

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-2510-SB-2014 (O&M)

Date of Decision : 26.02.2019

Devinder Kumar alias Davinder Singh

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present : Mr. Abhishek Goyal, Advocate
for the appellant.

Mr. Ramdeep Partap Singh, DAG, Punjab.

RAJ SHEKHAR ATTRI, J. (Oral)

Feeling aggrieved against the judgment of conviction and order of sentence dated 24.04.2014, passed by the learned Additional Sessions Judge, SAS Nagar (Mohali), vide which he has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 04 months under Section 376 IPC and rigorous imprisonment for a period of 07 years and to pay a fine of Rs.5,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 02 months under Section 450 IPC, he has preferred the instant appeal.

This case pertains to sexual assault on a mentally retarded minor girl at the relevant time. She belongs to a down trodden part of the society. Her mother Smt. Paramjit Kaur was doing the labour work in a factory. On 02.09.2013, at about 11:00 a.m., she had gone to her work

place and the prosecutrix was alone at home. Suddenly the immediate neighbour Smt. Jaswinder Kaur wife of Sh. Jaswinder Khan as well as another neighbour namely Jaswinder Kaur wife of Mandeep Singh heard the shrieks of the minor prosecutrix. They immediately rushed towards the house of the prosecutrix. When they merely entered into the house, one boy on seeing them fled away from there. They raised alarm and chased him. Other neighbours **Mandeep/Navneet Singh** and Balwinder Singh also accompanied them and apprehended the running person, who was none-else but the appellant. When Jaswinder Kaur wife of Sh. Jaswinder Khan and Jaswinder Kaur wife of Mandeep Singh entered the room, they found that the minor prosecutrix was half naked. She was weeping and bleeding. On inquiry, the prosecutrix told that the person, who just ran from the house, had come there on the pretext of taking room on rent and on finding the prosecutrix alone, he forcibly committed rape upon her.

The prosecutrix was taken to the hospital by the neighbours. Police was informed. On arrival of the police, the accused was apprehended from the place. Statement Ex.PW1/A of Jaswinder Kaur wife of Sh. Jaswinder Khan was recorded. The intimation (Ruqa) was sent to the police on the basis of which FIR was registered. Accused was arrested on the spot vide memo Ex.PW9/D. The blood stained mattress (dari) was also taken into possession and sent to the chemical examiner, who opined vide his opinion that it contained human blood. Similarly, the clothes worn by the prosecutrix were also sent to chemical examiner. On examination, spermatozoa were detected on the high vaginal swab.

In order to prove its case the prosecution examined **PW1** Dr. Balwinder Kaur, Medical Officer, Civil Hospital, Kharar, who had medico

legally examined the prosecutrix specifically opined vide his endorsement Ex.PW1/D that possibility of sexual intercourse with the minor prosecutrix cannot be ruled out. **PW2** Jaswinder Kaur wife of Jaswinder Khan, eye witness to the occurrence, also corroborated the case of the prosecution. The prosecutrix also stepped into witness box as **PW3** but she was not found to be a competent witness as she was mentally retarded. Her disability certificate, placed on record, proves that she was having 75% intellectual disability of permanent nature. **PW4** Jaswinder Kaur wife of Sh. Mandeep Singh, who is another eye witness, corroborated the case of the prosecution. **PW5** Som Nath, who is the father of the prosecutrix, has stated that the prosecutrix was alone in the house on the day of occurrence. He also proved her age. **PW6** Balwinder Singh testified that when he alongwith Mandeep Singh was coming in the street, they heard the noise and they saw the accused while running away from the spot. They chased him and apprehended him and later on he was handed over to the police. He identified the accused during the trial. **PW7** MHC Bawinder Kumar is a formal witness. He had taken the sealed parcels containing clothes of the prosecutrix and deposited with the chemical examiner. **PW8** Dr. Rajesh Kumar, who has medico legally examined the accused, opined that he was capable to perform sexual intercourse. **PW9** ASI Randhir Singh conducted the investigation of this case. **PW10** lady constable Rup Kaur is the formal witness. She accompanied the prosecutrix to the hospital for getting her medically examined on 02.09.2013. She received the sealed parcels from the doctor and deposited the same with the MHC. **PW11** Constable Kuldeep Singh had deposited the sealed parcel containing mattress (dari) with the chemical examiner in a safe condition.

After closing of evidence, the accused was examined under Section 313 Cr.P.C. and all the incriminating material was put to him to which he took the plea of innocence and false implication.

On appreciation of evidence, the trial court convicted and sentenced the accused, as stated above.

I have heard learned counsel for the parties and have gone through the record.

Learned counsel for the appellant has vehemently contended that the prosecutrix was found to be incompetent witness, therefore, her evidence could not be recorded; that no person was present at the time of alleged occurrence; that there is absolutely no evidence if the appellant was identified and the evidence with regard to the identification produced by the prosecution is not reliable; that no test identification parade was conducted and prosecution has miserably failed to prove the charges framed against the appellant. He further argued that Section 53-A of the Code of Criminal Procedure is mandatory in nature and in the circumstances of the case it was mandatory for the prosecution to collect DNA profile of the appellant to compare with the vaginal swabs of the prosecutrix but nothing has been done and the appellant is entitled to the benefit of doubt. In support of his contention, he has placed reliance upon the judgments of Hon'ble Supreme Court in *Shail Kumari Devi and another v. Krishan Bhagwan Pathak alias Kishun B Pathak 2008(3) RCR (Criminal) 842* and *Krishan Kumar Malik vs. State of Haryana 2011 (3) RCR (Criminal) 589* and the judgment of Rajasthan High Court in *Richpal Kharra vs. State 2013 (8) RCR (Criminal) 2605*.

On the other hand, learned State counsel vehemently

contended that the accused was seen leaving the house of the prosecutrix immediately after the occurrence and **PW2** Jaswinder Kaur wife of Jaswinder Khan and **PW4** Jaswinder Kaur wife of Mandeep Singh entered the house of the prosecutrix after hearing her shrieks and this evidence is sufficient to connect the accused with the crime. He further submitted that apart from it **PW6** Balwinder Singh had accompanied Manjit Singh and apprehended the accused, who was running away from the spot. According to him, the prosecution proved the charges against the accused beyond reasonable shadow of doubt.

This court has given thoughtful consideration to the rival contentions.

The following points have arisen for the determination:-

- (i) Whether the prosecutrix is mentally retarded ?
- (ii) Whether the prosecutrix was ravished?
- (iii) Whether the identification of the accused being a rapist has been proved beyond shadow of doubt ?

Mental condition of the prosecutrix

First of all coming to the mental condition of the prosecutrix. **PW1** Dr. Balwinder Kaur has categorically deposed that the prosecutrix was mentally sub-normal. This fact has been corroborated by **PW2** Jaswinder Kaur wife of Jaswinder Khan. She has categorically stated that the prosecutrix was not mentally sound. Apart from it, she was also medico-legally examined and learned trial court has given specific observation that she was not competent witness. **PW4** Jaswinder Kaur wife of Mandeep Singh has also substantiated said version of prosecution and stated that the prosecutrix was not mentally sound and due to this reason,

she was used to stay at home. **PW2** Jaswinder Kaur wife of Jaswinder Khan and **PW4** Jaswinder Kaur wife of Mandeep Singh are the immediate neighbours and they are on visiting terms with the family of the prosecutrix. **PW5** Som Nath, who is the father of the prosecutrix has categorically stated that the prosecutrix is not mentally sound.

Thus, from the analysis of evidence, this court reach to the conclusion that the prosecutrix herself was mentally retarded and was a special child, due to which she could not be examined, though produced before the court and was found to be incompetent witness.

Sexual assault of the prosecutrix

So far as the sexual assault of the prosecutrix is concerned, it is proved by medcially as well as circumstantial evidence. When the crime was committed upon her, she was in the house and started screaming in a loud voice, which attracted her neighbours **PW2** Jaswinder Kaur wife of Jaswinder Khan and **PW4** Jaswinder Kaur wife of Mandeep Singh. When they rushed to her rescue and entered the house of the prosecutrix, they saw the accused coming out of the house of the prosecutrix and on see them, he started running in the street. They raised alarm and chased him and ultimately the passer byes Manjit Singh and his associate apprehended the accused and he was handed over to the police

Res gestae

The principle of res gestae is an important rule of evidence, embodied in Section 6 of the Indian Evidence Act, which means that a fact which though not in issue, is so connected with an effective issue as to form the part of same transaction becomes relevant by itself. The purpose of incorporating this Rule in Section 6 of the Evidence Act was to complete

the missing links in the chain of evidence of a witness.

This rule is an exception to the general rule wherein, hearsay evidence becomes admissible.

In the case in hand, following chain of the facts points towards the identification of the accused and shows his presence.

PW2 Jaswinder Kaur wife of Jaswinder Khan and PW4 Jaswinder Kaur wife of Mandeep Singh rushed to the house of the prosecutrix on hearing her shrieks. They found the accused was running out of the house. Consequently, they chased the accused and raised alarm and on seeing this PW6 Balwinder Singh and one Manjit Singh chased the petitioner and apprehended him in the street.

This court would like to reproduce the relevant part of the examination-in-chief of **PW2** Jaswinder Kaur wife of Jaswinder Khan as under:-

“When I reached near the house of Paramjit Kaur, I noticed that the accused present in the court came out of the house of Paramjit Kaur and tried to slip away from the spot. I raised raula and the persons from the Mohalla apprehended the accused present in the court. Thereafter I entered the house of Paramjit Kaur and went inside.”

Similarly **PW4** Jaswinder Kaur wife of Mandeep Singh corroborated the prosecution version in unequivocal terms and stated that she alongwith **PW2** Jaswinder Kaur wife of Jaswinder Khan on hearing the shrieks of the prosecutrix, visited the house of the prosecutrix and noticed that present accused hurriedly came out of the house and fled away. They raised alarm, therefore the accused was arrested by the residents of the area (mohalla). Thus, evidence of **PW2** Jaswinder Kaur and **PW4** Jaswinder Kaur establishes that when they reached at the spot, they found accused

coming out of the house of the prosecutrix hurriedly and he ran away from there to make good escape. The evidence of **PW2** Jaswinder Kaur and **PW4** Jaswinder Kaur was assailed on the ground that their evidence is inter-se contradictory. Reliance has been placed upon the cross-examination of **PW2** Jaswinder Kaur wife of Jaswinder Khan that she alongwith **PW4** Jaswinder Kaur wife of Mandeep Singh went to the house of the prosecutrix together but contrary to it **PW4** Jaswinder Kaur wife of Mandeep Singh has stated that both of them had not entered the house of the prosecutrix jointly. Rather **PW4** Jaswinder Kaur wife of Mandeep Singh entered her house firstly. However, if we read the entire evidence of **PW4** Jaswinder Kaur wife of Mandeep Singh, it establishes that both had gone together to the house of the prosecutrix and at that time **PW4** Jaswinder Kaur was ahead of **PW2** Jaswinder Kaur and they entered her house almost at the same time. Both **PW2** Jaswinder Kaur and **PW4** Jaswinder Kaur are the neighbours and have no special interest in the case of the prosecution or any axe to grind against the accused.

PW6 Balwinder Singh was passing through the street when he heard the noise. He has categorically stated that when he was passing through the street, 2-3 ladies were raising hue and cry and saying that accused committed rape upon the prosecutrix and at that time he noticed that the accused was running from the spot towards the market. Thereafter, this witness alongwith Mandeep Singh chased the accused and apprehended him and later on handed over to the police. This fact has also been corroborated by the investigating officer.

Thus, evidence of **PW6** Balwinder Singh is reliable one. He is a natural witness. He has no interest in the case of the prosecution and has

no enmity with the accused. It has been established that immediately after the offence, accused tried to escape from the spot. He was seen by **PW2** Jaswinder Kaur and **PW4** Jaswinder Kaur coming out of the house of the prosecutrix and he was also seen running in the street by **PW6** Balwinder Singh, who with the help of Manjeet Singh apprehended the accused. Thus, one fact has been strongly established that the accused was seen coming out of the victim's house by the neighbours immediately after the alleged occurrence, this fact itself gives rise to a reasonable belief that he had in fact committed the heinous crime.

Apart from it, the accused was medically examined and was found capable of performing sexual intercourse. Therefore, all these circumstances formed a chain, leading from the house of the prosecutrix till he was apprehended. In these circumstances, it was the duty of the accused to explain his presence in the house of the prosecutrix, as these facts were in his special and personal knowledge, but he failed to submit any explanation. Therefore, inference is drawn against him that he was the person who committed rape upon the prosecutrix.

It has been argued that the doctor failed to collect the DNA profile and this fact also creates doubt in the prosecution story. This court has gone through the evidence on record, but it carries no weight. Section 53-A of the Code of Criminal Procedure is mandatory in nature. [in ***Krishan Kumar Malik's case*** (*supra*)] But if DNA has not been collected, this fact ipso facto does not belie the prosecution evidence. The medical evidence as well as the ocular evidence of **PW1** Jaswinder Kaur wife of Jaswinder Khan, **PW4** Jaswinder Kaur wife of Mandeep Singh and **PW6** Balwinder Singh are reliable and trustworthy and sufficient to prove the

guilt of the accused.

This court is satisfied that the facts and circumstances of the case had proved the identification of the accused. Thus, the identification of the accused is well established.

The ocular evidence of the prosecution is fully corroborated by medical evidence as well as by direct evidence of **PW2** Jaswinder Kaur wife of Jaswinder Khan and **PW4** Jaswinder Kaur wife of Mandeep Singh. After careful and minute analysis of evidence, this court is of the opinion that the prosecution has been able to prove its case beyond reasonable shadow of doubt.

The facts of **Richpal Kharra's** case (supra) are distinguishable. Similarly, the facts in **Krishan Kumar Malik's** (supra) case are entirely distinguishable.

In this view of the matter, the judgment of conviction and order of sentence do not require any interference and are hereby affirmed.

Consequently, the instant appeal being devoid of any merit is hereby dismissed. The sentenced awarded to the appellant by the trial court stands maintained.

26.02.2019

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**(RAJ SHEKHAR ATTRI)
JUDGE**

Whether speaking/reasoned
Whether Reportable :

Yes/No
Yes/No