

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-D-719-DB-2016

Date of decision: 11.03.2022

Sham Lal

..... Appellant

Versus

State of Punjab

..... Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

PRESENT: Ms. Satinder Kaur, Advocate Amicus Curiae with
Ms. Nishu Rana, Advocate for the appellant.

Mr. H.S. Grewal, Additional Advocate General, Punjab.

ASHOK KUMAR VERMA, J.

1. Appellant-Sham Lal, preferred the instant appeal against the judgment of conviction dated 14.07.2016 and order of sentence dated 15.07.2016, passed by the learned Sessions Judge, Rupnagar, whereby he was convicted and sentenced as under:-

<i>Offence</i>	<i>Sentence</i>
Under Section 363 IPC	To undergo rigorous imprisonment for 5 years and to pay a fine of Rs.5000/- and in default of payment of fine, to further undergo rigorous imprisonment for three months.
Under Section 366 IPC	To undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5000/- and in default of payment of fine, to further undergo rigorous imprisonment for three months.
Under Section 376(2) (f) IPC read with Section 6 of the Protection of Children from Sexual Offences Act, 2012.	To undergo rigorous imprisonment for 15 years and to pay a fine of Rs.10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year.

All the sentences were ordered to run concurrently. It was also ordered that an amount of Rs.10,000/- out of the fine imposed upon the appellant, if recovered, shall be paid to the victim as compensation.

2. Put pithily, the prosecutrix (name withheld) aged around 12 years studying in 8th standard, was raped by appellant-Sham Lal (accused), who is none-else, but her step father. As per prosecution story, on 12.05.2015, the prosecutrix went to school with her brother-Anish Kumar. Appellant-accused had brought them from school around 11.00 AM before closing hours of school. After leaving Anish Kumar-brother of the prosecutrix in a sweet shop at Daroli, the accused took the prosecutrix to Nangal on his motorcycle. He parked his motorcycle at a petrol pump at Nangal. Thereafter, he took the prosecutrix to village Bela by bus and they stayed there in the house of some person. On 13.05.2015, the appellant took the prosecutrix in forest on foot in the area of village Jandori. During night time, he committed rape upon the prosecutrix and threatened to kill her by administering poison, in case, she disclose this fact to anyone. On 14.05.2015, the prosecutrix escaped from the place of occurrence and went to the house of her *Tayi* (paternal aunt)-Premi Devi, who brought her to the house of her mother at village Mangloor. She disclosed the occurrence to her mother. The matter was reported to the police. ASI Naresh Kumari, recorded the statement of prosecutrix Ex. PA under Section 164 Cr.P.C., on the basis of which formal FIR under Section 376 IPC and Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (in short-'the POCSO Act') was registered. Prosecutrix was produced before the Sub Divisional Judicial Magistrate, Anandpur Sahib, who also recorded her statement Ex. PB, under Section 164 Cr.P.C. She was got medico-legally examined from Civil Hospital, Anandpur Sahib. Vaginal swabs, pubic hairs

and clothes of the prosecutrix were preserved and sent for chemical examination. As per report of Chemical Examiner Ex. PF, spermatozoa was found on vaginal swabs. Statements of relevant witnesses have also been recorded. Accused was arrested. Motorocycle was also recovered and after completion of investigation, final report under Section 173 (2) Cr.P.C. was presented before the learned Area Magistrate.

3. On commitment of the case to the Court of Sessions, appellant-accused was charge-sheeted under Section 376(2)(f) IPC read with Section 6 of the POCSO Act and later on additional charge under Sections 363 and 366 IPC was also framed against him, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 12 prosecution witnesses and produced material documents and objects which were exhibited.

5. After conclusion of prosecution evidence, statement of the appellant-accused under Section 313 Cr.P.C. was recorded. He denied the entire incriminating evidence brought on record against him and pleaded his false implication. In defence, no witness was examined by the appellant-accused.

6. On appraisal of evidence led by the prosecution and hearing learned counsel for both the sides, the learned trial Court convicted and sentenced the appellant as indicated above in the opening part of this judgment.

7. Learned counsel for the appellant has vehemently submitted that the impugned judgment of the Trial Court is purely based on surmises and conjectures and deserves to be set aside. The trial Court has wrongly assessed the age of the prosecutrix as 12 years at the time occurrence as

ample evidence has come on record that she is major. There is inordinate delay of more than four days in lodging the FIR, which has not been duly explained by the prosecution and the said delay was fatal to the case of prosecution. Learned counsel further contends that DNA test was not got conducted by the Investigating Officer, for matching the semen of the appellant with that found on vaginal swabs of the prosecutrix as required under the provisions of Section 53A Cr.P.C., which create dent on the prosecution story. In support of her contentions, learned counsel for the appellant has placed reliance upon a judgment of Hon'ble the Supreme Court in **Krishan Kumar Malik Vs. State of Haryana, 2011(7) SCC 130**. The appellant has falsely been implicated in the present case due to strained matrimonial relations between him and the mother of prosecutrix. Learned counsel for the appellant further argues that the punishment awarded under Section 376 of the IPC is on the higher side which deserves to be reduced by taking a lenient view.

8. On the other hand, learned State counsel has submitted that the appellant has rightly been convicted and sentenced by the trial court. There is cogent evidence on record to show that the appellant was involved in the commission of the offence. The prosecution has examined as many as 12 witnesses to prove its case. After appreciation of the evidence on record, the Trial Court has rightly convicted and sentenced the appellant.

9. We have given our thoughtful consideration to the submissions made by learned counsel for the appellant and learned State Counsel and have gone through the lower Court record. We are not impressed with the submissions steered on merits by the learned counsel for the appellant.

10. So far as the question regarding age of the prosecutrix is concerned, suffice it to say, in order to prove the age of the prosecutrix, the

prosecution has examined PW-7 Surinder Singh, ETT Teacher, Government Primary School, Gag, District Ropar, who brought the admission register. As per record, date of birth of the prosecutrix was 18.11.2002. He gave report Ex.PH on the police request which bears his signatures. The prosecutrix left the school and school leaving certificate was issued by him which is Ex. PJ. Copy of entry of admission register is Ex.PK. As per school leaving certificate Ex. PJ, date of birth of prosecutrix is 18.11.2002. Incident took place on 13.05.2015. We are of the opinion that school leaving certificate has been prepared by public official in discharge of his official duty and is relevant under Section 35 of Indian Evidence Act, 1872. Hence, it is proved that on the date of incident, the prosecutrix was 13 years of age.

11. Further more, the submission of the learned counsel for the appellant that there is an inordinate delay of about 4 days in lodging the FIR is also misconceived as the offence against the appellant stands fully proved. Moreover, this argument is ill founded as the incident is dated 13.05.2015 and FIR was registered on 15.05.2015. In the present case, the prosecutrix herself stepped into the witness-box as PW-1 and deposed that at the time of incident, she was studying in Government Middle School, Mangloor. Her date of birth is 18.11.2002. On 12.05.2015, she had gone to school and her step father-Sham Lal, brought her and Anish Kumar, her younger brother back from the school at about 11.00 AM. After leaving her brother at a sweet shop at Daroli, she was taken to Nangal by the accused on a motorcycle. The accused parked the motor cycle at petrol pump at Nangal. She was taken to Bela on a bus. They stayed at Bela for night in the house of some body. In the morning, Sham Lal-accused took her in a jungle on foot in the area of village Jandori. During night time, the accused committed rape upon her. He threatened to kill her by administering poison, in case;

she disclosed this fact to anyone. On 14.05.2015, she escaped from the place of occurrence and went to the house of her *Tayi* (paternal aunt)-Prema Devi at village Jandori, who brought the prosecutrix to her mother's house at village Mangloor on 15.05.2015. She narrated the occurrence to her *Tayi* and her mother. After reaching village the matter was reported at police station Anandpur Sahib and her statement Ex. PA was got recorded by the police which bears her signatures.

12. Moreover, the deposition of PW-1 the prosecutrix is further corroborated with the deposition of her mother PW-2-Sharda, who deposed that on 12.05.2015, the prosecutrix along with her brother-Anish Kumar, had gone to school. At about 11.00 AM, both the children were picked by her husband-Sham Lal (accused) from the school. She had received a phone call from the accused that he picked up both the children from the school and told her that Anish Kumar was sitting in a shop at Daroli and the victim was with him and he will return soon. Thereafter, she tried to contact the accused on his mobile phone but the same was switched off. Her daughter returned back to home 15.05.2015. She told her that she along with accused stayed in the house of some body at Bela for a night and thereafter, she was taken to jungle area. She told that accused Sham Lal committed rape upon her in the jungle. She also told her that for the whole night they were in jungle and in the morning, she could identify the area that it was near the house of her *Tayi*-Prema Devi. Her daughter escaped from there and went to the house of *Tayi*-Prema Devi and she returned to her house in the morning of 15.05.2015. The matter was reported to the police and her statement was got recorded by the police.

13. PW-3 Prema Devi, deposed that victim was her niece. On 14.05.2015 at about 7.00 AM she came to her house and told her that Sham

Lal accused took her in the jungle area and in the jungle the accused did wrongful act with her. She also told her that firstly she was taken in a house at Bela by accused-Sham Lal. On 15.05.2015, she left her niece to the house of her mother-Sharda.

14. PW-9 Jasbir Kaur, Punjabi Mistress, Government High School, Dasgran, District Rupnagar, deposed that on 12.05.2015 she was teaching Punjabi to 8th class in Government Middle School, Gagh. Around 11.00 AM, father of prosecutrix, namely; Sham Lal (accused) came to class room and asked her to grant leave to his son-Anish Kumar and daughter (prosecutrix). She allowed the children to leave the school and granted leave to them. Sham Lal, went away along with his son-Anish Kumar and daughter. Therefore, last seen evidence also stands proved.

15. The ocular version regarding the occurrence is further corroborated by the medical evidence. PW-6 Dr. Sunaina, Medical Officer, Ganye, Civil Hospital, Anandpur Sahib, deposed that on 16.05.2015, she had medico-legally examined the prosecutrix. She proved MLR of the prosecutrix Ex.PE. On physical examination, no mark of external injury was visible on the body. Pubic hairs were cut and they were sent for chemical examination. Labia Minora and Majora were normally developed. Vaginal swabs were taken and sent for chemical examination. *Hymen was ruptured.* *On P/V examination: introitus admitted two fingers easily. Uterus anteverted. After the receipt of report of Chemical Examiner, she gave her opinion that possibility of sexual assault with the prosecutrix cannot be rule out.* Furthermore, PW-5 Dr. Ranbir Singh, Medical Officer, deposed that on 16.05.2015, he medico-legally examined Sham Lal-accused and proved MLR Ex.PD in this regard. He opined that there is nothing to suggest that the person examined by him is not capable of performing sexual intercourse.

These materials are consistent which are sufficient to prove the aforesaid offence against the appellant beyond reasonable doubts. The prosecution story is further strengthened by the Report of Chemical Examiner, Ex. PF, wherein it is reported that '*Spermatozoa was found on the undershirt of the prosecutrix*'.

16. The judgment in **Krishan Kumar Malik's case (supra)**, relied upon by learned counsel for the appellant in support of her contention that DNA test was not got conducted by the Investigating Officer, for matching the semen of the appellant with that found on vaginal swabs of the prosecutrix as required under Section 53A Cr.P.C., is distinguishable from the facts and circumstances of the present case as in the said case, the prosecutrix had not disclosed the name of the accused who committed rape upon her. In the present case, the prosecutrix testified to her rape or sexual assault at the hands of her step father-appellant in her statement under Section 164 of the Cr.P.C. recorded by the Judicial Magistrate as well as before the Trial Court while appearing in the witness box as PW-1.

17. Hon'ble Supreme Court in its judgment in **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753**, while discussing in detail the plight of the victim of sexual assault, had observed that the testimony of victim, in such cases, is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused, where her testimony inspires confidence and is found to be reliable. Therefore, no benefit of the judgment in **Krishan Kumar Malik's case (supra)**, can be given to the appellant.

18. We are also not convinced with the argument of learned counsel for the appellant that appellant has been falsely implicated in the instant case due to strained matrimonial relations between him and the mother of prosecutrix. The accused when examined under Section 313 Cr.P.C., claimed himself to be innocent. He further stated that false story has been concocted in order to grab his property. However, no evidence to this effect was led by the accused in defence. He is step father of the prosecutrix, therefore, such type of version is highly improbable and does not appeal to reasoning under the given circumstances.

19. In view of the above discussions, we are of the considered view that no doubt, nothing could be more flagitious, abominable and disdainful than the act of the appellant whereby the appellant violated the body of his own step-daughter. We find no illegality in the judgment of conviction and order of sentence passed by the Trial Court. However, keeping in view the provisions of Section 376 IPC as amended on 03.02.2013, the victim in the present case was above 12 years of age. Hence, as per Section 376 sub-clause (1) the imprisonment has to be not less than 7 years or it can be for a term which may extend to imprisonment for life. For better appreciation, Section 376 IPC, is reproduced as

under:-

“376. (1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,--

(a) being a police officer commits rape-

(i) within the limits of the police station to which such police officer is appointed ; or

- (ii) in the premises of any station house; or*
- (iii) On a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or*
- (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant: or*
- (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or*
- (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution commits rape on any inmate of such jail, remand home, place or institution; or*
- (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or*
- (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or*
- (g) commits rape during communal or sectarian violence; or*
- (h) commits rape on a woman knowing her to be pregnant; or*
- (i) commits rape on a woman when she is under sixteen years of age; or*
- (j) commits rape, on a woman incapable of giving consent; or*
- (k) being in a position of control or dominance over a woman, commits rape on such woman; or*
- (l) commits rape on a woman suffering from mental or physical disability; or*
- (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or*

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation—For the purposes of this sub-section,--

- (a) "armed forces" means the naval, military and air forces any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;*
- (b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention and rehabilitation;*
- (c) "police office" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;*
- (d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children."*

20. However, the fact remains that the appellant and complainant-Sharda (mother of prosecutrix) were married and one daughter-Neelam was born out of this wedlock. From the first marriage the complainant had two children i.e. one male child-Anish Kumar and one daughter-the prosecutrix. As per agreement 01.05.2015, Ex. DA, marriage between the appellant and complainant was dissolved by way of mutual consent and minor daughter-Neelam was agreed to remain in the custody of appellant. Since, the appellant is in custody, his daughter-Neelam is staying

without father and she did not have mother, and as such we take a lenient view.

21. Accordingly, while maintaining the conviction of the appellant for the offences punishable under Sections 363, 366 and 376(2)(f) IPC read with Section 6 of the POCSO Act, the substantive sentence awarded to him for the offence punishable under Section 376(2)(f) IPC read with Section 6 of the POCSO Act, is reduced from 15 years to 10 years.

22. The appeal is, thus, dismissed with the aforesaid modification in quantum of sentence. Pending applications in this case, if any, shall stand disposed of accordingly. Registry to return back the Lower Court Record.

(ASHOK KUMAR VERMA)
JUDGE

(RITU BAHRI)
JUDGE

March 11, 2022
rishu

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No