

1. **Crl. Appeal No. S-476-SB-2014 (O&M)**
Date of Decision: 07.11.2016

Versus

2. **CrI. Appeal No. S-1892-SB-2014 (O&M)**

Versus

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

- Present: Mr. Rajesh Sethi, Advocate with
Ms. Paramjit Kaur Deol, Advocate
for the appellant.
(In CRA-S-476-SB-2014)

Ms. Aditi Girdhar, Advocate with
Mr. Nitin Jain, Advocate
for the appellant.
(In CRA-S-1892-SB-2014)

Mr. Sandeep Vashisht, DAG, Haryana.

These two appeals are being taken up together as they arise out of the same FIR.

Both the appellants faced trial in the complaint filed by the

Gurpreet Singh Bhatia
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I attest to the accuracy and
authenticity of this document
High Court Chandigarh

sentenced to undergo the following sentence:-

Convict-Surinder was sentenced to undergo-

Section 506 of IPC	Rigorous imprisonment for 2 years.
Section 120-B of IPC	Rigorous imprisonment for 7 years and fine of Rs. 10,000/-. In default of payment of fine, he was to further undergo imprisonment for six months.
Under Section 4 of the Protection of Children from Sexual Offences Act, 2012.	Rigorous imprisonment for 7 years and fine of Rs. 10,000/-. In default of payment of fine, he was to further undergo imprisonment for six months.

Convict-Kusum was sentenced to the following sentence:-

Section 506 of IPC	Rigorous imprisonment for 2 years.
Section 120-B of IPC	Rigorous imprisonment for 7 years and fine of Rs. 10,000/-. In default of payment of fine, he was to further undergo imprisonment for six months.

The victim is a 14 years old girl who was living with her mother in village Nadda Sahib in a rented accommodation. Her father had left her mother years ago. The victim's mother is alleged to have developed illicit relation with Surender, an ex-serviceman. The victim and her mother shifted from Surajpur to Nadda Sahib and Surinder used to often visit them. Two years prior to the incident the victim is alleged to have attempted illicit relation with her. The victim confided her mother who asked her to remain quite and not mention it to anyone. She asked her to do what her uncle

wanted and in case of refusal a threat was extended that she would face

consequences. The victim had alleged that Surinder had raped her and her mother kept guard outside the house. She had alleged that she was raped in the presence of her mother on 28.2.2013. The victim complained to her mother that she could not bear the torture any longer on which both of them threatened her. Surinder left for his village in Bihar, the next morning. The victim managed to escape and went to the house of her cousin who is a maid and worked in a house in Sector-17, Panchkula. A formal report was lodged. The victim was medically examined. On completion of investigation, challan was presented against Kusum, mother of the victim and Surinder.

Charge was framed under Section 376, 506, 120-B IPC and Section 4 of the POCSO Act against Surinder and under Section 506 and 120-B IPC against Kusum to which they pleaded not guilty.

At the trial, the prosecution examined victim PW-2 who gave similar version as given by her in her complaint besides her cousin PW-3, the official witnesses and the medical officers.

In their statements recorded under Section 313 Cr.P.C., the accused abjured the trial and pleaded false implication. No evidence was led in their defence.

The trial Court accepted the statement of the prosecutrix and convicted both of the appellants to the sentences noted above.

I have heard the counsel for the appellants and the State counsel.

The submissions made on behalf of the appellants was that the last incident narrated by the prosecutrix was of 28.2.2013 and the prosecution had alleged that the victim escaped from the house and went to her cousin's house. It was urged that a week prior to the lodging of the FIR,

the girl had run away with a married man and the girl was brought back and that was the grudge the girl was nursing. It was urged that the prosecutrix has admitted this fact that she had gone away with Maksood and she had admitted that she had secretly married him and she had also admitted that she had a fight with her mother regarding her marriage. It was urged that the victim is not a minor and she had deposed that she had never gone to school and was unable to read or write. It was urged that the complaint was made with the assistance of an Advocate and the ossification test was purposely not carried out as it would have revealed her correct age and the FSL report completely demolishes the case of the prosecution. It was urged that the investigator had not properly conducted the investigation and it was lopsided and had he brought these facts on the record, the challan could not have been filed. It was urged that the investigating officer had stated that it did not come in his investigation that the victim had married Maksood or she had remained with him as his wife and he feigned ignorance regarding the ossification test recommended by the doctor. It was urged that no DNA test was carried out and merely because the hymen was ruptured, the trial Court has accepted the statement of the prosecutrix. It was urged that accused Surinder in his statement under Section 313 Cr.P.C. had stated that when the victim had left her parental home and had got married to Maksood who was already married, he had helped the mother in recovering the girl which annoyed the victim and her other relatives who were supporting the victim.

The State counsel supported the judgment of the trial Court and urged that the girl was a minor and the police had collected the record from

the girl had forgotten that she had gone to school in her younger days.

The victim had given her age as 14 years. Her statement is to be seen first. She had deposed that she was living in a rented accommodation with her mother in village Nadda Sahib and she was three years old when her father deserted her mother. Surinder started visiting their house and he raped her and when she disclosed it to her mother, she threatened her. She had stated that after shifting from Bihar, they were first living in village Surajpur and then shifted to Nadda Sahib and the last incident took place on 28.2.2013 and as she was fed up, she told her mother that she would disclose it to the police. She stated that her mother and Surinder threatened her and Surinder left for Bihar and she managed to escape on 1.3.2013 and went to her sister's house who lived in Panchkula and disclosed everything to her and her sister took her to a lady Advocate and Raipan scribed her complaint. She along with her sister and Raipan went to the police station. She stated that she was being raped for the last 1½ years. She also disclosed that presently she was living with Somwati, a distant relative of hers. She stated that she was five years old when her father left her mother and at that time they were living in village Majri and she was told this fact by her mother. She could not recall the period of stay in Majri. However, she stated that she lived for one year at Surajpur and they were living in Nadda Sahib for the past one year. She had stated that when they left Majri, she was 14 years old. She was categorical that she had never gone to school nor had attended any class and she was unable to read and write. She stated that she had met the Lawyer several times and Raipan was working as a Driver with the Lawyer. She admitted that she had left home for five days and stayed with Maksood, a resident of village Majri. She admitted that she had

got secretly married to him during those days and they exchanged garlands at Mansa Devi Temple. She stated that she was not living with Maksood since he was already married. She also stated that she had not taken any action against Maksood. She admitted that her mother came to know of her marriage and there was a fight between them. She denied that she had framed her mother in order to take revenge.

Somwati Devi PW-3 cousin of the victim works as a maid deposed that she was not on visiting terms with Kusum, the mother of the victim and she had not disclosed anything to her earlier and on 1.3.2013, the victim came to her house and she was crying and narrated the incidents. She stated that she contacted her Lawyer with whom she was working and she sent her driver along with her to the police station where the complaint was written. She could not say whether the victim had left the house with Maksood or had married him. She admitted that the victim's mother had disclosed that the prosecutrix had married Maksood. She stated that she had seen Surinder accused for the first time in the police station.

PW Raipan was given up as unnecessary.

Dr. Charu PW-11 had medically examined the prosecutrix. She had noted the following:-

“No external mark of injury seen anywhere on the body.

External Genetalia normal.

P/V – Hymen ruptured.

Vagina admits two fingers easily.

Uterus normal size, retroverted.

Cervic firm.”

The medical officer had stated that she had advised the police

to get the radiological examination carried out to ascertain the age. She had stated that the possibility of rape could not be ruled out. After going through the FSL report, the medical officer has stated that the report was negative and there were less chances of sexual assault being committed upon the victim.

In the statement recorded under Section 313 Cr.P.C., accused Surinder deposed that the case was false and was registered in a planned manner and the victim left home and got secretly married to Maksood and since Kusum (mother) was looking for her and he had seen the victim in the company of Maksood, he helped Kusum in recovering the victim, therefore, case was got registered as the victim was annoyed with him.

Similar statement was made by accused Kusum, mother of the victim. She stated that her daughter was major and she had not got her admitted anywhere and the records produced by the State did not relate to her and her daughter was born in 1993 on a day prior to Diwali.

The medical evidence shows that there was no external mark of injury on any part of the body. The hymen was ruptured and the vagina admitted two fingers easily. The medical officer had advised radiological test to ascertain the age of the victim perhaps that test was not carried out for the reasons only known to the investigating officer. The FSL report did not find any traces of semen on the vaginal swabs. The medical officer had reported that after going through the FSL report, there were less chances that the victim had been violated.

Coming to the question of the age of the victim. The prosecutrix had stated that she was 14 years old. As against it, the mother

record collected by the police from the school did not pertain to her daughter. The victim also took the same stand that she had never gone to school and was unable to read and write. Therefore the vital question would be whether the record which had been produced by the prosecution actually relates to the victim. No question was put to the victim that she had studied in the schools which are referred to in the school leaving certificates. One of the certificates pertains to the year 2006-07 and Ex. PT/3 pertains to the year February 2005 to July 2006. No effort was made by the Investigating Officer to ascertain the first school attended by the victim. They did not collect any record from the school attended by the victim. The prosecution had failed to get the ossification test though it had been advised by the medical officer. It is, therefore, to be held that the prosecution had failed to prove that the girl was under 16 years.

It is now to be seen as to whether the evidence of the prosecutrix can be accepted to be truthful and trustworthy considering the fact that the victim was having an affair with Maksood and there is an admission that she left her house and was away for five days. There is also an admission that she got married to him and the relations between the mother and the daughter were strained.

The fact that the solitary statement of the prosecutrix is always to be considered as truthful cannot be mechanically applied to every case of sexual assault and the veracity of the story projected by the prosecution qua the allegations of rape in each case must be examined. Before proceeding further, the salient propositions of law laid down by the Apex Court need to be noted.

S.C. 1393 the Hon'ble Apex Court had laid down the following propositions of law which may be summed up as follows:-

1. The delay in lodging of the First Information Report, if properly explained should not matter in sexual offences.

2. The testimony of the victim in cases of sexual offences is vital and unless there are compelling circumstances which necessitate looking for corroboration of her statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict.

3. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury.

4. The Court while appreciating the evidence of the prosecution may look for some assurance of her statement to satisfy its judicial conscience, since she, is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.

5. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness.

6. The evidence of a victim of sexual offence is entitled to great weight, absence of corroboration notwithstanding,

7. Corroborative evidence is not an imperative component of judicial credence in every case of rape.

8. Even in cases, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse no such inference like the victim being a girl of "lose moral character"

is permissible to be drawn from that circumstances alone.

9. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in Court.

Hon'ble Supreme Court in ***Raju and others Vs. State of Madhya Pradesh, (2008) 15 SCC 133*** has held that the accused must be protected against the possibility of false implication. It has been further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should without exception be taken as the gospel truth. It was held:

"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal

distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

In ***Tameezuddin alias Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566*** it has been held that though evidence of 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. It had been held as follows:

"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 story is indeed improbable.

In ***Narender Kumar Vs. State (NCT of Delhi), (2012) 7 SCC 171*** Hon'ble Apex Court has held that minor or insignificant inconsistencies, discrepancies or contradictions in the statement of prosecutrix are inconsequential. However, if the statement of prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon. It has

further been held that onus of proof is on the prosecution to establish each ingredient of offence beyond reasonable doubt on basis of cogent evidence and material on record. The sole testimony of prosecutrix can be relied for the purpose of conviction without any corroboration if the same inspires confidence, but if court finds it difficult to accept version of prosecutrix on its face value, it may look for corroboration by other evidence, direct or circumstantial. The Court must appreciate evidence in its totality with utmost sensitivity. It was held:

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr., AIR 2003 SC 818;

and Vishnu v. State of Maharashtra, AIR 2006 SC 508).”

In *Munna Vs. State of Madhya Pradesh, 2014(10) SCC 254,*

in a similar situation, the Hon'ble Apex Court held as under:-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecution in view of the statutory presumption under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

The prosecutrix was not a minor. She had left home for five days and got married to Maksood a married man. Her mother was upset and had been looking for her daughter. The victim has admitted that her relations with her mother were not good. Somwati PW-3 has also admitted that the victim's mother Kusum had told her that her daughter had married Maksood, therefore, there remains no doubt that the victim fled home and married Maksood who was already married and since the mother was not happy with this development, she was trying to bring her back and that annoyed the victim and she chose to complain against her mother and also named Surinder who was helping her mother. The FSL report does not show the presence of any semen on the swabs. Had the girl been violated, there would have been traces of semen in the swabs. The medical officer

after going through the FSL report had opined that there were very less

chances of sexual assault being committed upon the victim.

In the light of the above, the statement of the prosecutrix alone would not be sufficient to uphold the judgment. It is difficult to accept the version of the prosecution on its face value. There is no direct or substantial evidence which lends credence to her testimony. There were no injuries. There is a delay in lodging the FIR. Even the story is improbable and belies logic and I am of the view that the story is indeed improbable.

Resultantly, both the appeals are accepted and the judgment of conviction and order of sentence passed by the Court below are set aside and both the accused are acquitted of the charges. The appellants are in custody. They be released forthwith if their custody is not required in connection with any other case.

(ANITA CHAUDHRY)
JUDGE

November 07, 2016
Gurpreet

Whether speaking/reasoned	:	Yes
Whether reportable	:	No