

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

CRA-S-2312-SB of 2016

Date of Decision: 02.12.2017

Uttam

.....Appellant

Vs.

State of Haryana

.....Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr.Vikas Sharma, Advocate, for the appellant.

Mr.D.K.Mittal, AAG, Haryana.

RITU BAHRI, J. (ORAL)

The appellant has come up in appeal against the judgment of conviction dated 12.11.2014 and order of sentence dated 13.11.2014 whereby he has been convicted 10 years for the offence under Section 376(2)(1) IPC and under Section 4 and 5 of POCSO Act.

On 21.05.2014, ASI, Smt.Savita, Women Cell, Gurgaon, received an information from Police Post, New Colony, Gurgaon about the crime in question and she came there where Sub Inspector Suresh Kumar along with prosecutrix nine years old girl, her father Sh.Ashok Kumar, her mother Smt.Seema were present. Legal Advison Ms.Alreena Senapati, Nodal Officer Crime against Women, ACP, Smt. Usha Kundu also came there and after their inquiries, Sh.Ashok Kumar father of the victim got recorded the statement to the police wherein he detailed about the circumstances how his minor girl was sexually abused. He informed that he was a rickshaw puller and was living in a rented house No.616/30 Jyoti Park, Gurgaon, where,

several other tenants were also living. He further detailed that after taking meal in the night time, his daughter prosecutrix and Karisma and Kajal went to the roof of house to sleep whereas he and his wife Seema were taking meal in their room. After some time, his daughter Karisma came weeping and disclosed that prosecutrix was taken away by Uttam uncle to the different roof. Then he and his wife both rushed to the roof and found that accused Uttam was doing wrong act with his daughter who was caught red handed. His daughter was weeping. When they raised alarm, several other people gathered there. Uttam who was drunk was trying to run away and he fell down and sustained injuries. He further informed that Uttam son of Jasbir Singh hails from Village Bhunda, District Shahjanpura (U.P) and was living in the same house on rent and in fact, he had committed wrong act with their daughter and this was also so disclosed to them by their daughter.

Investigation was carried out by lady Assistant Sub Inspector Smt.Savita and Sub Inspector Suresh Kumar. The place of occurrence was inspected and site plan was prepared. Prosecutrix was got medico legally examined and her statement under Section 164 CRPC was got recorded, wherein she disclosed that when at around 10:00 p.m. she was on the roof of the house along with her sisters, one man came in drunk condition. He caught her neck, gagged her mouth and then committed wrong act with her. Her mother had seen him and she kicked him. Then he left her. Accused Uttam was arrested in this case on the same day i.e on 21.05.2014 and was got medico legally examined. On completion of investigation, challan was presented against the accused. After committed the case to the Court of sessions vide order dated 02.07.2014 passed by the Court learned CJM Gurgaon, the accused was charge-sheeted under Section 376(2)(i) of IPC

and Section 6 of the Protection of Children from Sexual Offences Act, 2012.

During the course of trial, the prosecution has examined Prosecutrix as (PW1), Sh.Ashok (PW2), Smt.Seema (PW3), Sub Inspector Tota Ram (PW4), Sh.Girish Kumar Draftsman (PW5), Assistant Sub Inspector Smt.Savita (PW6), Constable Jasbir Singh (PW7), Head Constable Mukesh Kumar (PW8) , Constable Lal Chand (PW9), Dr,Nidhi Aggarwal(PW10), Sub Inspector Suresh Kumar (PW11) and Dr.Rakesh Kumar (PW12). The prosecution evidence was closed in terms of statement dated 19th of September, 2014 made by the learned Public Prosecutor. In additional evidence, prosecution examined Ms.Manvika Banswal, Judicial Magistrate Ist Class, Gurgaon (PW13).

State of the accused has been recorded under Section 313(1)(b) of the code of Criminal Procedure without oath. He has pleaded his false implication in the case.

The trial Court after going through the evidence and materials on record passed the judgment of conviction of 10 years. The prosecutrix was examined as PW-1. She put certain general questions before her examination to determine her competency to depose as a witness, since she was only 9 years of age. She was found fully conveying her thoughts and was therefore, held to be a competent person to depose. She has narrated the incident clearly deposing that about some days back, she along with her sisters, was sleeping on the roof of the house, whereas her parents were still taking meals. One fellow suddenly came there, gagged her mouth and forcibly caught her with her neck. She was taken to a nearby roof by that fellow who while removing her pant, had put his fingers in her private parts. She further deposed that in the meantime, her sister Karishma woke up and

called her parents. Her mother and father both come there. Her mother kicked that fellow and he then left her. Her father then called the police.

The trial Court has held that in the cross-examination of the prosecutrix, she has rejected the suggestion that she was not taken away by the accused or that while sleeping, she got frightened and had wrongly named the accused. In answer to a Court question as to who has taken her away, she named that fellow as Uttam and on a further Court question as to how she knows his name, she has revealed that he lives in her neighborhood. In her further cross-examination, she had clarified that her parents had never fight with accused Uttam. She had also revealed that her parents never asked her to name the accused. She had rejected the suggestion that no such crime was ever committed by accused. After examination of the witness was over, when accused was shown to her, she had identified him as accused Uttam. Even though victim was 9 years old, she in her cross-examination, made allegation against the accused. After going through the examination-in-chief and cross-examination, the same version as given by her as given in the statement under Section 164 Cr.P.C. before the Judicial Magistrate Ist. Class. She specifically stated that accused had come in drunken condition got her naked and committed wrong act with her. Her testimony was fully corroborated by statement made by PW-3 and PW-4 who are eye-witness of the incident. However, Dr.Nidhi Aggarwal, PW-10, Medical Officer, General Hospital, Gurgaon, had medico legally examined the victim and has not found any external and internal injury marks on her person or on her private parts. She had not ruled out possibility of sexual assault on the victim. Dr.Rakesh Kumar PW12, Medical Officer, from General Hospital, Gurgaon had medico legally examined accused Uttam on 21.05.2014 and

has found nothing suggestive of the fact that he was incapable to perform sexual intercourse and as per FSL report Exh.PK that ethyl alcohol was detected in his blood in the strength of 69 mg%. Hence, as per medical opinion given by the doctors and FSL report, coupled with the statements made by PW1 to PW3, the accused in the drunken condition had taken the daughter of the informant and committed wrong acts. This finding has been rightly given by the trial Court which is sufficient to return a finding that accused had committed wrong acts upon the prosecutrix PW1. The investigation had been carried out by PW11 Suresh Kumar, Sub Inspection who has corroborated the version of prosecutrix. ASI Smt.Savita PW-6 and Ms.Manvika Banswal, PW-13 Judicial Magistrate Ist Class, Gurgaon the witnesses before her statement Ex.PO under Section 164 Cr.P.C. was recorded which is corroborated the version of prosecutrix.

There was no defence coming forth on behalf of the accused as the little girl was not a victim. Hence, the conviction has been rightly based on the evidence led by the prosecution which is another aspect which has been examined by the trial Court after the amendment in the definition of rape by the Criminal Law Amendment Act, 2013. In the present appeal, after incident immediately the police was informed on 21.05.2014 and then the medical of accused as well as prosecutrix was conducted and there was no delay for referring the matter to the police. At the same time, on the date of incident, the provisions of IPC with respect of Section 375, 376(2)(i) was amended and rape has been defined as under:

375. Rape- A man is said to commit “rape” if he-

(a)

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the

vagina, the urethra or anus of a woman, or makes her to do so with him or any other person”.

Since the victim was below 16 years of age and as per Section 375, the minimum punishment up to 10 years on the allegation of rape is found to be correct.

Therefore, this act of the accused certainly amounts to commission of rape upon little girl who is only 9 years of age, which is punishable under Section 376(2) of IPC.

Furthermore act of accused also falls within the ambit of Protection of Children from Sexual Offences Act, 2012, Section 3(b) of the Protection of Children from Sexual Offences Act, 2012 defines penetrative sexual assault that :

3.Penetrative sexual assault. _ A person is said to commit “ penetrative sexual assault” if _

- (a)
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child, to do so with him or any other person.

Since medical record and version of the prosecutrix and as per aforesaid section, accused had committed aggravated penetrative sexual assault upon 9 years old girl. Hence, the punishment is also covered under Section 6 of Protection of Children from Sexual Offences Act, 2012.

Learned counsel for the appellant submits that victim is 9 years old at the time of incident and conviction cannot be based on solely on her testimony. The learned trial Court has referred to the judgment of **Balaji Vs. State (Represented by Inspector of Police) 2010(1)RCR**

(Criminal) 598 wherein, the accused was convicted under Section 302 of Indian Penal Code on the basis of evidence of a child witness who was 10 years only. It was held that a child witness whose testimony was reliable, can be relied upon to bring home guilt to the accused. However, a reference has been made in the judgment of the Supreme Court in the case of **State of Karnataka Vs. Shantappa Madivalappa Galapuji 2009 ACR Supreme Court 2144**, wherein, the Hon'ble Supreme Court had discussed the evidentiary value of testimony of child witness. The Hon'ble Supreme Court has also held that even if a child in his tender age can be allowed to testify if he has intellectual capacity to understand question and give rational answer thereto. It was further held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices his meaning, his apparent possession or lack of intelligence. After carefully scrutiny of their evidence, the Court comes to the conclusion that there is a ring of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In the present case, the victim clearly narrated the incident and also faced cross examination, which goes to show that she is a competent witness and has given quite truthful version of the incident and the trial Court after putting certain question to her, reach a conscious decision that she was being capable to give her evidence. While appearing as witness, her statement made in the Court as PW-1 and there was no contradiction in her testimony and while getting her statement recorded under Section 164 Cr.P.C. Hence, the testimony of victim was rightly accepted in view of the guidelines made by Hon'ble Supreme Court in the above-mentioned cases. However, the Hon'ble Supreme Court in the case of **State of Haryana Vs.**

Basti Ram 2013(2) RAJ 647 wherein, it was held that statement of prosecutrix if found to be worthy of credence and reliable requires no corroboration. The Court may convict the accused on the sole testimony of prosecutrix.

Keeping in view the above and there was no delay in reporting the matter to the police and got the medical of both the accused and prosecutrix's statement under Section 164 Cr.P.C. and testimonies of parties, allegation of rape has been rightly proved by the prosecution against the accused/appellant for the offence under section 376(2)(1) of IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 vide impugned order dated 12.11.2014 which does not reflect any material irregularity or perversity which warrant interference. Hence the present appeal stands dismissed.

(RITU BAHRI)
JUDGE

02.12.2017

anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No