

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

Date of decision: 16.05.2022

CRA-D-1077-DB-2013 (O&M)

1.

Amarjit Singh @ Bittu

.....Appellant

Versus

State of Punjab

.....Respondent

2.

CRA-D-1180-DB-2013

Daljit Singh

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

HON'BLE MR. JUSTICE ASHOK KUMAR VERMA

Present: Mr. Naresh Kumar, Advocate,
for the appellant (in CRA-D-1077-DB-2013).

Mr. Naveen Batra, Advocate,
for the appellant (in CRA-D-1180-DB-2013).

Mr. Anil Kumar Lamdharia, Advocate,
for the complainant.

Mr. H.S. Grewal, Addl. A.G., Punjab.

Ritu Bahri, J.

This judgment shall dispose of CRA-D-1077-DB-2013 and CRA-D-1180-DB-2013 together as both have arisen out of one judgment.

Both the above appeals have been filed against the judgment of conviction and order of sentence dated 03.09.2013 passed by the Additional Sessions Judge, Hoshiarpur whereby accused-appellants (Daljit Singh and

got recorded her statement with SI Kulwant Singh to the effect that she has two children i.e. one son namely Davinder Singh, aged about 8 years and one daughter (prosecutrix), aged about 5 years. Relations of the complainant with her husband were not congenial, therefore, she was living separately at her parental house for the last about four years. On 18.02.2013, at about 5.00 P.M., her daughter was found missing. She along with her parents started searching for her daughter. At about 7.00 P.M., she came to know that her daughter was present at the house of Daljit Singh. When they visited at that place, it was found that pullover of her daughter had been removed and Daljit Singh along with his friend was outraging the modesty of complainant's daughter and was doing obscene acts with her. Both of them were lying on the bed along with her daughter in quilt. When they came out of the quilt, the zips of their pants were open. She took away her daughter and later on, she came to know the name of other person as Amarjit Singh. After making endorsement on the statement of complainant, SI Kulwant Singh sent the same to the police station, whereupon FIR Ex.PW10/B was recorded by ASI Ashwani Kumar. Thereafter, Investigating Officer, along with other police officials, visited the place of occurrence. Rough site plan of the place of occurrence was prepared. Thereafter, accused-appellants Daljit Singh and Amarjit Singh @ Bittu were arrested and their memos of arrest and personal search were prepared. During interrogation, Daljit Singh made a disclosure statement Ex.PG. On the same day, medical examination of the prosecutrix was got conducted at Civil Hospital, Dasuya. On the next day, medical examination of both the accused-appellants was also got conducted. On 20.02.2013, the prosecutrix was produced before the Court of learned SDJM, Dasuya, for recording her

statement under Section 164 Cr.P.C. On completion of investigation, report under Section 173 Cr.P.C. was prepared and presented in the Court of Illaqa Magistrate. Copies of challan and other documents were supplied to the accused-appellants free of costs, as envisaged under Section 207 Cr.P.C. Thereafter, learned Illaqa Magistrate committed the case to the Court of Sessions.

Finding a prima facie case, charge under Section 376-D IPC was framed against the accused-appellants, to which, they pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined Dr. Rajwinder Kaur, Medical Officer (PW-1), Baljit Kaur-complainant (PW-2), Dr. Vinod Sareen (PW-3), ASI Bhupinder Singh (PW-4), Kuldip Singh, Draftsman (PW-5), H.C. Satnam Singh (PW-6), H.C. Mohinder Singh (PW-7), H.C. Jarnail Singh (PW-8), Shri Ashish Abrol, Learned JMIC (PW-9), SI Kulwant Singh, I.O. (PW-10) and Manjit Singh, Panchayat Secretary (PW-11).

On conclusion of the prosecution evidence, statements of the accused-appellants under Section 313 Cr. P.C. were recorded, wherein entire incriminating evidence was put to them. However, they denied the same and pleaded false implication in the case. In defence, accused-appellants examined Jagat Singh (DW-1) and Joginder Singh, Ex. Sarpanch of village Bagol Khurd (DW-2).

Trial Court, after going through the evidence led by the prosecution, convicted and sentenced accused-appellants in the aforesaid terms. The conviction of accused-appellants is based on the grounds as under:-

- (i) Baljit Kaur, complainant, while appearing in the witness box as PW-2, had identified both the accused. Hence, there was no need for any identification parade. There was no delay in registration of the FIR, as the girl/prosecutrix was recovered at 7.00 P.M. on 18.02.2013 and the complaint was made to the police in the next morning i.e. 19.02.2013. Hence, there was no inordinate delay in lodging of the complaint by the complainant.
- (ii) As per version given by Shri Aashish Abrol, learned Judicial Magistrate Ist Class, Hoshiarpur (PW-9), the prosecutrix, aged about 05 years, daughter of Baljit Kaur, had appeared before him. He put some questions to the prosecutrix in order to check her capability. She was found to be incapable for making her statement and he passed order, Ex.PW9/B, underneath the questions and answers. He also proved envelope as Ex.PW9/C.
- (iii) Dr. Rajwinder Kaur, Medical Officer, Civil Hospital, Dasuya (PW-1) had medically examined the prosecutrix (daughter of Baljit Kaur-complainant). She deposed that report of swab and clothes, which were sent for examination, was received. The same was proved as Ex.PA/1. She further deposed that as per chemical examiner report, spermatozoa was detected on contents (swab, *pajama* and cap). As per her opinion, possibility of rape could not be ruled out on the basis of medical report. During cross-examination, this witness stated that there were no marks of violence on any part of the body of prosecutrix. She further stated that hymen was neither ruptured

nor torn. There was no bleeding on the private part of the prosecutrix. As per genital examination, there were no marks of injury. The hymen was intact. After going through the medical evidence and testimony of Baljit Kaur (PW-2), the trial Court held that there was limited penetration, due to which, probably the hymen of the prosecutrix was not ruptured. Even if, hymen was not ruptured, the presence of *mens rea* on the part of accused could not be denied. Both the accused had fully prepared themselves and taken the girl from the house. Later on, the girl (prosecutrix) was found lying on the cot. She was covered with quilt and her underwear was removed. Merely, absence of injury on the private part of the prosecutrix would not have adverse inference on the case of prosecution. She has been the victim of sex crime. There was direct link of the accused with the commission of crime as per medical report and the FSL report.

(iv) Dr. Vinod Sareen, Senior Medical Officer, Civil Hospital, Hoshiarpur (PW-3) deposed that he had examined Amarjit Singh @ Bittu son of Kehar Singh and Daljit Singh son of Jagir Singh (accused-appellants) and gave his opinion, Ex.PC & Ex.PD that there was nothing to suggest that they were incapable of doing sexual intercourse. The trial Court further examined the testimony of ASI Bhupinder Singh (PW-4), who had recorded the statements of Dalip Kumar Sharma and Manjit Singh, Panchayat Secretary and H.C. Mohinder Singh. Kuldip Kumar Sharma, Draftsman, Old Court Complex, Dasuya (PW-

5) deposed that on 20.03.2013 on the asking of ASI Bhupinder Singh, he visited the house of Daljit Singh at village Ibrahimpur and prepared site plan Ex.PE with its correct marginal notes. HC Satnam Singh (PW-6) stated that on 19.02.2013, SI Kulwant Singh deposited with him one parcel of clothes and swab duly sealed with seals bearing impression 'CH'. On 26.02.2013, he handed over those parcels along with sealed envelopes to HC Mohinder Singh through Road No.64/21. HC Mohinder Singh (PW-7) deposed that on 26.02.2013, MHC Satnam Singh handed over to him two parcels of clothes and swabs along with sealed envelope for depositing the same in the office of Chemical Lab, Kharar. After depositing the same in the said Lab, he handed over receipt to the MHC on the same day. HC Jarnail Singh (PW-8) was member of the police party headed by SI Kulwant Singh. He deposed that the prosecutrix was produced before the doctor at Civil Hospital, Dasuya for her medical examination. On receipt of the MLR, same was handed over to the Investigating Officer. He further deposed that during investigation on 19.02.2013, accused Daljit Singh made a disclosure statement Ex.PG regarding commission of crime along with his friend Amarjit Singh @ Bittu. Disclosure statement of Amarjit Singh, in this regard, was recorded on 20.02.2013 Ex.PH. SI Kulwant Singh, Investigating Officer (PW-10) deposed with regard to the entire investigation carried out by him in this case.

On the basis of above evidence and observations, both the

appellants have been convicted. While convicting them, trial Court referred to the judgment passed by Hon'ble the Supreme Court in **Radhakrishna Nagesh vs. State of Andhra**, 2013 (1) Recent Criminal Reports 659 (SC), wherein it has been held that if, there is no penetration, it does not necessarily mean that no rape has been committed. Tearing of the hymen is not necessary and it will depend upon the facts and circumstances of a given case. Even slightest penetration is sufficient to constitute the offence of rape.

In the present case, as per deposition of Dr. Rajwinder Kaur (PW-1), the hymen was intact, but as per report of the chemical examiner Ex.PA/1, spermatozoa was detected in the contents of Ex.I, II & V. Ex.1 is swab, Ex.II is *pajami* and Ex.V is cap. As per Baljit Kaur (PW-2), *pajama* was shown to the doctor. Even though the hymen was intact, but presence of spermatozoa, as indicated in the FSL report Ex.PA/1, was sufficient to hold that the prosecutrix was subjected to rape. Dr. Vinod Sareen (PW-3) had examined Amarjit Singh @ Bittu son of Kehar Singh and Daljit Singh son of Jagir Singh (accused-appellants). He was of the opinion that there was nothing to suggest that they were incapable of doing sexual intercourse. Medical reports of both the accused-appellants, in this regard, have been proved on record as Ex.PC and Ex.PD. Keeping in view the judgment passed in **Radhakrishna Nagesh's** case (supra); the deposition made by Dr. Rajwinder Kaur (PW-1) and Baljit Kaur-complainant (PW-2), both the accused-appellants have been rightly convicted and sentenced by the trial Court.

As regards the disclosure statements made by both the accused-appellants, they were identified by Baljit Kaur-complainant, mother of the

prosecutrix. Baljit Kaur (PW-2), during her cross-examination, had stated that only Daljit Singh was residing in the house, where the occurrence had taken place and his other family members were residing separately in a big house. She found her daughter in that house. She did not recognize Amarjit Singh @ Bittu at that time as she was not knowing his name. She told the police about a 'Sikh Gentleman'. However, the police got the accused identified from her as a second accused. At the time of incident, when her daughter went missing, entire neighbourhood assembled at the spot and the accused had run away after scaling the wall.

HC Jarnail Singh (PW-8) stated that the prosecutrix was produced before the doctor at Civil Hospital, Dasuya and after receiving the MLR, same was handed over to the Investigating Officer. Daljit Singh was arrested by the Investigating Officer vide arrest memo Ex.PE. Second accused namely Amarjit Singh was arrested vide arrest memo Ex.PF. Their personal search memos Ex.PE/1 and Ex.PF/2 were prepared. He further stated that during investigation on 19.02.2013, accused Daljit Singh made a disclosure statement regarding commission of crime by him along with his friend Amarjit Singh @ Bittu. On 20.02.2013, accused Amarjit Singh disclosed to the Investigating Officer regarding commission of crime committed by him along with his friend Daljit Singh. Accordingly, his disclosure statement Ex.PH was recorded. Disclosure statement made by Daljit Singh is signed by HC Jarnail Singh and SI Kulwant Singh. A perusal of this statement shows that Daljit Singh had become drunk on 18.02.2013 and he allured sweets to the prosecutrix, aged about five years. Then he took her to his house and put her in the quilt. After taking off her underwear, he put his fingers in her vagina and committed sex. He further

stated that he had committed mistake, but his friend Amarjit Singh @ Bittu suddenly came to his house. He was also drunk. He remained lying on one side and later on, he (Daljit Singh) told him the whole incident. Upon this, he snubbed him. In this disclosure statement, presence of Amarjit Singh @ Bittu is made out and to this extent, the disclosure statement made by Daljit Singh can be relied upon. Further, the disclosure statement made by Amarjit Singh @ Bittu was also signed by SI Kulwant Singh and HC Jarnail Singh. In this statement, Amarjit Singh @ Bittu stated that he and Daljit Singh had taken liquor on 18.02.2013. He had slept in the house of Daljit Singh. In the morning, Daljit Singh told him that he had done wrong act with his neighbour's girl (prosecutrix), aged about 05 years. Upon this, he (Amarjit Singh @ Bittu) scolded him. He further submitted that he did not commit any wrong act like this.

Both the disclosure statements have to be examined in view of the judgment passed by Hon'ble the Supreme Court in **Indra Dalal vs. State of Haryana**, Criminal Appeal No.1261 of 2009 (decided on 29.05.2015). In this judgment, Hon'ble the Supreme Court had examined the provisions of Sections 25, 26 and 27 of the Evidence Act, 1872 and held that the information in the disclosure statement is only to be read to the extent of leading to discovery of any fact and only that much statement can be used against the accused. Such information, as given, must relate distinctly to the facts discovered. In para nos.22 and 23 of the judgment, it was observed as under:-

“22. The only portion of the information contained in the confessional statements that may be proved is provided under Section 27 of the Evidence Act, which reads as under:

“27. **How much of information received from accused may be proved.**- Provided that, when any fact is deposited to as

discovered in consequence of information received from a person accused of any offence, in the custody of police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

23. It is clear that Section 27 is in the form of proviso to Sections 25 and 26 of the Evidence Act. It makes it clear that so much of such information which is received from a person accused of any offence, in the custody of a police officer, which has led to discovery of any fact, may be used against the accused. Such information as given must relate distinctly to the fact discovered. In the present case, the information provided by all the accused/appellants in the form of confessional statements, has not led to any discovery. More starkly put, the recovery of scooter is not related to the confessional statements allegedly made by the appellants. This recovery was pursuant to the statement made by Harish Chander Godara. It was not on the basis of any disclosure statements made by these appellants. Likewise, insofar as confessional statement (Mark A) allegedly given by Jaibir is concerned, that is again in another FIR. We shall come to its admissibility separately. Therefore, the situation contemplated under Section 27 of the Evidence Act also does not get attracted. Even if the scooter was recovered pursuant to the disclosure statement, it would have made the fact of recovery of scooter only, as admissible under Section 27 of the Evidence Act, and it would not make the so-called confessional statements of the appellants admissible which cannot be held as proved against them.”

In the present case, as per disclosure statements, presence of both the accused-appellants at the place of occurrence i.e. in the house of Daljit Singh on 18.02.2013, is made out. As regards commission of offence of rape is concerned, apart from the disclosure statements, medical evidence given by Dr. Rajwinder Kaur (PW-1), chemical examination report Ex.PA/2, presence of spermatozoa on the clothes of the victim, coupled with the version given by Baljit Kaur (PW-2), mother of the prosecutrix, completed the link evidence that rape was committed on the minor child. The incident had taken place on 18.02.2013 and the victim was produced before the doctor on 19.02.2013. There was no delay in lodging of the FIR, which was registered on 19.02.2013 in the morning. Accused-appellants

were got identified by the police and hence, the presence of Amarjit Singh in the house of Daljit Singh on the date and time of occurrence, cannot be doubted. Therefore, to this extent, the disclosure statements can be read into evidence as per judgment passed in **Indra Dalal's** case (supra).

The next point for consideration is, whether absence of any DNA report would be fatal to the case of the prosecution?

Reference, at this stage, can be made to the judgment passed by Hon'ble the Supreme Court in **Sunil vs. State of Madhya Pradesh**, Criminal Appeal No.3940 of 2014 (decided on 08.04.2016), wherein it was held that if, the FSL report confirms presence of spermatozoa on clothes of accused and also on semen slide of deceased/victim, the conviction is not to be interfered with. While referring to the judgment passed in **Krishan Kumar Malik vs. State of Haryana**, (2011) 7 SCC 130, Hon'ble the Supreme Court observed as under:-

“4. From the provisions of Section 53A of the Code and the decision of this Court in Krishan Kumar (supra), it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53A really “facilitates the prosecution to prove its case”. A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.”

In the above said case, Hon'ble the Supreme Court had commuted the sentence of death into life imprisonment. In the present case, even if, there was no DNA report, the medical report Ex.PA/1 proved the presence of spermatozoa on the contents of Ex.I, II & V.

Learned counsel for the appellants has referred to another judgment passed in **Rajoo and others vs. State of M.P.**, 2009 AIR (Supreme Court) 858, wherein Hon'ble the Supreme Court had acquitted 13 accused, who had faced trial for raping a girl. The allegation was that the prosecutrix had been raped by each of the accused one after another. However, as per medical report, no scratch was found on her body. As per medical evidence, the prosecutrix was habituated to the sexual intercourse for long. This judgment cannot be of any help to the appellants as in that case, the prosecutrix was found to be habituated to sexual intercourse for long and there was no scratch on her person. Hence, the allegation levelled by her that 13 persons had raped her, was found to be doubtful. In para 9 of the judgment, it was observed as under:-

“9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if, the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a

case of alleged rape. It is, however, significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

Hon'ble the Supreme Court further observed that the test identification parade conducted by the Naib Tehsildar (PW-5) was farcical.

In the facts of the present case, the victim was five year old girl and identification of the accused was done by her mother Baljit Kaur-complainant (PW-2). Moreover, there was no delay in lodging the FIR. Hence, the above said judgment cannot be applied to the facts of the present case.

On the other hand, the Himachal Pradesh High Court in **Subhash vs. State of Himachal Pradesh**, 2015 (43) R.C.R. (Criminal) 783, while examining injuries on the body of the prosecutrix, held that absence of injuries on external or internal part of the victim cannot be a reason to disbelieve the testimony of the prosecutrix. Even, non-rupture of hymen itself would be of no consequence and rape could be held to be proved even, if there is slight penetration. In that case also, mother of the prosecutrix had come to know about the incident immediately and oral version of the complainant stood corroborated by the link evidence i.e. testimony of the doctor and FSL report. In para nos. 18 and 19 of the judgment, it was

observed as under:-

“18. The Apex Court in ***Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689***, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

19. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix, is not conclusive of the fact that prosecutrix was not subjected to rape.....”

In the present case, the prosecution version does not suffer from any dent. Presence of accused-appellants at the place of occurrence is made out from their disclosure statements, coupled with the medical evidence proved on record by Dr. Rajwinder Kaur (PW-1) and the version of the complainant (PW-2), who immediately took action and got recorded the FIR. In view of the above discussion, we are of the considered opinion that the prosecution has been able to prove the commission of crime against the victim by leading cogent and convincing evidence. The impugned judgment has been passed by appreciating the evidence in the right perspective and no ground is made out to interfere therein.

Resultantly, finding no merits, both the appeals i.e. CRA-D-1077-DB-2013 and CRA-D-1180-DB-2013 are dismissed.

(RITU BAHRI)
JUDGE

(ASHOK KUMAR VERMA)
JUDGE

16.05.2022
ajp

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No