorous imprisonment for six months. The appellant aggrieved against his conviction and sentence has filed the present appeal.

Mr. Sanjeev Sharma, Advocate learned counsel for the appellant submits that the appellant has been falsely implicated in the case. It is submitted that the prosecution case that Hira Lal complainant (PW-1) and Prem Kumar (PW-2) had witnessed the occurrence at the house of Charanjit Kumar (appellant), when the minor prosecutrix is stated to be at his house at about 3.00 p.m. is highly unnatural and their presence is doubtful. Both of them are in fact made up witnesses and from their deposition it stands proved that they did not see any such occurrence and they have given false evidence. It is submitted that their statements are falsified from the deposition of Dr. Neelu Kaura, Medical Officer, Civil Hospital, Moga (PW-7) who at the time of medically examining the prosecutrix in the MLR (Ex.P10) mentions the case to be of alleged rape giving history of being abducted by a local village boy and taken to his house, and after sometime the child came to her house bleeding and giving history of being sexually assaulted.

It is submitted that there are other discrepancies in the case inasmuch as Hira Lal (PW-1) in his cross examination stated that he sent his daughter to buy a match box from the 'kariyana' (grocery) shop of Vishal, which it is stated is at a distance of 12-13 karams (one 'karam' is equal to 5 ½ feet) from his house while it is

admitted that Prem Kumar (PW-2) was running a 'kariyana' shop in the village, which was at a distance of 1 'killa' from the house of the complainant while that of Vishal was at more distance. It is also submitted that Prem Kumar (PW-2) in his examination in chief stated that the prosecutrix was sent by his uncle (i.e. by Hira Lal) to bring match box before he reached his house while Hira Lal stated that he had sent the prosecutrix after Prem Kumar had come to his house. It is further submitted that it is an admitted case that the house of the appellant was situated in the village 'abadi' (habitation) and when Hira Lal (PW-1) and Prem Kumar (PW-2) went to the house of the appellant at the time of occurrence, Hira Lal (PW-1) stated that the door of the house was open while Prem Kumar (PW-2) stated that the door of the house of the appellant was closed but was not bolted from inside. It is also stated that Hira Lal (PW-1) in his cross examination stated that the appellant ran away from his house and at that time he was undressed. It is stated to be highly improbable that the appellant would run away in an undressed condition and that too in broad day light. It is also stated that Inspector Balwant Singh (PW-3) in his cross examination stated that the cot where the incident had occurred did not have blood stains, which would show that the occurrence was not seen by Hira Lal (PW-1) and Prem Kumar (PW-2). Besides, Prem Kumar (PW-2) in his cross examination stated that he had not gone alone for searching the prosecutrix since it was a matter of a girl child. This according to learned counsel clearly showed that Prem Kumar (PW-2) had knowledge of the occurrence at that time. It is submitted that the chemical examiner's report (Ex.P14) has not been correctly appreciated inasmuch as no spermatozoa was

detected on the 'pajami' of the prosecutrix and her clothes were not produced in Court. Therefore, it is submitted that the appeal is liable to be accepted and the appellant acquitted of the offence attributed to him.

In response, learned counsel for the State has submitted that the prosecution has established and proved its case beyond shadow of reasonable doubt against the appellant and the learned Additional Sessions Judge has recorded cogent and convincing reasons for convicting and sentencing the appellant. It is submitted that there are no discrepancies in the prosecution case as have been submitted by the learned counsel for the appellant. Besides, the minor discrepancies would not in any manner affect the prosecution case. Therefore, the appeal is liable to be dismissed.

We have given our thoughtful consideration to the contentions of the learned counsel for the parties and with their assistance perused the record.

The prosecution case is that rape had been committed by the appellant on the minor daughter of Hira Lal (complainant). The rape was committed at the house of the appellant at about 3.00 p.m. on 12.08.2010. The complainant had sent his daughter to get a match box from the shop. However, his daughter did not return for quite sometime. Then he along with his nephew Prem Kumar went searching for her. During the search, they reached the house of the appellant and they heard shrieks of a child coming from his house. When they looked from the door of the house, they saw that the appellant was committing rape on the daughter of the complainant. The time would be about 3.00 p.m. at that time. The complainant and his nephew entered the house and raised a hue

and cry. The appellant on seeing them pushed his way and ran away. The complainant and his nephew took care of the minor girl and brought her to Civil Hospital, Moga.

At the hospital, Dr. Neelu Kaura, Medical Officer, Civil Hospital, Moga (PW-7) examined the prosecutrix. The doctor mentioned that the victim a five years old female and was brought to their hospital by Hira Lal with history of alleged rape. According to the history of the case that was recorded, it was mentioned that the prosecutrix was abducted by a local village boy and taken to his house and after sometime the child came back to her house bleeding and giving history of being sexually assaulted. On examination, the patient was conscious and oriented. Her clothes were soaked with blood and stool. Her pulse was 90 per minute. The abdomen was soft. No external injury was seen on her thigh, legs or abdomen. On local examination, there was third degree perennial tear extending from introits to anal sphincter. Clitoris was normal. Labia normal. Fourchette torn, tear involving the anal sphincter also. The swabs were taken and sent for chemical examination. The clothes were preserved and sealed. On the same day, the patient (i.e. the prosecutrix) was referred to Guru Gobind Singh Medical College and Hospital, Faridkot for treatment.

Dr. Lajya, Associate Professor, Guru Gobind Singh Medical College and Hospital, Faridkot (PW-8) operated the victim on 12.08.2010 at 4.40 p.m. On examination under anesthesia, there was third degree perennial tear which was extending to the abdominal cavity. There was also multiple vaginal lacerations and para urethral tear. The tears were repaired and abdominal cavity was opened and there was a tear in the posterior fornix behind the

uterus. It was also repaired. Abdominal cavity was washed and the wound was closed. Post operatively the patient was discharged in a satisfactory condition on 24.08.2010.

Hira Lal (PW-1) in his deposition in Court reiterated his statement Ex.P1 on the basis of which FIR (Ex.P3) was registered. Besides, Prem Kumar (PW-2) also supported the prosecution case. Both of them stated that they had witnessed the occurrence. However, according to learned counsel for the appellant their presence at the house of the appellant is highly unnatural and they were in fact not present. In support of this, he has submitted that their statements are falsified from the deposition of Dr. Neelu Kaura, Medical Officer, Civil Hospital, Moga (PW-7) who in the MLR (Ex.P10) has at the time of examining the victim mentioned the case to be one of alleged rape and while recording the history, it is mentioned that the prosecutrix was abducted by a local village boy and taken to his house and after sometime the child came to her house bleeding and giving history of being sexually assaulted.

In this regard, it may be noticed that the history of a rape victim is recorded with a view to treat the patient and is not recorded in a manner as Court proceedings are recorded. The family members who were giving the history to the doctor specially where the victim is their minor child mention it in a subdued manner so as to underplay the act as they have a feeling of humiliation, frustration and being remorse in their helpless situation. Therefore, not much weightage or consideration is liable to be given to the history of the patient as mentioned in the MLR (Ex.P10).

It may also be noticed that Hira Lal (complainant PW-1) and Prem Kumar (PW-2) were cross examined at length. However,

the history of the case as recorded in the MLR (Ex.P10) was not put to them in their cross examination. Rather the suggestions put to Hira Lal (PW-1) during his cross examination were that his wife had illicit relations with the accused. Hira Lal (PW-1) denied the same as wrong. It is also stated by him as wrong to suggest that he had a suspicion that his wife had gone to the house of the accused with his daughter (prosecutrix). It is further stated as wrong to suggest that when they (i.e. Hira Lal and Prem Kumar) reached the house of the accused, they saw his wife with the accused in a compromising condition. It is further stated as wrong to suggest that on seeing this he (Hira Lal) intentionally put his thumb in the private part of his daughter (prosecutrix) for falsely implicating the accused in this case in order to save his wife. The said cross examination goes to show that the appellant accepts that Hira Lal and Prem Kumar did go to the house of the accused although they saw his wife with the accused in a compromising condition. There is in any case no cross examination regarding the prosecutrix being abducted by a local village boy and taken to his house as is recorded in the MLR (Ex.P10). The defence was liable to put to the prosecution witnesses Hira Lal and Prem Kumar so much of its case as it concerned them and if questions were not put, the Court is to presume their depositions as correct and accept them. Therefore, the history of the case as recorded in the MLR (Ex.P10) by Dr. Neelu Kaura (PW-7) is not of any significance so as to hold the prosecution case to be doubtful or otherwise not made out in view of the said history as recorded.

It has also been submitted by learned counsel for the appellant that Hira Lal (PW-1) in his cross examination stated that

he sent his daughter to buy match box from the 'kariyana' (grocery) shop of Vishal, which it is stated is at a distance of 12-13 'karams' from his house while it is admitted that Prem Kumar (PW-2) was running a 'kariyana' shop in the village which was at a distance of 1 'killa' from the house of the complainant while that of Vishal was at a more distance. Therefore, it is sought to be urged that the prosecutrix would go to a place which is near her house rather than at a place which is far.

In this respect, it needs to be noticed that Hira Lal (complainant PW-1) in his cross examination stated that his daughter was sent at about 2.30 p.m. to bring a match box from the 'kariyana' shop of Vishal, which was at a distance of 12-13 'karams' (one 'karam' is equal to 5 ½ feet). Prem Kumar (PW-2) in his cross examination states that his 'kariyana' shop was at a distance of one 'killa' (measurement of distance in acres). The shop of Vishal, it is stated by Prem Kumar (PW-2) is on the other side and at a distance of two 'killas' from the house of Hira Lal (PW-1). However, this would not in any manner make any difference or affect the prosecution case as Hira Lal (PW-1) may be having his dealings for the groceries with Vishal. The possibility of his not dealing with his nephew, who was running a shop cannot be ruled out. It may also be noticed that Prem Kumar (PW-2) states that when he on 12.08.2010 at about 2.00 p.m. had gone to see his uncle, who was not feeling well, his uncle told him that his daughter had been sent by him to get a match box but she had not returned. Prem Kumar (PW-2) further states that his uncle inquired from him about the prosecutrix and he told him that she had not come to him for getting a match box. Therefore, Hira Lal does not rule out the

possibility of the prosecutrix going to the shop of Prem Kumar even. The prosecutrix being a small child may have for her own reason gone to the shop of Vishal to get a match box. In any case, the fact that the prosecutrix had gone to the shop of Vishal for bringing a match box and not to the shop of Prem Kumar (PW-2) would not affect the depositions made by Hira Lal (PW-1) and Prem Kumar (PW-2), who had witnessed the appellant committing rape with the daughter of Hira Lal (PW-1).

The contention of the learned counsel for the appellant that Prem Kumar (PW-2) stated that the prosecutrix was sent by his uncle i.e. Hira Lal (PW-1) to bring match box before he i.e. Prem Kumar reached the house of Hira Lal, while Hira Lal stated that he sent the prosecutrix after Prem Kumar had come to his house, is also not of any significance. The same does not affect the prosecution case and minor discrepancies do occur when witnesses are deposing after some time. In fact these go to show that the witnesses have not been narrating the sequence of events as tutored witnesses.

The other contention of the learned counsel for the appellant that the house of Charanjit Kumar (appellant) is situated in the village 'abadi' (habitation) and when Hira Lal (PW-1) and Prem Kumar (PW-2) went there at the time of occurrence, Hira Lal (PW-1) had stated that the door of the house was open while Prem Kumar (PW-2) stated that the door of the house of the appellant was closed but was not bolted from inside, is not of any consequence. Hira Lal in his cross examination rather stated that when they entered the house of the accused through the main gate which was lying open at that time they raised 'raula' (alarm). Prem

Kumar (PW-2) in his deposition stated that when they were near the main gate of the house of the accused they heard shrieks of the prosecutrix. The main door of the house of the accused was closed but not bolted from inside. In the circumstances, it is to be noticed that Hira Lal says that the main gate of the house of the accused was open when they reached the house of the accused while Prem Kumar (PW-2) states that the main door of the house of the accused was closed but not bolted from inside. In the rough site plan (Ex.P4) and in the scaled site plan (Ex.P8) prepared by Gursewak Singh, Draftsman (PW-4), the main gate of the house is shown as opening in the street from Gurdwara Singh Sabha to Daroli Bhai and then there is a 'verandah' in the house and in the 'verandah' there is an open room where point 'A' is the place that has been depicted where the minor girl was raped on a cot. Therefore, it is quite evident that according to Hira Lal, the main gate of the house was open and according to Prem Kumar (PW-2) the door in the room was closed but not bolted.

It is also stated by learned counsel for the appellant that Hira Lal (PW-1) in his cross examination stated that the appellant ran away from his house and at that time he was undressed. It is stated to be highly improbable that the appellant would run away in an undressed condition and that too in broad day light. Hira Lal (PW-1) in his cross examination states that when they saw the accused, he was totally undressed. Neither was he wearing upper garments or lower garments. The accused, it is stated, ran away outside the house while he was undressed. No body apprehended him when he ran away from his house. In case, the accused is stated to be undressed when he had run away on seeing Hira Lal

and Prem Kumar then that could be his reaction to the situation and one cannot comprehend how a person would behave or react in such a situation. Besides, the situation may be such that in the afternoon at 3.00 p.m. in the month of August when it is quite a sultry weather, there may not have been many persons around and seeing the situation in which the appellant was and fearing for his own self he could have run away in an undressed state. Therefore, the said circumstance of his running away in an undressed condition when he was in the act of committing rape would not affect the prosecution case.

It is still further contended by the learned counsel for the appellant that Inspector Balwant Singh (PW-3) in his cross examination stated that the cot where the incident had occurred did not have blood stains, which would show that the occurrence was not seen by Hira Lal (PW-1) and Prem Kumar (PW-2). Balwant Singh (PW-3) in his cross examination stated that there was one cot which was made of jute that was lying at point 'A' in the site plan (Ex.PA) (sic. - Ex.P4) where the incident occurred. It is further stated that there was no bed sheet on the said cot and the said cot was not stained with blood. Hira Lal (PW-1) in his cross examination stated that the cot on which his daughter was lying was not covered with any bed sheet. However, he does not state as to whether there was any blood on the cot. In fact this was not put to him in cross examination. All that Hira Lal and Prem Kumar say is that blood was oozing from the vagina of the prosecutrix. They do not say whether it fell on the cot also. It may also be noticed that in the initial statement (Ex.P1) of Hira Lal on the basis of which FIR (Ex.P3) was registered, it is mentioned that after Charanjit Kumar

on seeing Hira Lal and Prem Kumar pushed his way and ran away and when they took care of the prosecutrix, they saw that blood was oozing out from her vagina and her clothes were also stained with blood. It is not stated by Hira Lal that there was blood on the cot also. Therefore, there is no variance between the statements of Hira Lal (PW-1), Prem Kumar (PW-2), and Inspector Balwant Singh (PW-3) in this regard. Even otherwise blood did not fall on the cot and, therefore, there was no blood on the cot.

The contention of the learned counsel for the appellant that Prem Kumar (PW-2) in his cross examination stated that he had not gone alone for searching the prosecutrix since it was a matter of a girl child and that this clearly showed that Prem Kumar (PW-2) had knowledge of the occurrence at that time is not of much significance. Prem Kumar (PW-2) in his cross examination does in fact state that he did not go alone for the search of the prosecutrix because the matter was of a girl child. It is to be noticed that on the date of incident i.e. 12.08.2010 Prem Kumar had gone to see his uncle (Hira Lal) in his house at about 2.00 p.m. His uncle informed him that his daughter was sent by him to get a match box but she had not returned. Hira Lal inquired from him (Prem Kumar) but he told him that she had not come to him for getting a match box. The minor girl had not returned for quite sometime; therefore, Hira Lal and Prem Kumar went together. It is in the said context that as the minor girl had not returned that Prem Kumar stated that he did not go alone for the search of the prosecutrix because the matter was of a girl child. This would not in any manner mean that he was already aware of the occurrence as is sought to be contended by the learned counsel for the appellant.

It is further submitted by the learned counsel for the appellant that the chemical examiner's report (Ex.P14) has not been correctly appreciated inasmuch as no spermatozoa was detected on the 'pajami' of the prosecutrix and her clothes were not produced in Court. In this regard, it is to be noticed that in case rape was committed by the appellant on the prosecutrix, who was a small girl of five years, he would have removed the 'pajami' of the girl and then indulged in the unfortunate act. In such a case, there would be no spermatozoa on the 'pajami' of the prosecutrix in the chemical examiner's report (Ex.P14) as it must have been removed.

A perusal of the chemical examiner's report (Ex.P14) shows that two packets were received by the chemical examiner from Dr. Neelu Kaura, Medical Officer, Civil Hospital, Moga (PW-7). One packet contained two vaginal swabs and the other contained a 'pajami' which were marked as exhibit-I and exhibit-II respectively. The result was to the effect that spermatozoa was detected in the contents of exhibit -I (i.e. two vaginal swabs), although it was not detected in the contents of exhibit-II (i.e. 'pajami'). The fact that spermatozoa was detected from the vaginal swabs sent by Dr. Neelu Kaura (PW-7), which relate to the prosecutrix, it is quite evident that it was the spermatozoa of the appellant, which was on the vaginal swabs of the prosecutrix and that she was subjected to rape. The spermatozoa not being detected on the 'pajami' is absolutely inconsequential. Besides, the fact that the clothes of the prosecutrix were not produced in Court, in view of the other clinching evidence on record would not affect the prosecution case.

There is cogent and convincing evidence on record that the minor girl aged 5 years was subjected to rape by the appellant. The

appellant was examined for sexual capability by Dr. Jasdeep Singh (PW-9) the then Medical Officer at Civil Hospital, Moga on 13.08.2010. On examination, it was observed that the appellant had well developed secondary sexual characters. Pubic hair was present. Cremasteric reflex was present. There was nothing to suggest that the appellant was unable to perform sexual intercourse. His (PW-9) report to this effect was Ex.P13. In cross examination it is stated that it is not necessary that there would be penile swelling in case the person committed rape with a minor girl of the age of near about five-six years. Possibility of abrasions on the penis in such case could not be ruled out.

The medical examination of the prosecutrix was conducted initially by Dr. Neelu Kaura (PW-7) a reference to which have been made above. In the MLR (Ex.P10) the nature of injuries have been mentioned as 3rd degree perennial tear. This extended from introitus to anal sphincter. Clitoris was normal. Labia normal, Fourchette torn, tear involving the anal sphincter also. Copy of referral card has been tendered in evidence as Ex.P11. Dr. Neelu Kaura (PW-7) was cross examined on behalf of the appellant. It was stated by her that 3rd degree peineal tear means extending from introitus to anal sphincter. Such tear could occur by sexual intercourse. She stated that she was not told about the age of the boy who had kidnapped the victim and nor did she mention the same in her record. It is further stated by Dr. Kaura (PW-7) that such tear could not occur with thumb penetration. Tear of the penis, it is stated, never takes place by sexual intercourse. It is stated as wrong to suggest that such tear is possible by thrust of a thumb by force. It is also stated as wrong to suggest that swelling could also occur on the penis in

such sexual intercourse. It is also stated as wrong to suggest that injuries described by her (PW-7) in the MLR could not occur due to thrust of a penis in the vagina. It is stated as correct that these injuries could occur due to fall on sharp edged object. It is stated as wrong to suggest that she was deposing falsely.

Dr. Lajya Associate Professor G.G.S. Medical College and Hospital, Faridkot (PW-8) stated that on 12.08.2010 she operated upon the victim a five years old female daughter of Hira Lal. The patient was referred from Civil Hospital, Moga for treatment. On examination under anesthesia, there was 3rd degree perennial tear which was extending to the abdominal cavity. There was also multiple vaginal lacerations and para urethral tear. The tears were repaired and abdominal cavity was opened and there was a tear in the posterior fornix behind the uterus. It was also repaired. Abdominal cavity was washed and wound was closed. Post operatively patient was discharged in satisfactory condition on 24.08.2010. Dr. Lajya (PW-8) had brought the original medical report pertaining to the treatment of the patient (prosecutrix), which was prepared by a team of doctors including herself. It bears signatures of Dr. Parminder Kaur, whose signatures she identified on Ex.P-12. In cross-examination on behalf of learned counsel for the accused, it is stated that the victim was referred to her for treatment.

The prosecution, therefore, has proved beyond reasonable shadow of doubt that the appellant committed rape of the minor girl aged five years. This is proved from the eye witness account of Hira Lal (PW-1) and his nephew Prem Kumar (PW-2). It may be noticed that they have no motive whatsoever and neither has any

been urged to falsely implicate the appellant. Besides, the medical evidence on record that has been referred to also corroborates the oral account inasmuch as Dr. Neelu Kaura (PW-7) has clearly stated that the 3rd degree perennial tear could occur by sexual intercourse and that such tear could not occur with thumb penetration, which was the defence set up by the appellant. The same stands completely discounted from the opinion given by her.

As regards the quantum of sentence, it is to be noticed that keeping in view the fact that the appellant is a healthy grown male and has been examined by Dr. Jasdeep Singh (PW-9), the then Medical Officer, Civil Hospital, Moga and observed to be able to perform sexual intercourse and in his statement under Section 313 Cr.P.C. he has given his age as 30 years old while the prosecutrix is a minor girl aged five years, it would be just and expedient not to interfere with the sentence that has been imposed by the learned Additional Sessions Judge, Moga.

As regards payment of compensation it is contented by learned counsel for the appellant that the appellant is a labourer and is not in a position to pay any compensation to the victim. It is submitted that the appeal has been filed through legal aid. However, it may be noticed that the appellant committed rape on a five years old minor girl and, therefore, even though he may not be in a position to pay the compensation, the same is liable to be paid and compensation awarded in terms of Section 357-A Cr.P.C. The case is accordingly referred to the District Legal Services Authority at Moga to determine the compensation in accordance with the victim compensation scheme and pay to the rape victim the due amount of compensation in accordance with the scheme.

The appeal except for the payment of compensation to the victim, is dismissed.

(S. S. Saron)
Judge

(Ritu Bahri)
Judge

06.06.2016
Hemlata/A.Kaundal