

In the High Court for the States of Punjab and Haryana at
Chandigarh

CRA-S-608-SB-2004 (O&M)

Reserved on: 31.07.2023

Date of Decision: August 17, 2023

Sahib Ram

... Appellant

Versus

State of Punjab

.. Respondent

CORAM: HON'BLE MR. JUSTICE VIVEK PURI

Present: Mr. H.S. Randhawa, Advocate,
Amicus Curiae for the petitioner.

Mr. HittanNehra, Addl. A.G., Punjab

VivekPuri, J.

1. The present appeal has been preferred against the judgment of conviction dated 16.02.2004 vide which the appellant has been convicted under Section 376 of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment for a period of 7 years and to pay fine of Rs. 5,000/- in default whereof to further undergo rigorous imprisonment for a period of 1-1/2 years.

2. The facts as put forth by the prosecution are to the effect that the prosecutrix is a student of 4th standard in Government Primary School. On 28.11.2002, the parents of the prosecutrix were away to Civil Hospital, Abohar as her mother was to take medicine. The prosecutrix had stayed away from the school. On that very day, the prosecutrix along with

her elder brother had gone to the fields to fetch fodder. They were cutting fodder from the fields of Chaudhry Bhagirath. At about 10/11 AM, the appellant, aged about 40 years, who was also collecting the fodder from the fields of Bhagirath told them that there was enough fodder in the sugarcane fields and they can cut the fodder from those fields. The prosecutrix along with her brother went to sugarcane fields for the purpose of cutting fodder. The appellant gave Rs. 5/- to the brother of the prosecutrix and asked him to bring bidis for him. The brother of the prosecutrix went to bring bidis. Thereafter, the appellant forcibly removed the salwar of the prosecutrix and started committing rape upon her. She raised an alarm which attracted her brother and Om Parkash at the spot. The appellant slipped away from the spot. The prosecutrix washed the blood stains from the salwar and she along with her brother narrated the incident to her parents after they returned back to the house. Her father disclosed the matter in the biradari and they were deliberations in the panchayat. The appellant had not appeared before the panchayat and accordingly, the matter was reported to the police.

3. On completion of the investigation, the challan was presented under Section 376 IPC. As the offence under Section 376 IPC were exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions in terms of order

dated 12.08.2003 passed by the Court of learned Judicial Magistrate First Class, Abohar.

4. A prima facie case under Section 376 IPC was made out against the appellant. The charge was accordingly framed. The contents thereof were read over and explained to him to which he pleaded not guilty and claimed trial.

5. To substantiate its case, the prosecution has examined 10 witnesses. The statement of the appellant under Section 313 Cr.P.C. has been recorded. The defence has examined 3 witnesses.

6. To substantiate its version, the prosecution has examined the prosecutrix, who has stepped into the witness box as PW4. The preliminary questions were put to her by the learned trial court and by recording the satisfaction that she was in a position to understand the questions, sanctity of the oath and was in a position to give rational answers to the questions put to her, the statement was recorded. She has testified with regard to the allegations as put forth against the appellant. Her brother, who is an eye witness to the occurrence, has stepped into the witness box as PW3. Dr. D.P. Godara, PW1, had medico legally examined the appellant and as per his opinion, there was nothing to suggest that he was not capable of doing sexual intercourse. Dr. Poonam, PW2, had medico legally examined the prosecutrix, who was aged about 11 years. The initial investigation of the case was conducted by

ASI Ved Parkash, PW8. Subsequent investigation has been conducted by S.I. Kuldeep Singh, PW7 and Inspector Raj Kumar, PW9. Sahib Ram, PW10, is working as Chowkidar and he has testified with regard to the birth certificate depicting the date of birth of the prosecutrix as 10.05.1992. Constable Resham Singh, PW5 and AMHC Iqbal Singh, PW6, have proved their affidavits with regard to the safe custody of the case property.

7. In the statement recorded under Section 313 Cr.P.C., the appellant has denied the correctness of the incriminating evidence appearing against him. The defence version put forth by him is to the effect that he has a son, aged 21 years and a daughter aged about 24 years. His daughter is having two sons. He has been falsely implicated on account of party faction in the village. The appellant belongs to Akali party and the opposite party belongs to Congress party. Bhagirath Sarpanch and others were inimical towards him as he was candidate for the Sarpanch in the village. He has been falsely implicated at the instance of Bhagirath. The financial condition of the parental family of the prosecutrix was not sound and Bhagirath is an influential person. Bhagirath was interested in becoming Sarpanch after putting the appellant behind the bar. The mother of the prosecutrix is a lady of loose character. The appellant is owner of 25 killas of land and he was not present in the village at the time of occurrence.

8. The appellant has examined Om Parkash as DW1, who is alleged to be an eye witness to dispute the case as put forth by the prosecution. In support of his defence version, the appellant has further examined Ranbir Singh as DW2, who is a member of gram panchayat and Kaushalya, DW3 is the wife of the appellant.

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

10. Learned Amicus Curiae contends that the occurrence took place on 28.11.2002 and FIR has been lodged after a delay of 6 days on 04.12.2002. The learned trial Court has not relied upon the birth certificate as appearing in the record of Chowkidar. Even the Radiologist who has conducted the ossification test to verify the age of the prosecutrix has not been examined. The learned trial Court has relied upon the Modi's Jurisprudence and Toxicology to conclude that the age of the prosecutrix was less than 13 years on account of absence of pubic hair. The medical officer was not confronted with the passage in the text book relied upon by the learned trial Court. No school record has been produced to depict the age of the prosecutrix. As per the report of the chemical examiner, spermatozoa has been detected which tends to indicate tampering with the evidence as the medical examination of the prosecutrix was conducted after a lapse of period of about 6 days from the date of occurrence. There was

no injury found on the person of the prosecutrix at the time of her medical examination. Moreover, Om Parkash, DW1, who is stated to be an eye witness has stepped into the witness box to dispute the case as put forth by the prosecution and furthermore, the appellant has been falsely implicated on account of political rivalry. Lastly, it has been contended that presently the age of the appellant is more than 60 years and he has undergone the agony of trial for a period of 21 years. The occurrence took place prior to the amendment of the Indian Penal Code in the year 2013 and leniency in the matter of sentence can be considered.

11. On the contrary, while supporting the judgment of the learned trial Court, learned State counsel has argued that in such like cases, the delay in reporting the matter to the police is inevitable. The parental family members of the prosecutrix had taken the matter in Panchayat, but the appellant failed to join the proceedings in the panchayat and it has resulted in delay in lodging the FIR. There is nothing to indicate that the intervening period has been utilized in concocting a false story. There is sufficient and reliable material to indicate that the age of the prosecutrix was less than 13 years at the time of the occurrence. While appearing in the witness box, the prosecutrix has specified her age to be 11 years. Her elder brother, who has stepped into witness box as PW3 has specified her age to be 13 years. Moreover, the

appellant has not sought to build up a case of consent and in such circumstances, the controversy with regard to the age of the prosecutrix becomes inconsequential. Furthermore, the non-motile spermatozoa can be collected from the vaginal cavity up to a period of 10 days. There is a categorical statement of the prosecutrix supported with the deposition of her brother and further corroborated with scientific evidence which proves and establishes the guilt of the appellant beyond the shadow of reasonable doubt. It has been further submitted that leniency in the matter of sentence in cases involving sexual offences may not be desirable and such like cases are to be dealt with severely. The learned trial Court has already shown sufficient leniency and imposed minimum sentence of imprisonment.

12. The importance of lodging the FIR with due promptitude has been highlighted in a fairly substantial number of judicial pronouncements. In the event, the matter is reported to the police with due promptitude, it rules out the possibility of introduction of coloured, concocted, exaggerated or false version, but at the same time, it has to be borne in mind that the delay in lodging the FIR is not necessarily a circumstance which would warrant the rejection of prosecution case in entirety. The FIR is expected to reflect true picture of the occurrence without any embellishment or fabrication. No specific time has been fixed for reporting the matter to the police. The delay in informing the police with regard to the

incident or lodging the FIR is bound to occur due to variety of reasons depending upon the surrounding circumstances existing at the time of occurrence and even subsequent to the commission of crime. The FIR is to be lodged promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same. However, no straight jacket formula can be laid in this regard. Furthermore, in a case of sexual offences, the criteria may be different. It shall be appropriate to mention here that in case of rape, the prosecutrix remains in a traumatic state of mind. The prosecutrix as well as her family may be initially reluctant to approach the police as the honour of the family and the reputation of the prosecutrix will be at stake. The delay in lodging the FIR in such like cases is a natural phenomena. The delay in lodging the FIR in rape cases cannot be equated with cases in other offences. The delay in case of sexual offences has to be considered with different yard sticks.

13. With regard to the age of the prosecutrix, it may be mentioned here that while appearing in the witness box, the prosecutrix has specified her age to be 11 years. Even the prosecutrix appeared to be of tender age to the learned trial Court and it had put a preliminary questions to her to record its satisfaction to the effect that child witness understands the sanctity of oath and is in a position to give rational answers to the questions put to her. After recording such satisfaction, the

statement of the prosecutrix has been recorded. Even her elder brother has given his age to be 13 years while appearing in the witness box and his age has not been sought to be disputed by the appellant during the course of cross-examination. At the time of medical examination of the prosecutrix the pubic hair were found to be absent. The learned trial Court has relied upon Modi's Jurisprudence wherein it has been observed that in case of girls, the development of pubic hair commences at the age of about 13 years. Consequently, it has been concluded that the prosecutrix was less than 13 years of age in the absence of auxiliary and pubic hair as observed by the medical officer. Although the medical officer was not confronted with such observations as recorded in the text book but even otherwise the material on record is indicative of the fact that the prosecutrix was less than the aged less than 13 years at the time of occurrence. Dr. Poonam, PW2, who had medico legally examined the prosecutrix had also advised for x-ray examination for determination of the age, The x-ray report for determination of the age was also forwarded by her to the officer incharge vide report Ex.P5. Although, the name of the radiologist has not been mentioned in the list of witnesses and consequently, he has not been examined during the trial Court, but it cannot be termed to be circumstance to raise any doubt with regard to the age of the prosecutrix. As per the ossification test, the age of the prosecutrix has been specified

to be below 13 years. The defective or imperfect investigation cannot be termed to be a circumstance to enure any benefit to the accused. There is no contrary evidence to indicate that the age of the prosecutrix was more than 16 years. Even otherwise the appellant is not seeking to build up a case to the effect that prosecutrix was more than 16 years of age and a consenting party. In such circumstances, the age of the prosecutrix has been correctly concluded to be about 13 years by the learned trial Court.

14. The appellant has sought to put forth a case to the effect that he has been falsely implicated on account of political rivalry in the village. The financial condition of the parental family of the prosecutrix was not sound and Bhagirath of opposite faction is an influential person. Bhagirath had given money to the parents of the prosecutrix and she has been wrongly projected with false allegations against the appellant.

15. It sounds improbable that the prosecutrix will be projected to falsely implicate the appellant on account of political rivalry with a person who has no connection or concern with the family. There is nothing to indicate that Bhagirath is in any manner related to the family of the prosecutrix or her family was in any manner under his influence. It is improbable that the parents of the prosecutrix will put the honour of the family and the prosecutrix at stake

by wrongly projecting allegations of rape on account of political rivalry of the strangers to the family.

16. In the absence of injury on the person of the prosecutrix, it cannot be concluded that the incident had not taken place. It always depends upon the facts and circumstances of the case. It may be true that if a person is unwilling to yield to sexual intercourse, one is expected to receive injuries on her person, but it will be too much to hold that whenever a prosecutrix is found to have suffered no injury, the case of the prosecution has to be discarded. The prosecutrix was a young child of less than 13 years of age and the appellant was aged about 40 years. The lurking fear in the mind of the hapless victim must have rendered herself not in a position to offer severe resistance, which could have resulted in injuries on her person.

17. Furthermore, there is categorical case to the effect that she raised alarm which attracted her brother and Om Parkash. Although, Om Parkash, DW1, has sought to dispute the version as put forth by the prosecution, but it cannot be termed to be a circumstance to discard the other satisfactory and reliable evidence appearing against the appellant. The version as put forth by the prosecutrix is supported by the deposition of her brother who is an eye witness to the occurrence and the medical evidence appearing on record. As per the report of chemical examiner, spermatozoa were also

detected. There is nothing to indicate that the scientific evidence was at any point of time tampered with to falsely implicate the appellant. Even the appellant has not sought to cross-examine the medical officer with respect to the fact that non-motile spermatozoa cannot be detected after a lapse of period of about six days. The deposition of the prosecutrix and her brother is natural and does not in any manner indicate that they have deposed to falsely implicate the appellant. On the appraisal of the material on record, the prosecution has successfully proved and established the guilt of the appellant beyond the shadow of reasonable doubt. The judgment of conviction has been correctly recorded which does not call for any interference by this Court.

18. Lastly, it may be mentioned here that the occurrence took place in the year 2004 and the amendment of Section 376 IPC of 2013 will not be applicable to the present incident. Consequently, as per proviso to Section 376 IPC, the Court may, for adequate and special reasons imposed the sentence of imprisonment for a term of less than 7 years.

19. In **Ravinder Vs. State of M.P., 2006(9) SCC 590,** the sentence of the appellant to undergo RI for the offence under Section 376 IPC was reduced to period already undergone as he remained in custody for more than 4 years.

20. In **Mahendra Subhashbhai Vankheda vs. The State of Gujarat etc., 2017(15) SCC 591,** the sentence was

reduced to already undergone 3 years imprisonment. It was observed that accused was aged about 19 years and relationship was consensual. The victim had voluntarily left the house.

21. In **Mahabir vs. State of Haryana, 2010(4) R.C.R. (Criminal) 919 (Punjab & Haryana)**, the sentence imposed upon the appellant was reduced to already undergone (2 years and 4 months) by observing that the occurrence took place about 12 years ago.

22. In **Kamal vs. State of Haryana, 2016(3) Law Herald 2231 (Punjab & Haryana)**, the sentence was reduced to already undergone as the total sentence including remission was to the extent of 4 years, 2 months and 29 days, considering the fact that the appellant was 21 years old at the time of occurrence.

23. In **Dheeraj Kumar @ Sonu vs. State of Punjab, 2018(1) R.C.R. (Criminal) 231 (Punjab & Haryana)**, sentence of imprisonment of 10 years in case of gang rape was reduced to already undergone imprisonment of 7 years, 9 months and 4 days on the score that the incident had taken place in the year 2008 i.e. 10 years ago.

24. The age of the appellant at the time of occurrence was to be more than 40 years. He was having a married daughter and two grand children at that point of time. It has not been disputed that by now the age of the appellant must

have been more than 60 years. The custody certificate indicates that the appellant has already undergone total sentence including remission to the extent of 6 years, 3 months and 19 days.

25. The appellant has undergone substantial portion of sentence imposed upon him and the occurrence took place about 19-1/2 years ago. Even at that point of time, the appellant was having two grand children and presently, his age must be more than 60 years. In such circumstances, it may not be appropriate to effect re-arrest of the appellant and direct him to undergo remaining period of imprisonment, which is to the extent of about eight months.

26. In these set of circumstances, the ends of justice will be amply met, if the sentence of imprisonment imposed upon the appellant is reduced to that already undergone. As such, the sentence imposed upon the appellant is reduced to already undergone without any modification in the amount of fine imposed upon him.

27. The appeal stands disposed of accordingly.

AUGUST 17, 2023

vkdl

(VIVEK PURI)

Judge

Whether speaking/reasoned: Yes

Whether reportable: Yes