

In the High Court of Punjab and Haryana at Chandigarh.

Criminal Appeal No.D-816-DB of 2010
Date of Decision:- October 24, 2017

Raju @ AjayAppellant
Versus
State of HaryanaRespondent

CORAM: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Gurvinder Singh Gill

Present : Mr. Rajesh Gupta, Advocate, for the appellant.

Mr. Ankur Mittal, Additional Advocate General, Haryana with
Mr. Manoj Dhankhar, Assistant Advocate General, Haryana.

Gurvinder Singh Gill, J.

1. Raju @ Ajay has filed the present appeal challenging judgment dated 1.6.2010 passed by learned Sessions Judge, Kurukshetra vide which he has been held guilty for having committed offence under Section 376(2)(f) of Indian Penal Code, 1860 (for short, 'IPC') and has been sentenced to undergo rigorous imprisonment for life and to pay fine of ₹ 8,000/-.
2. The case arises out of FIR No. 334 dated 17.10.2009 registered under Section 376 of IPC, Police Station Shahabad, lodged on the basis of written application (Ex.P-14) submitted by Bahadur, father of the prosecutrix, to SHO Police Station Shahabad. The translated gist of the aforesaid application reads as follows:

“I am resident of village Badia Police Station Lakhnasi, Uttar

Pradesh and am working as a labourer with my children at shop No.39 New Grain market, Shahabad for Shish Pal and Parveen Kumar. My wife namely Taretar had gone to Chandigarh about 3-4 days back. Yesterday i.e. on 16.10.2009, during night at about 1-1.30 AM, I had slept in the veranda of shop No.39 after work. My daughter (prosecutrix) aged 5¼ years was also sleeping by my side in the veranda. At about 3.30 AM when I woke up, I noticed that my daughter was not there. I looked for her and I heard cries of my daughter coming from inside the shop. Upon opening the shop I saw Raju @ Ajay son of Lalurasidev resident of Balokheri, Caste Harijan, Police Station Galahad, District Madhyadpoura, Bihar committing rape upon my daughter (prosecutrix) after removing her shorts. He had made her lie on a cushion and had pressed the mouth of my daughter with one hand. Upon seeing me, he left my daughter there and ran away from the spot after pushing me aside. I came out and raised alarm and disclosed about the incident to my acquaintances there. My daughter fell unconscious due to the pain. I kept waiting for the shop owner during the night. I also informed my wife telephonically and waited for her to come. Ajay @ Raju has forcibly raped my daughter. Action be taken against him.”

3. Pursuant to submission of the aforesaid application, DDR No.22 dated 17.10.2009 was lodged at 4.15 PM and formal FIR was recorded on its basis on 17.10.2009 itself. The police conducted requisite investigation. The

prosecutrix was got medically examined. A rough site plan of the place of occurrence was prepared. Statements of witnesses were recorded under Section 161 Cr.P.C. The accused was arrested on 17.10.2009. He was also got medico legally examined. Opinion of Radiologist as regards age of prosecutrix was obtained. Vaginal swabs, shorts of the prosecutrix and also of the accused were sent to FSL for examination. After conclusion of investigation challan was presented in the Court of learned Chief Judicial Magistrate, Kurukshetra on 14.1.2010, who committed the case to the Court of Sessions vide order dated 1.2.2010. The Sessions Judge, Kurukshetra, upon finding that the facts *prima facie* disclosed commission of offence punishable under Section 376(1)(f) of IPC, framed charges against accused on 13.2.2010 to which the accused pleaded not guilty and claimed trial.

4. The prosecution in order to establish its case examined as many as 14 witnesses. PW-1 Dr. Mrs. Sunita Kumari, Medical Officer, CHC, Shahabad who had medico legally examined the prosecutrix on 17.10.2009 proved MLR as Ex.P-3 wherein she has stated about the observations recorded by her. PW-2 Dr. Lajja Ram, Radiologist, LNJP Hospital, Kurukshetra proved his report Ex.P-5 wherein on the basis of the radiological examination he has opined the age of the prosecutrix to be about 6 years. PW-3 Dr. Ravinder Nath, Medical Officer, CHC, Shahabad who had medically examined the accused on 17.10.2009 opined that upon medical examination there was nothing to suggest that he was incapable of performing sexual activity. PW-4 SI Om Parkash stated that on 17.10.2009 upon receipt of ruqa Ex.P-14 from ASI Balwan Singh he recorded FIR as Ex.P-15. He further stated that he sent

special reports through C. Jarnail Singh.

5. PW-5 Majer Singh, EHC tendered his affidavit Ex.P-17 in evidence wherein he deposed that on 27.10.2009 Naresh Kumar, MHC handed over a parcel containing clothes of prosecutrix, two parcels of vials, one parcel containing envelope addressed to Director FSL Madhuban and he accordingly deposited the same in the office of the FSL on the same day. He further deposed that as long as the aforesaid parcels remained in his possession the same were not tampered with. PW-6 C. Jarnail Singh tendered his affidavit Ex.P-18 in evidence wherein he deposed that he had delivered the special reports to Duty Magistrate and to the Superintendent of Police and Deputy Superintendent of Police on 17.10.2009 itself. PW-7 Sudeep Kumar, Draftsman proved the scaled site plan Ex.P-19 of the place of occurrence prepared by him. PW-8 ASI Jarnail Singh stated that on 17.10.2009 after medico legal examination of the accused and the prosecutrix, the Doctors handed over the sealed parcels to him which he deposited with ASI Balwan Singh.
6. PW-9 Dr. Karuna, Dental Surgeon, LNJP Hospital, Kurukshetra stated that on 9.1.2010, considering the radiological dentition and clinical examination, the age of prosecutrix was opined to be between 6 to 7 years. She proved her report in this regard as Ex.P-22. PW-10 HC Naresh Kumar tendered his affidavit as Ex.P-23 in evidence wherein he deposed that on 17.10.2009 he was posted as MHC at Police Station Shahabad and on the said day ASI Balwan Singh had deposited the case property with him and that on 27.10.2009 he had entrusted the case property to EHC Majer Singh for depositing the same in the office of FSL Madhuban which he accordingly

deposited. He further stated that as long as the case property remained in his possession the same was not tampered with.

7. PW-11 Ram Dutt, Welfare Inspector, Kurukshetra stated that on 13.12.2009 he was posted as Inspector/SHO Police Station Shahabad and that upon completion of investigation he prepared report under Section 173 Cr.P.C. which is signed by him. PW-12 Bahadur complainant, father of the prosecutrix, stated in tune with the allegations made by him, in his application Ex.P-14 to the effect that the accused had raped his daughter, aged about about 5 years. PW-13 Tater Devi, wife of the complainant, has stated that during the days of paddy season on the day of Diwali she had gone to meet her daughter while her husband and prosecutrix were at Shahabad. She deposed that her husband informed her telephonically that the accused picked the prosecutrix at about 3 AM while she was sleeping in the veranda and took her inside the shop and raped her. She stated that she rushed back to Shahabad. She further deposed that blood was oozing out from the private parts of her daughter and upon inquiry her daughter disclosed that Raju had committed rape on her. PW-14 SI Balwan Singh who had conducted investigation in the case has deposed about the same including submission of application by complainant Bahadur, inspection of the spot, arrest of the accused, medical examination of the prosecutrix and also of the accused.
8. Upon conclusion of the prosecution evidence, entire incriminating evidence appearing against the accused was put to the accused to enable him to explain the same but the accused denied the prosecution case in toto and pleaded false implication. The accused in his defence has not led any evidence.

9. The learned trial Court, upon appreciation of the evidence on record held the accused guilty for committing offence punishable under Section 376(2)(f) of IPC and sentenced the accused to undergo rigorous imprisonment for life and to pay fine of ₹8,000/-. Feeling aggrieved by the aforesaid judgment, the appellant filed the present appeal.
10. The learned counsel for the appellant, while assailing the case of the prosecution submitted that there is unexplained delay of more than 12 hours in lodging the FIR which renders the case of the prosecution highly doubtful. It has further been submitted that the prosecutrix has not been examined in the present case and in the absence of her testimony, the charges framed against the accused cannot be said to be proved. The learned counsel has further submitted that there is no independent witness to lend corroboration to the testimony of the complainant and in the absence of the same, the charges framed against the accused cannot be said to be proved. It has also been submitted that since no DNA examination of the semen allegedly found on the shorts of the prosecutrix was conducted to establish origin of the same, therefore, it cannot be said that the semen belonged to the accused so as to connect him with the alleged crime. The learned counsel thus submitted that in view of the aforesaid infirmities, the conviction of the accused cannot sustain and the accused is entitled to be acquitted.
11. On the other hand, the learned counsel representing the State submitted that the testimony of the complainant could not be shattered on any count and that the medical evidence in the shape of testimony of PW-1 Dr. Mrs. Sunita Kumari who had medically examined the prosecutrix and also the report of the

FSL which confirmed the presence of semen on the shorts of the prosecutrix fully establishes the case of the prosecution. The learned State counsel has submitted that the impugned judgment is well reasoned and has been passed after properly appreciating the evidence on record and does not suffer from any infirmity. The learned counsel thus prayed for dismissal of the appeal.

12. We have considered the rival submissions addressed before this Court and with able assistance of learned counsel have also perused the relevant referred record of the case.
13. As far as the contention of the appellant regarding omission of prosecution to examine the prosecutrix is concerned, it is not in dispute that the prosecutrix was of tender age. While the complainant has disclosed the age of his daughter to be 5 ¼ years, the opinion of the Radiologist as per his report Ex.P-5 is that the prosecutrix was aged about 6 years. Further as per opinion of PW-9 Dr. Karuna, Dental Surgeon, LNJP Hospital, Kurukshetra, the age of prosecutrix was between 6 to 7 years. PW-2 Dr. Lajja Ram, Radiologist, LNJP Hospital, Kurukshetra was not cross-examined at all on behalf of the accused. PW-9 Dr. Karuna was briefly cross-examined but nothing substantial could be elicited during her cross-examination so as to doubt her opinion as regards the age of the prosecutrix on the basis of her examination. As such, it is held that the prosecutrix was aged about 6 to 7 years. A child of such tender age cannot be said to be a competent witness and is certainly not competent enough to depose in Court.
14. This Court, in 2012(3) RCR (Criminal) 94 Maghar Singh @ Manga Vs. State of Punjab, where the prosecutrix was aged 8 to 10 years and had not been

examined by the Court being incompetent witness upheld the conviction based on other evidence and held that there was no hard and fast rule that the examination of prosecutrix is essential requirement of law and condition precedent for recording conviction and that conviction could be entailed if there is other evidence to prove the guilt of the accused. In view of the age of the prosecutrix who was aged between 6 to 7 years and in light of the above referred judgment the contention raised by learned counsel for the appellant regarding omission to examine the prosecutrix cannot be accepted and it is held that the non-examination of the prosecutrix in the present case is not fatal to the case of the prosecution.

15. As regards the contention of delay in recording the FIR we do find that FIR was lodged after about 12 hours of the occurrence, but it needs to be borne in mind that the occurrence had taken place in the wee hours of the day i.e. at about 3 AM. The complainant waited for his wife who was away to a different city when the occurrence took place before lodging the FIR. In any case it is well settled that delay in lodging the FIR *ipso facto* is not sufficient to throw out the case of the prosecution especially when the allegations pertain to an offence as serious as rape. It is from the totality of the facts that any inference regarding the effect of delay has to be drawn. In the present case the fact that the occurrence had taken place at 3 AM when the wife of the complainant was also away is fairly sufficient explanation. Hon'ble the Supreme Court in a case reported as (2015)2 SCC 84 Om Prakash vs. State of Haryana, in a case of rape of a minor girl aged 16 years by two accused when victim's mother was out of station and the victim stated that she could disclose the horrifying

incident only after her mother returned back resulting in delay of 20 days in lodging the FIR, it was held that the delay was not fatal. The facts in the present case are also somewhat identical inasmuch as the victim's mother was away and victim's father waited for his wife to come back before lodging FIR. In any case there is nothing to suggest that a false case has been concocted against the accused. In these circumstances the delay of 12 hours in lodging FIR, *ipso-facto* cannot be said to be fatal to the case of prosecution.

16. We find that the occurrence had taken place in the early hours of the day i.e. around 3 AM within the shop which was closed at that time. In fact even the complainant was sleeping before he entered the shop and the accused immediately thereafter ran away from the place of occurrence. As such, the absence of any witness is not an un-natural circumstance. In any case, the accused would not commit such type of offence in public view and possibility of independent witnesses is always remote in cases of rape. The contention raised by learned counsel in this regard is devoid of merit and is rejected.
17. The contention of the appellant that no DNA examination was conducted loses significance in view of the fact that it is a case where an eye witness of the occurrence is there and upon chemical examination of the shorts which the prosecutrix who is aged 6 to 7 years was wearing, semen was detected. In the present case complainant PW-12 Bahadur, while in the witness box has stated that on the last Diwali he was residing in shop No.39, New Anaj Mandi, Shahabad and on the said night he along with his daughter (prosecutrix) was sleeping in the veranda of Shop No.39. He deposed that when he woke up around 3 AM he noticed that his daughter (prosecutrix) was missing and when

he was looking for her, he heard cries coming from the glass door and upon hearing the cries he went inside the shop and saw that accused Raju had removed clothes of his daughter and committing rape upon her. He further stated that on seeing him, the accused pushed him and ran away from the shop. The aforesaid occurrence had taken place at around 3 AM in the morning on 16.10.2009. The prosecutrix was medico legally examined on the same day in the evening by PW-1 Dr. Mrs. Sunita Kumari who proved the MLR as Ex.P-3. PW-1 Dr. Mrs. Sunita Kumari while in the witness box stated as follows:

“.....Local examination: Labia majora swollen on both sides. Clotted blood was present at vaginal orifice. On examination, there was a tear one cm. long muscle deep present on the posterior wall of the vagina. The hymen was also torn posteriorly. Clotted blood was present. Two vaginal swabs were taken, sealed in two glass vials and handed over to the police. Blue coloured half pant was worn by the patient during examination which was sealed and handed over to the police.

I have also gone through the report of F.S.L. Ex.P2, human semen was detected on the short nikkar worn by XXXX (prosecutrix) and so in my opinion she was subjected to rape and also as per the above mentioned finding.....”

18. The aforesaid witness was very briefly cross-examined on behalf of the accused. The entire cross-examination reads as follows:

XXX by Shri S.S.Tarar, Legal Aid counsel for the accused.

“ All the facts mentioned above are the suggestive of penetration but the symptoms does not give the exact opinion qua penetration.”

19. The statement of PW-1 Dr. Mrs. Sunita Kumari leaves no manner of doubt that

the prosecutrix had been subjected to forcible intercourse. Not only semen was found, even clotted blood was also found to be present at the vaginal orifice. Still further, upon chemical examination of the shorts worn by the prosecutrix, human semen was detected. The one line cross-examination of the witness does not impeach the credibility of the witness or her opinion regarding rape of the prosecutrix. The present case is not only a case of torn hymen but a case where presence of semen was also detected on the shorts worn by the prosecutrix. As such, there can not possibly be any doubt that the prosecutrix had been subjected to rape. The complainant having witnessed the occurrence and having specifically stated that he had seen the accused committing rape and having disclosed his name in the very first instance to the police and his testimony not having been shattered on any material aspect of the case, we do not find any infirmity in the findings recorded by the trial Court to the effect that the accused had committed rape upon the prosecutrix.

20. No other argument has been raised before this Court.
21. In view of the discussions made above, we do not find any infirmity in the findings of the trial Court as regards the conviction of the accused and the same is upheld. In view of the barbaric act of the accused in committing rape upon the prosecutrix who was aged barely 6 to 7 years, we find that the sentence as awarded by the trial Court is commensurate with the offence committed by the accused and does not call for any interference.
22. It may be added here that there is slight discrepancy in the charge-sheet inasmuch as the accused has been charged for committing offence of 'rape' stated to be punishable under section 376(1)(f) of IPC, whereas there is no

such sub-section of section 376 of IPC. In any case, the accused can not be said to have been prejudiced in any manner as the language of charge-sheet is otherwise unambiguous and it is specifically described that the accused is charged for committing 'rape' upon the minor prosecutrix aged 5 ¼ years. There is another minor error in the concluding part of the impugned judgement, wherein while holding the accused guilty of having committing 'rape' on the minor prosecutrix, the provisions providing for punishment have been incorrectly mentioned as section 376(2)(f) whereas it ought to have been mentioned as 376(2)(i) of IPC. Accordingly, while dismissing the appeal and upholding the conviction of the accused for having committed rape upon the minor prosecutrix, it is clarified that his conviction shall be treated to be for offence of 'rape' punishable under section 376(2)(i) of IPC as the prosecutrix was aged less than 16 years at the time commission of offence.

22. There is no merit in the appeal and the same is hereby dismissed.

(Rajesh Bindal)
Judge

(Gurvinder Singh Gill)
Judge

October 24, 2017
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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No