

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

CRA-S-739-SB-2004 (O&M)
Date of Decision: 10.05.2016

Arjinder 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: Ms. Ruchi Sekhri, Advocate
for the appellant.

Mr. Deep Singh, A.A.G., Punjab,
counsel for the respondent-State.

ANITA CHAUDHRY, J.

This appeal is directed against the judgment dated 08.03.2004, vide which the appellant was convicted under Sections 376, 506 IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years along with fine of Rs.1,000/- for commission of offence under Section 376 IPC. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 1 month. He was also sentenced to undergo rigorous imprisonment for a period of 1 year along with fine of Rs.500/- for commission of the offence under Section 506 IPC. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 15 days.

A complaint was lodged by the victim who was stated to be 14 years old. She had retired to her room after

dinner on 09.09.2002. Her mother Kamala Rani, brother Balwinder Singh and Shiv Kumar had gone to sleep on the roof. She was waiting for the return of her father and other two brothers. The main door was lying unbolted. At 9:00 PM, their neighbour (appellant) entered the room and bolted the door from inside. The complainant confronted him by saying that he was like her brother but he caught hold of her neck and threatened that in case she made any noise, he would strangulate her. Fear gripped her, she could not raise alarm and was thrown on the bed. The accused opened the cord of her salwar and raped her. Meantime, the brother and the mother of the complainant came down and called her out. On hearing this, the accused hurriedly put on his clothes, unbolted the door and ran away. The mother helped the complainant put her clothes. The father and other two brothers returned from work around 10:00 PM. The incident was narrated to him. Since the matter involved the honour of the family, he wished to discuss it with his relatives before reporting. The father discussed the issue with his relatives and complainant along with her father went to the police station two days later on 11.9.2002. Initially a DDR was entered and few hours later, the FIR was registered under Section 376 & 506 IPC. The complainant was sent for her medical examination. The complainant was also produced before the Magistrate for her statement under Section 164 Cr.P.C. The vaginal swabs were sent to the Chemical Examiner. The accused was arrested on 16.09.2002.

Charge was framed under Section 376, 506 IPC, to which the accused pleaded not guilty.

The prosecution examined Dr. Kiran Chawla – PW1. She had conducted the medical examination on the prosecutrix. She found the body to be moderately built, nourished and the secondary characteristics were well developed. Notably the hymen was torn but it was healed and the vagina admitted one finger. She also deposed that the torn hymen gets healed within three days.

Complainant was examined as PW2. She was confronted with her statement under Section 164 Cr.P.C. and she admitted that she had not made allegations of rape in her statement then made to the Magistrate. She stated that she had not stated that fact as the accused had not committed the said act i.e. sexual intercourse. The complainant admitted that the accused was a tenant in their house and she knew him since childhood. With respect to her age, she stated that she was admitted in the school about 15 years ago at the age of 5 – 6 years. Though giving her personal details, she had stated that she was 14 years old.

Dharampal–PW3 stated that on return from work, his family members told him about the incident and he discussed the matter with the family and thereafter reported the matter to the police. He stated that he knew the father of the accused who was a tenant in his house for the last 6 – 7 years and a room in front of their house was under tenancy but it was not used for residential purpose but mainly for storage. He admitted that he had given a complaint Mark PW3/A to the SDM.

Kamla Rani, mother of the complainant was given up as unnecessary.

Dr. Sanjeev Hans – PW4 had examined the accused.

Balwinder Kumar – PW5, brother of the complainant deposed that he and his mother heard whispers from the ground floor and both of them came down and went in the room and they found the prosecutrix naked and the accused tried to flee and his mother asked him (witness) to go out so that his sister could put her clothes and thereafter, his sister disclosed that she had been threatened and that she had been raped. He stated that his sister had never attended school. He also stated that he was working for the last 7 years. He admitted that they had not reported the matter to the police the same night nor they had taken their sister for medical examination.

In the Statement recorded under Section 313 Cr.P.C, the accused pleaded false implication. He stated that the complainant wanted them to vacate the house and there was a dispute and the case had been registered on false allegations.

In defence, the accused had examined his father who spoke about the pressure on them to vacate the premises and about the compromise that was got effected through the Panchayat. He stated that after the registration of the case, there was a compromise and Dharampal agreed for withdrawal of the case and he agreed to vacate the room.

The trial Court gave a categoric finding that the girl was over 16 years of age. Para no.10 of the judgment reads as

under:-

"The only evidence on the file to prove the age of Minakshi prosecutrix is her statement on oath where she has given her age to be 14 years but this version put forth by her is proved to be wrong by the fact in her cross examination and in the statement of her brother Balwinder Kumar. She in cross examination stated that she was admitted in a School about 15 years ago and at that time her age was 56 years. She also admitted that her mensuration period started for the last 4 - 5 years. Her brother Balwinder Singh in his cross examination has given his age to be 21 years and admitted that his brother Minto is one year younger to him and Minakshi prosecutrix is one year younger to Minto. This statement brings Minakshi to the age group of 19 years and prove her to be over 16 years. The exact date of birth is not coming forth from the side of the prosecution. To prove the said fact her school certificate would have been the best piece of evidence but the same was withheld by the prosecutor for the reasons best known to it. This calls upon the court to draw an adverse inference against it and to hold that if the said certificate was produced on the record the contents would have gone against the prosecution. In the absence of any documentary evidence with regard to her age, the prosecution could have also opted for her ossification test to prove her age to be less than 16 years. This medical test was also not conducted upon Minakshi. The discussion above thus leads to conclude that prosecutrix on 09.09.2002 was over 16 years of age."

I have heard the counsel of both the sides.

The submission on behalf of the appellant was that in the statement recorded under Section 164 Cr.P.C., the complainant does not specifically refer to the allegations of rape and she justified this in her statement in the Court by saying that she had not made any allegations since there was no sexual act. The counsel had urged that this fact gets fortified from the fact that the Medical Officer had found the hymen to be torn and healed and as per the Expert's opinion, the hymen gets healed within three days. It was urged that the incident is said to have taken place at 9:00 PM on 09.09.2002 and the prosecutrix was medically examined on 11.09.2002, after about 50 hours and the Medical Officer had found the hymen to be healed which proved that no rape had been committed. It was urged that the trial Court had recorded a conviction mainly because spermatozoa was found in the FSL report. It was urged that the whole family except the father was at home and it was impossible that the boy could have raped the girl when the whole family was awake. It was urged that the incident did not take place in the dead of the night. It was urged that there was a delay of 2 days in lodging the FIR and it could be a case of consent, therefore, the family did not lodge the complaint that night. It was urged that no DNA test was carried out, therefore, the origin of the spermatozoa was not detected. It was also urged that the mother failed to step into the witness box and she was one who had seen her daughter in that position and an adverse position should have been drawn and she would have spilled

the beans. It was urged that the accused could not be so audacious that he could have entered the house in the presence of other members and the story was false.

The State counsel supported the judgment and had urged that the girl was under 18 and the statement of the prosecutrix should normally be accepted and the statement of the prosecutrix gets support from medical evidence.

Neither the complainant nor the State had filed the appeal, therefore, the finding had attained finality. The prosecution in fact had led no evidence to prove the age of the victim but there were inherent discrepancies in the statement of the witnesses. The complainant had given her age as 14 years but in her statement, she stated that she had started going to school 15 years ago. The brother had stated that his sister had never gone to school, therefore, it was a concerted effort on the part of the complainant and her family to keep away the evidence with respect to her age. There is an admission that the eldest of the brother's was Balwinder Singh who had given his age as 20 years. Mintu was the brother younger to Balwinder Singh. He was a year younger and the complainant was a year younger to Mintu. In any case, it was proved that the complainant was over 16 years of age. The finding can not be disturbed.

The incident had taken place on the ground floor of the house at 9:00 PM. The father of the complainant was yet to return from work and the family had not retired after dinner. They were waiting for the son and the father to return.

The main door of the house was open. The allegations are that the accused who was known to the prosecutrix entered the room of the victim and gave a threat and threw her on the bed and removed her clothes. The family was awake and was on the first floor of the house. It appears strange that the accused would have dared to commit such an act when the family was around. The girl did not call out for help. She could have easily alerted her family. The mother failed to step into the witness box. The brother had stated that he had heard whispers coming from the room below, therefore, he and his mother came down and when they opened the door, the sister was lying naked. It appears to be a case of consent. The prosecutrix was into a relationship. She did not cry out for help. She was not in a isolated room of any abandoned house. The family was around. The house of the complainant is small and a little noise could have alerted the family. The complainant did not resist the overtures. There were no injuries on the complainant. It appears that no sexual act was committed on that day and the family had caught both of them that night as they were together and that is the reason that the incident was not reported to the police immediately. This fact gets strengthened from the statement made by the Medical Officer. The girl was examined after 48 hours and the hymen was found to be healed, which goes to show that the sexual activity must have taken prior to the appointed day. It appears that the boy had again visited the girl but they were caught as the family got alerted on hearing whispers coming from floor below.

From the evidence, it stands established that the girl was more than 16 years, though less than 18 years. Section 375 of IPC, defines rape. According to this Section, a man is said to commit rape if he has sexual intercourse with the woman against her will and without her consent. However as per sixthly of this Section, if act of sexual intercourse has been committed even with the consent of woman below 16 years of age, it would constitute rape punishable under Section 376 of IPC. In other words, as per the Section, consent given by a woman below 16 years is no consent in the eye of law and as a corollary woman aged more than 16 years though a minor is capable of giving consent and if the circumstances indicate such consent by woman aged more than 16 years, the act complained would not constitute as rape within the meaning of Section 375 of IPC.

The prosecutrix was more than 16 years. She was capable of giving consent. If the evidence is read, it indicates that the prosecutrix and the accused were in a relationship. Though, the incident had occurred on 09.09.2002, the parents and the whole family knew of it but they did not lodge the report on the same night. The medical examination conducted on the prosecutrix did not indicate evidence of recent sexual intercourse. However, the medical examination indicates that the girl was sexually alive. Thus, in the light of the discussion above, the possibility of the alleged incident having taken place in the manner projected by the prosecution appears to be doubtful. No doubt, the victim in her evidence before the

Court had stated on oath that she was subjected to rape and in a catena of decisions, it has been held that in sexual offences, evidence of the victim is not required to be corroborated, however, that is not the absolute rule. In the given circumstances here, the finding cannot be affirmed.

The appeal is allowed. The judgment and order of the trial Court is set aside.

(ANITA CHAUDHRY)
JUDGE

10.05.2016
sunil