

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

CRA-S-1459-SB-2009

Date of decision: 15.9.2017

Krishan

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr.Ankur Lal, Advocate / Amicus Curiae
for the appellant

Ms.Dimple Jain, AAG, Haryana

JITENDRA CHAUHAN, J.

Present appeal has been directed against the judgment of conviction and the order of sentence dated 17/18.12.2008, passed by Additional Sessions Judge, (Fast Track Court), Hisar vide which the appellant was convicted under Section 376 read with Section 511 of the Indian Penal Code and sentenced for a period of seven years rigorous imprisonment and to pay a fine of Rs.5,000/-; in default of payment of fine, to further undergo rigorous imprisonment for one year.

The facts of the case as noticed in para no. 2 of the judgment of the trial Court are as under:-

“The prosecution case is that on 9.8.2007 Hari Kishan came to police station and produced an application mentioning therein that on 7.8.07 at about 5.00 P.M. his daughter -prosecutrix (name

not being disclosed) aged 11 years had gone to quench her thirst on the handpump of Civil Hospital Narnaund. In the meantime, Krishan s/o Prem, who was working in the hospital, had caught hand of her daughter and took her inside the hospital and laid her on the bed and he removed her salwar and tried to commit rape on her. When her daughter cried, he threatened that he would kill her if she cried. Accordingly, a case under Section 376/ 511/ 506 IPC was registered.

Police investigated the matter and arrested the accused. After completion of investigation, report under Section 173 Cr.P.C. was filed in the Court, on the basis of which, charges under Section 376 read with Section 511 and 506 IPC were framed against the accused, to which he did not plead guilty and claimed trial.

In order to prove its case, the prosecution examined PW1- Dr.Sawayam Parbha, PW2 Dr.Yashpal, PW3 Subhash Chander, PW4 Sub Inspector Vinod Kumar, PW5 Harkesh, PW6 Prosecutrix, PW7 Hari Kishan and PW8 Prem Singh.

In his statement, recorded under Section 313 Cr.P.C, the accused denied all incriminating evidence against him and pleaded not guilty and false implication. Without leading any evidence in defence, he closed his defence evidence.

After going through the evidence and hearing the counsel for the parties, learned Trial Court convicted and sentenced the accused as indicated above. Aggrieved by the judgment of conviction and order of sentence, the accused-appellant filed the present appeal.

On behalf of the appellant, it is submitted that PW8 Prem Singh, an independent witness, has specifically deposed that he did not see or hear anything, which means no such incident took place as projected by the prosecution. He further contended that there are material contradictions in the statements of the prosecutrix PW6 and her father PW7. There are also discrepancies in the medical and the ocular evidence, which further strengthens the defence version that no such incident ever took place. No case under Section 376 read with Section 511 IPC was made out against the appellant because at best, it was a case of outraging the modesty of the prosecutrix.

On the other hand, the learned counsel for the State submitted that the prosecution case is fully established and therefore, the learned trial Court has rightly convicted and sentenced the appellant.

The rival contentions of the learned counsel for the parties have been heard and record has been meticulously perused.

The prosecutrix, aged 12 years appeared as PW6, has fully supported the case of the prosecution by deposing that while she was drinking water from the hand-pump, the accused-appellant present in the Court, came there and took her inside the hospital and made her to lie down on a wooden bed. Then he kissed her prior to doing the wrong act. Thereafter, he removed her salwar and also removed his trouser. She further categorically deposed that thereafter the appellant inserted his penis in her vagina. When he placed his penis over her vagina, she felt pain and as such she cried loudly.”

Further the stance of the prosecution is corroborated by medical evidence, in the shape of PW1 Dr. Sawayam Parbha, Medical Officer, G.H.Hansi. This doctor had examined the prosecutrix on 9.8.2007 and observed that there was red bluish contusions size 1½ cm x 1/2 cm and 1 cm x 1/2 cm on both cheeks. She opined that the possibility of injuries on both cheeks with teeth bite cannot be ruled out. PW2 Dr. Yashpal on examination found the accused to be fit to have sexual intercourse.

Moreover, the statement of the prosecutrix stands corroborated by the deposition of PW7, her father Hari Kishan to whom the entire occurrence was narrated by the prosecutrix. It was deposed by him “on 7.8.2007, he was away to village Bass in connection with labour work. He came back on 9.8.2007 and was told by his daughter (name not to be mentioned) that one Krishan, who is a doctor in the hospital, had taken her inside and laid her on the bed and removed her salwar and tried to do wrong act with her and thereupon she cried and other persons of the hospital came there and she was rescued. Thereafter, she came to home but neither her nor her mother was available there. Then he alongwith the girl as well as his wife came to the police station Narnaund and gave application Ex.P14, which bears his signatures.”

The discrepancies in the statements of the prosecutrix and her father, as pointed out by the learned counsel for the appellant, do not go to the root of the case, rather, such discrepancies suggest that the case of the prosecution is truthful and the witnesses are deposing truthfully. Parrot like statements or tailored version cannot be expected from the witnesses.

Hon'ble the Supreme Court in **State Of Himachal Pradesh vs**

Lekh Raj And Anr 1999 Supp(4) SCR 286 illuminatingly observed as under:-

“In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. **Parrot-like statements** are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in **Ousu Varghese v. State Of Kerala 1974 3 SCC 767** held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In **Jagdish v. State of M.P 1981 SCC Cri 676** this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in **State of Rajasthan v. Kalki 1981 2 SCC 752** held that in the depositions of

witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.”

In the present case too, the prosecutrix and her father have narrated the events in a lucid manner. The medical evidence also corroborates their version.

Hon'ble the apex Court in **Tarkeshwar Sahu vs. State of Bihar (2006)8 SCC 560** held as under:-

“The distinction between rape and criminal assault has been aptly described in the English case **Rex v. James Lloyd 173 ER 141**. In this case, while summing up the charge to the jury, Justice Patterson observed: "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part."

In **Radhakrishna Nagesh vs. State of Andhra Pradesh (2013) 11 Supreme Court Cases 688**, Hon'ble the Supreme Court has observed as under:-

25. The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of

attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The Explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl.

26. At this stage, we may make a reference to the judgments of this Court which would support the view that we have taken. Firstly, in the case of **Guddu @ Santosh v. State of Madhya Pradesh [(2006) Supp. 1 SCR 414]**, where the Court was dealing with somewhat similar circumstances, this Court made a finding that the High Court had failed to notice that even slight penetration was sufficient to constitute the offence of rape and upheld the conviction of accused, though the sentence was reduced. It held as under:-

“It is not a case where merely a preparation had been undergone by the appellant as contended by the learned Counsel. Evidently, the appellant made an attempt to criminally assault the prosecutrix. In fact, from the nature of the medical evidence an inference could 'also

have been drawn by the High Court that there had been penetration. The High Court failed to notice that even slight penetration was sufficient to constitute an offence of rape. The redness of the hymen would not have been possible but for penetration to some extent. In **Kappula Venkat Rao (supra)**, this Court categorically made a distinction between the preparation for commission of an offence and attempt to commit the same, in the following terms:

Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measure necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is

punishable only when the preparation is to commit offence under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. (Emphasis supplied)”

27. Secondly, in the case of **Tarkeshwar Sahu v. State of Bihar (now Jharkhand) [(2006) 8 SCC 560]**, the Court held as under:-

10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this

offence in State of U.P. v. Babul Nath. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words: (SCC p. 34, para 8) “8. It may here be noticed that Section 375IPC defines rape and the Explanation to Section 375 reads as follows:

‘Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.’

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her.” xxxxxx xxxxxx xxxxxx xxxxxx

12. The word “penetrate”, according to Concise Oxford Dictionary means “find access into or through, pass through”.

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

28. In light of the above judgments, it can safely be concluded that there was limited penetration due to which probably the hymen of the victim girl was not ruptured. The Court should adhere to a comprehensive approach, in order to examine the case of the prosecution. But as regards the facts and circumstances of the present case, the presence of the element of mens rea on part of the accused cannot be denied. He had fully prepared himself. He first lured the girl not only by inciting her, but even by actually purchasing bangles for her. Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not raise protest. This is why no marks of physical injury could be noticed on her body. Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution.

29. It will be useful to refer to the judgment of this Court in the case of **O.M. Baby (Dead) by L.Rs. v. State of Kerala [JT 2012 (6) SC 117]**, where the Court held as follows:-

“16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the

crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

14. We would further like to observe that while

appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case of **State of Punjab v. Gurmit Singh (1996) 2 SCC 384** and has found reiteration in a recent judgment in **Rajinder @ Raju v. State of H.P. (2009) 16 SCC 69**, para 19 whereof may be usefully extracted:

19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.”

30. Reference can also be made to the judgment of this Court in the case of **State of Himachal Pradesh v Asha Ram [AIR 2006 SC 381]**.

31. Thus, as per the facts and circumstances of the present case, there is a direct link of the accused with the commission of the crime. Such conclusion can well be established by the statement of the witnesses, the recoveries made, the Medical Report and the FSL Report. It does not leave any doubt in our mind that the accused has committed the offence with which he was charged.”

In the face of the above evidence, the arguments of learned counsel for the appellant that at best, it is a case under Section 354 IPC and a case of rape or attempt to rape, pales into insignificance because the prosecutrix has unequivocally deposed that the accused had put his penis into her vagina. When she felt pain, she cried loudly when she was rescued. The version of the father that the accused had put his penis on vagina, this Court is of the opinion that had the victim not cried, the accused would have ravished her further to fulfill his lust. In the light of categorical statement of the prosecutrix, the inconsistency, if any, can be safely ignored. Therefore, it is a case under Section 376 read with Section 511 IPC of attempt to commit rape. There is a large difference between outraging the modesty of a woman and trying to rape her. The accused had crossed all the stages and had reached near the stage of rape. If the victim had not cried, the offence of rape would have been consummated. By no stretch of imagination, such an act can be termed as merely outraging the modesty of a woman. Consequently the argument is rejected.

As regards the arguments of corroboration, it is trite law that the statement of the prosecutrix alone is sufficient to prove the offence of rape and the court need not look for the corroboration. It is true that injury

is not a *sine qua non* for deciding whether attempt to rape has been committed or not, but it has to be decided on the factual matrix of each case. It was a case of attempt, so the question of mark of injuries does not arise. Further the contusions on the cheeks go a long way to prove the case of the prosecution. Moreover, keeping in view the facts and circumstances of the present case, the presence of the element of *mens rea* on part of the accused cannot be denied. He had fully prepared himself. Therefore, this argument is also repelled.

Hon'ble the Supreme Court in **State of H.P. Vs Sanjay Kumar, (2017) 2 SCC 51** while dealing with the case of child victim, who was subjected to rape, has observed as under:-

“.....it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a

crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.”

Reverting to the instant case, the prosecutrix was 12 years of age at the time of occurrence. She had identified the accused in the Court and narrated the whole incident. The accused could not point out any reason to implicate him falsely by the victim.

With regard to turning hostile by PW8 Prem Singh, it has come on the record that he was a colleague of the accused and there is every possibility that the accused must have exerted pressure upon the witness not to depose in the court against him and influence his statement. Further in view of the clinching evidence of the prosecutrix, the turning of hostile by PW8 does not create any dent on the prosecution story.

In view of the above, the present appeal is accordingly dismissed and the impugned judgment and order passed by learned trial Court are upheld.

15.9.2017
gsv

(JITENDRA CHAUHAN)
JUDGE

Whether speaking / reasoned?
Whether reportable?

Yes / No
Yes / No