

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

**CRA-S No.2008-SB of 2012
Date of Decision: 19.05.2018**

Lal KumarAppellant
Vs
State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Nitin Jain, Legal Aid Counsel,
for the appellant.

Ms. Jaspreet Kaur, AAG, Punjab.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction and order of sentence dated 23.04.2012 passed by Sessions Judge, Sangrur.

[2]. Appellant has been convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- along with default clause i.e. to undergo further rigorous imprisonment of 6 months in case of non-payment of fine.

[3]. Prosecution story started with the allegations that prosecutrix along with her husband Haider Ali was residing in a rented accommodation in Lakshmi Bagh, Dhuri. Appellant used to repair old gunny bags in a rented shop near Sangrur Wala

Railway Phatak at Lakshmi Bagh, Dhuri. Prosecutrix was working with him. On 19.02.2010, prosecutrix was repairing old bags in the shop of the appellant. At about 1:30 PM, appellant came to her and caught her from her arm. Thereafter, he took her in a room at the backside of the shop and committed rape upon her against her wishes. When she attempted to raise alarm, the appellant gagged her mouth. After committing rape upon her, the appellant left the site. Prosecutrix also went home and waited for arrival of her husband. After arrival of her husband, she narrated the event to her husband and they started for reporting the matter to the police.

[4]. FIR No.26 dated 19.02.2010 under Section 376 IPC, Police Station Dhuri came to be registered in the aforesaid backdrop of the case. The investigation was conducted by the police and report under Section 173 Cr.P.C was submitted to the Court. Charge under Section 376 IPC was framed, to which the accused/appellant pleaded not guilty and claimed trial.

[5]. Prosecution examined witnesses and got exhibited material documents on record. Thereafter, statement of the accused was also recorded under Section 313 Cr.P.C. In his statement, he pleaded false implication and denied the incriminating material put to him. He was called upon to lead defence evidence, but he did not do so.

[6]. On the basis of material on record, Sessions Judge, Sangrur convicted and sentenced the appellant in the manner as depicted above.

[7]. Arguments raised on behalf of the accused/appellant before the trial Court have been repeated in the present appeal to the effect that alleged occurrence took place at about 1:30 PM on 19.02.2010, but the FIR in question came to be registered at 7:20 PM after recording DDR No.37. Prosecutrix got recorded her statement only after consulting with her husband. Secondly, learned counsel for the appellant pointed out that prosecutrix is the sole witness and the accused/appellant has been convicted only on the statement of the prosecutrix without any independent corroboration. Husband of the prosecutrix namely Haider Ali has not been examined. Thirdly, statement of Dr. Sumandeep Grewal (PW2) is suggestive of the fact that no injury was found on the body of the prosecutrix, showing any struggle made by her. In the absence of any such injury, only conclusion was that alleged act took place with her consent. Fourthly, prosecutrix has refused to undergo DNA test of spermatozoa as referred in the chemical examiner's report Ex. PB/4 to connect it with the accused. Accused/appellant was arrested only on 24.08.2011.

[8]. Learned State counsel however opposed the

arguments raised by learned counsel for the appellant.

[9]. I have heard learned counsel for the parties and have perused the record.

[10]. Dr, Vinod Kumar, Medical Officer was examined as PW 1 who had tendered his affidavit Ex.PA. He had examined the accused/appellant. His cross examination did not yield any incriminating material in favour of the accused/appellant. Dr. Sumandeep Grewal, Ex-Medical Officer was examined as PW 2 who had medico legally examined the prosecutrix. The opinion of the doctor after seeing the chemical examiner's report was that the prosecutrix was subjected to sexual intercourse. The cross examination of the aforesaid witness did not yield any incriminating material in favour of the defence, except to say that the nails of the prosecutrix were not verified by the doctor while medically examining her. Prosecutrix was a married woman being married for one and half years. Kashmir Singh, Draftsman (PW 3), Piara Singh, Head Constable (PW 4) and Karnail Singh, Constable (PW 5) were witnesses of procedure/formal witnesses. The statement of Inspector Jaswant Singh, SHO was recorded as PW 6. The accused was apprehended by Inspector Jaswant Singh on 24.08.2011 on the basis of secret information. The witness was not cross examined by the defence, despite due opportunity. Statement of

Naresh Kumar was recorded as PW 7, who was a retired employee. He stated that some Muslims were tenants in his premises. They had left the premises some time ago and the police had recorded his statement. In his cross examination, he admitted that he had not brought any rent note on the date fixed. No further cross examination of the witness was done. Sub Inspector Palwinder Singh, Incharge, EO Wing (PW 8) took over the investigation and recorded the statement of aforesaid Naresh Kumar. Sub Inspector Palwinder Singh, Incharge EO Wing was not cross examined by the defence, despite due opportunity. Sub Inspector Satnam Singh, Incharge EO Wing was examined as PW 9 who stated that on 19.02.2010, he was present along with police party at Dhobi Ghat, Dhuri. Complainant accompanied by her husband Haider Ali appeared before the witness and made her statement Ex.PG. The same was read over to her and she after admitting the contents to be correct, appended her right thumb mark on the statement and her husband also attested the same. On the statement of the prosecutrix, endorsement Ex.PG/1 was made and the information was sent to police station for recording FIR. FIR Ex.PG/2 was recorded by ASI Ajaib Singh. Prosecutrix was medico legally examined. The witness had stated about the police action taken at different stages. He was cross examined

by learned defence counsel to the effect that Ex.PG was recorded in his presence by HC Ranjit Singh on the statement of the prosecutrix. The witness did not ask the prosecutrix whether she wanted her statement to be recorded at her house. The witness did not record statement of any person with regard to patrolling. After 19.02.2010, another statement of prosecutrix was recorded by the witness. Site plan Ex.PG/3 was prepared on the identification of prosecutrix on 19.02.2010. The witness was not cross examined further. Prosecutrix appeared as PW 10 and reiterated the contents of the complaint and FIR. Prosecutrix was cross examined by learned defence counsel in the following manner:-

“It is correct that number of houses were there around the spot of occurrence. At that time, I was wearing a salwar kameej. It is wrong to suggest that I was not working with the accused or that he did not commit rape with me. It is wrong to suggest that I lodged a false FIR at the instance of my husband. It is also wrong to suggest that I depose falsely.”

Prosecution evidence was closed after recording the statements of the aforesaid witnesses.

[11]. Bare perusal of statement of accused under Section 313 Cr.P.C would show that the entire incriminating material was put to him in his statement and he has denied the questions and claimed his false implication. No evidence in defence was

led by the accused.

[12]. Having considered the arguments of learned counsel for the parties, I am of the view that lodging of FIR at 7:20 PM on the basis of occurrence at about 1:30 PM, cannot be held to be inordinately delayed as the complainant being a lady had to wait for arrival of her husband and thereafter, they proceeded to lodge the FIR. DDR No.37 was recorded by the police before recording statement of the prosecutrix Ex.PG. Lodging of complaint after consultation with her husband is a natural course and no fault can be attributed to the prosecutrix in consulting with her husband. It is a settled principle that conviction can be recorded on the sole testimony of the victim, as none can be a witness to such an incident, therefore, arguments of learned counsel for the appellant that no independent witness has been examined fall through. Non-appearance of any injury on the person of prosecutrix in case of rape, cannot be generalized to mean rape was not committed. Prosecutrix was a married woman and her testimony cannot be discarded solely on the ground that she did not receive any injury during the course of event. The act of the accused falls squarely under the ambit of rape defined under the code. The ravishment of a woman without her consent by force, fear or fraud is a rape.

[13]. Admittedly, prosecutrix was a married woman and the occurrence took place in the shop of the accused. The act was against her will and without her consent as appeared in clauses first and secondly of Section 375 IPC. The consent has not been defined in the Code, but what is not consent is explained in Section 90 of the Code. If the consent is given under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception, then consent cannot be treated to be a consent within the ambit of Section 90 of IPC.

[14]. Prosecutrix while appearing as PW 10 has stated on oath that on 19.02.2010, she was subjected to rape by the accused without her wishes and consent. On raising alarm, the accused gagged her mouth. After returning home, she waited for arrival of her husband and thereafter, on apprising him, they went to police station for lodging the FIR. In her cross examination, nothing incriminating could be culled out by the defence. Suggestion of the defence was denied that she was not working with the accused or accused did not commit rape upon her and she had lodged false complaint against the accused at the instance of her husband. Prosecutrix had categorically submitted in her statement Ex.PG that when she

was repairing old gunny bags in the shop of the accused, the accused came and caught her from her arm. After taking her forcibly in a room at the backside of the shop, he committed rape upon her against her will and consent. He gagged her mouth when she attempted to raise alarm. Prosecutrix identified the place of occurrence during course of investigation. Prosecutrix was not confronted with any circumstances which suggested deviation from the prosecution story. The defence could not lead any such evidence, showing any enmity between the husband of the prosecutrix and the accused. Corroboration of such incident as a rule, cannot be insisted upon in cases of ravishment of the victim of sexual offence. Statement of prosecutrix alone, if found to be creditworthy, can be relied to reach a conclusion that she was so ravished by the accused.

[15]. Statement of Dr. Sumandeep Grewal (PW 2) would show that on seeing the report of FSL, it was found that the prosecutrix was subjected to rape. At the time of medico legal examination of the prosecutrix, she was conscious, co-operative and well oriented. Two samples of cervical smear swab from post fornix were taken and sent to FSL. On seeing the chemical examiner's report Ex.PB/4, doctor based her findings and opined that the prosecutrix was subjected to sexual intercourse. On being cross examined, defence could not extract any such

incriminating information from the witness. Absence of injury on the person of the prosecutrix cannot outrightly reject the case of the prosecutrix when other circumstances are available on record. No such general principle can be laid down on the said aspect of the case.

[16]. A feeble lady could hardly offer any resistance to the accused, a sturdy man, more so when the accused happened to be her employer and she being under his complete control and dominance. Absence of injury on the person of the victim of sex offence cannot lead any inference of willingness and consent on the part of the victim.

[17]. Hon'ble Apex Court in **Criminal Appeal No.769 of 2006** titled **State of Uttar Pradesh Vs. Chhoteylal**, decided on 14.01.2011 held that solely on the basis of stand taken by the accused in his statement under Section 313 Cr.P.C, no such motive of his false implication can be held. The circumstances even did not remotely suggest that the prosecutrix would put her reputation and chastity at stake for no obvious reasons. No such litigation was pending between the accused and husband of the prosecutrix. No evidence was led by the defence on the aforesaid aspect. Absence of injury on the external or internal part of the body of the prosecutrix did not make the testimony of the prosecutrix unreliable.

[18]. Keeping in view the dominate character of the accused and the prosecutrix being feeble lady could hardly offer any resistance, the Court cannot believe the defence as projected by the accused. The prosecutrix was sufficiently prevented from raising alarm as her mouth was gagged during course of event. Even in particular circumstances, any alarm at unknown place, might have endangered the life of the prosecutrix. No such pertinent inference can be drawn on the said aspect of the case. Corroboration in a case of such nature is not a condition precedent for conviction. It is not a matter of law, but guidance of prudence under given circumstances. None can be an eye-witness of such an event. Inference from a given situation and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of procedural tyranny as observed by the Hon'ble Apex Court in **Rafiq Vs. State of UP, 1980(4) SCC 262**. Absence of injury on the person of the prosecutrix is not an evidence of falsity of the case or an evidence of consent on the part of the prosecutrix. It is dependent upon facts and circumstances of each case as held by the Hon'ble Supreme Court in **State of Rajasthan Vs. Noore Khan, AIR 2000 SC 1812** and **State of Punjab Vs. Ramdev Singh, AIR 2004 SC 1290**.

[19]. After considering the material placed on record, non-examination of DNA test of spermatozoa as referred in the chemical examiner's report Ex. PB/4 to connect the accused with the crime in view of requirement under Section 53-A of the Code, is not a fact which would disprove the prosecution case. While appearing as PW 10, prosecutrix had narrated the act of her ravishment by the accused and immediately thereafter, she was medically examined and samples were taken. Ex.PB/4 showed presence of spermatozoa therein. It was not the case of defence that during intervening period, the prosecutrix had a sex with her husband or anyone else or the sealed parcel containing cervical smear swab from post fornix was tampered with during the transit or by the chemical examiner. In this context, reference to the explanation to Section 375 IPC can be made, wherein mere penetration is sufficient to constitute the offence of rape and ejaculation is not necessary to constitute the offence of rape. Section 53-A of the Code though empowered the Investigating Agency to go in for DNA test, but in the absence of such test, no such finding can be returned that the accused of the offence of rape should be given benefit of such non-conduct of test and even in a given case, non-rupture of hymen and opinion of doctor to negate possibility of rape can be thrown out when other evidence of rape is found to be

cogent and trustworthy.

[20]. Taking into consideration all the facts and circumstances of the case, I found that the prosecution has brought the guilt of the accused to the hilt. Judgment of conviction and order of sentence dated 23.04.2012 passed by the Sessions Judge, Sangrur are found to be in consonance with the act done by the accused. No illegality is found in the impugned judgment of conviction and order of sentence passed by the Sessions Judge, Sangrur. This appeal is found to be totally bereft of merits and the same is accordingly dismissed.

19.05, 2018

Prince

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No