

(2008) 05 P&H CK 0024

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 296-SB of 1998 and Criminal Revision No. 647 of 1998

Giani Ram

APPELLANT

Vs

State of Haryana
 Shingara Ram Vs Giani Ram and another

RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 173, 313

Evidence Act, 1872 — Section 114A

Penal Code, 1860 (IPC) — Section 376, 506

Citation : (2008) 4 RCR(Criminal) 811

Hon'ble Judges : A.N. Jindal, J

Bench : Single Bench

Advocate : Gaurav Goel, for Mr. Jai Vir Yadav, for the Appellant; Gaurav Goel, Advocate for Mr. Jai Vir Yadav Advocate and Praduman Yadav, DAG, Haryana for the State, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Jindal, J.—This judgment shall dispose of Criminal Appeal No. 296-SB of 1998 filed by the accused-appellant and Criminal Revision No. 647 of 1998 filed by the complainant against the judgment dated 11.3.1998 passed by the learned Additional Sessions Judge, Kaithal, vide which the accused-appellant Giani Ram (herein referred as 'the accused') aged about 38 years, politically aligned, allegedly had some evil designs over the prosecutrix (name not disclosed), a student of 10th class. He brought her from the class room on the pretext of illness of her mother and raped her. Consequently, he was convicted and sentenced to undergo rigorous imprisonment for seven years with fine of Rs. 2000/- u/s 376 IPC and rigorous imprisonment for three years with fine of Rs. 1000/- u/s 506 IPC. However, both the substantive sentences were ordered to run concurrently.

2. The prosecution allegations in brief are that on 8.1.1997, at about 10.00 a.m.

when the prosecutrix (name not disclosed) had gone to attend her school, then accused, her neighbour, visited her school teacher and mis-represented that the mother of the prosecutrix was ill. Consequently, he brought her out of the class and then took her to Bal Bhawan on the pretext of carrying cycle. After reaching Bal Bhawan, he took her into the room. As the prosecutrix was treating him as uncle, therefore, she did not doubt him. After entering the room the accused bolted the room from inside and made her to lie on the ground; removed her salwar, and raped her. Thereafter, he threatened her to kill in case she disclosed the occurrence to any body. She did not disclose about the occurrence to her parents out of fear but did not go to school. Ultimately, on repeated asking of her parents, 22.1.1997 she vomitted out the occurrence to them. Consequently, they set for Police Station Cheeka but S.I. Ram Kumar met them on the way, before whom Shingara Singh (father of the prosecutrix) got recorded his statement EX.PJ, on the basis of which formal FIR Ex.PG was registered by HC Prem Singh. SI Ram Kumar visited the place of occurrence; prepared the rough site plan Ex.PS recorded statements of the witnesses u/s 161 Cr.P.C.; statement of the prosecutrix u/s 164 Cr.P.C. was also recorded. On 23.1.1997, he got the prosecutrix medico-legally examined from Dr. Sunita Jain, Civil Hospital, Kaithal. On 24.1.1997, SI Ram Kumar collected the photo copy of the attendance register of the school Ex.PA and recorded statement of Mandeep Pal Kaur school teacher. On 27.1.1997, he arrested the accused and got him medico-legally examined through ASI Lajja Ram. On 29.1.1997, he collected the date of birth proof of the prosecutrix Ex.PB from Head Master, Government Girls Senior Secondary School, Cheeka. On 23.1.1997, he got the prosecutrix radiologically examined regarding her age. The completion of the investigation was followed by a report u/s 173 Cr.P.C. against the accused.

3. The charge framed against the accused u/s 376/506 IPC was denied by him.

4. In order to substantiate the charges, the prosecution examined as many as 12 witnesses. Smt. Mandeep Pal Kaur (PW-1) class teacher testified that the accused had visited the school on 8.1.1997 and took the prosecutrix from the class on the pretext that her mother was ill. At that time he had represented that he was her uncle and neighbour. Besides, she has proved the entry from the school card in order to establish that as per school records she was born on 15.3.1977.

5. Dr. Rajesh Kumar Arora (PW-2), medico-legally examined the accused and testified that the accused was competent to commit sexual intercourse.

6. Dr. R.S. Bugalia (PW-3), S.M.O. Radiologist, General Hospital, Ambala, radiologically examined the prosecutrix and gave her age between 17 and 17-1/2 years. Constable Rishi Pal (PW-4), HC Prem Singh (PW-5), C. Chatar Singh (PW-8), SI Lajja Ram (PW-9) and HC Sat Parkash (PW-10) are the formal witnesses.

7. Dr. Sunita Jain (PW-11) conducted medicolegal examination of the prosecutrix, SI Ram Kumar (PW-12) is the Investigating Officer, prosecutrix (PW6) and

Shingara Singh (PW-7) is the father of the prosecutrix.

8. When examined u/s 313 Cr.P.C. the accused denied all the incriminating circumstances appearing against him and pleaded his false implication in the case. In defence, he examined Parmod Bhargav (DW-1), Ram Dia Patwari (PW-2) and Karan Pal Halqa Patwari (DW-3).

The trial ended in conviction. Hence this appeal.

Arguments heard. Record perused.

9. Before I lay my hands to determine the factum of rape, I need to adjudicate about the issue regarding age of the prosecutrix who was studying in 10th class in the Government Girls Senior Secondary School, Cheeka. The prosecutrix has claimed herself to be 15 years old and her testimony stands corroborated by Shingara Singh (PW-7) who also has disclosed her age as 15 years on the date of incident. That apart, the prosecution has also examined Dr. R.S. Bugalia (PW-3) Radiologist, who conducted ossification test and according to him the prosecutrix was between 17 and 17-1/2 years of age. He proved his report Ex.PF and X-ray films Ex.P-2 to Ex.P-6. A letter issued by the Principal, Government Girls Senior Secondary School, Cheeka Ex.PB, reveals that her date of birth is 15.3.1975. As a matter of fact, no authenticity could be attached to the said letter as according to the Principal of the school as earlier, he intimated the police about the date of birth of the prosecutrix as 15.3.1977, but by way of the letter Ex.PB, he informed that date of birth of the prosecutrix was 15.3.1975. The Principal of the school has not been examined in order to show how this mistake crept in and on what basis he was deposing that she was about 20 years old at the time of occurrence. Apparently, no authenticity could be attached to the said letter as a student of 10th class cannot, in all human probabilities, be of 20 years old, rather she being a student of 10th class could possibly be about 16 years old. The report of the radiologist Ex.PF also contradicts the letter Ex.PB. Neither the original admission and withdrawal register was produced on the record nor the person who got recorded the date of birth of the prosecutrix in the school records has been examined. It may be observed that the parents of the wards normally project their children to be elder so that they may become eligible for service early. The Apex Court in case Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, observed as under:

"In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on the basis of entry, when it is alleged that the entry was made upon false information supplied with the above motive."

10. Thus in the absence of the proof original record i.e. school records, admission form, in the absence of examination of the person who made such entries, such

letters like Ex.PB have bleak importance. Similar observations were made in case *Hira Lal v. State of Haryana*, 1994 (2) RCR (CrL.) 435, wherein it was observed as under:

"The prosecution in the instant case has not cared to produce the birth entry of the prosecutrix either from the chowkidar register or from other record maintained in the office of the Civil Surgeon. It is quite patent that the prosecution has failed to produce the best evidence in this case concerning the age of the prosecutrix. Entry of date of birth in school admission register has very little evidentiary value."

11. In the instant case, the prosecution has also not examined any official from the Registrar, Births & Deaths to prove entry in the chowkidar's register, the office of Registrar, Births and Deaths or the record maintained in the police station, therefore, no value could be attached to the letter Ex.PB showing the date of birth of the prosecutrix as 15.3.1975 or 15.3.1977.

12. Now, I am left with the statement of the prosecutrix, her father Shingara Singh as well as the doctor who radiologically examined her. Both, prosecutrix (PW-6) and her father Shingara Singh (PW-7) consistently stated that the prosecutrix was 15 years of age at the time of occurrence. No meaningful cross-examination was conducted over these two witnesses to shatter their testimony qua this aspect of the case. Ossification test, as recorded by Dr. R.S. Bugalia (PW-3) reveals that she was 17 to 17-1/2 years of age but it is also not a surer test. He has admitted that his test was subject to variation of 3 years on either side. In any way, the testimony of Shingara Singh (PW-7), cannot be ignored as he had the personal knowledge of this fact, therefore, I agree with the view taken by the learned trial court that the prosecutrix could not be taken to be below 16 years of age at the time of occurrence.

13. It is a matter of common experience that in cases relating to rape or unnatural offences, the eye witnesses are seldom available and we are to bank upon the testimony of the prosecutrix as corroborated by other evidence and surrounding circumstances, it may be observed that various revelations have been made by the witnesses i.e. prosecutrix (PW-6) and Shingara Singh (PW-7) for proving the factum of rape. The prosecutrix was a student of 10th class and was resident of Segra Plot Cheeka. She has another sister. Both used to go to school, some times on bicycle and sometimes on foot as the school was at a distance of about 2-1/2 kms from the place of their residence. The accused was a man of matured age of 37 years and the prosecutrix used to say him uncle. The accused was having political links. She also disclosed to Mandeep Kaur (PW-1) (School teacher) that the accused was her uncle. The accused went to the school and misrepresented to the prosecutrix that her mother was sick and brought her from the class room. Unluckily, she had not taken her bicycle on that day, therefore, the accused took her to Bal Bhawan on the pretext to pick up his bicycle for leaving her at her house. The prosecutrix treating him to be elderly, did not sense any foul smell and accompanied him to the Bal Bhawan, where she

was taken inside the room and raped. The evidence further reveals that she due to fear remained so stunned that she did not disclose this fact to any one for 14 days under fear. After 8.1.1997, she did not attend the school. All these factors go to show that demon of sex had frightened her so much, remained under fear and shame that she stopped going to school. It would not be insignificant to mention here that the case of the accused is not of only total denial but suggestions given to her indicate that the accused has tried to develop a case that she was consenting party. The necessary extract of cross-examination evidencing the aforesaid fact is reproduced as under:

".... It is incorrect to suggest that I was indulging in the sexual intercourse of my free will since long. It is incorrect to suggest that accused did not forcibly rape me. It is incorrect that I have been indulging in sexual intercourse previously as/ well....."

14. The prosecutrix appeared before the Magistrate and made statement u/s 164 Cr.P.C. wherein also she disclosed that the accused had committed forcible intercourse upon her. She having withstood the test of cross- examination could in no circumstances be doubted. Her deposition is unimpeachable. Under these circumstances, presumption u/s 114-A of The Indian Evidence Act is bound to be attached to her statement. While elaborating the purview of Section 114-A of the Indian Evidence Act, the Apex Court in case *Yedla Srinivasa Rao v. State of A.P.*, 2006 (4) RCR(CrL.) 474: 2006 (3) Apex Cri 397 (SC) observed as under:

"15. If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to the atrocities committed against women and in the instant case as per the statement of PW, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her."

15. In the present case, in view of the facts as mentioned above that the accused brought the prosecutrix from the school and took her to Bal Bhawan forcibly and raped her. The circumstances show that the accused created such circumstances she had no option but to submit to his commands and it cannot be said to be a voluntary consent on her part. The post-rape circumstances i.e. the prosecutrix after rape did not go to school also shows that she may be under fear and had no face to show did not go to school, and also could not expose to her parents. As such it would have to be observed that the presumption as provided u/s 114-A of the Evidence Act is applicable to the instant case. On raising of such presumption, the burden shifts upon the accused in order to establish that it was with her consent. No positive evidence has been led to shift the onus. Mere fact that there was no sign of injury either on the person of the prosecutrix or on the

person of the accused, nor any semen was detected or that the prosecutrix was habitual of doing sexual intercourse, are hardly sufficient to hold that the prosecutrix was a consenting party. From the evidence it transpires that the occurrence took place on 8.1.1997 whereas she was medico-legally examined after 14 days i.e. on 22.1.1997, therefore, the question of human semen on the clothes of the prosecutrix or swabs does not arise and the injury on the private part also stand vanished with the passage of time.

16. The other question raised before me is that the Court should not believe the solitary statement of the prosecutrix unless it stands corroborated by any other evidence.

17. Having deliberated over the issue, it may be observed that testimony of the victim in the case of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty to act on the testimony of the victim of sexual assault alone to convict, but the only safeguard is that the conscience of the court should be satisfied with regard to her reliability and trustworthiness. Seeking corroboration of her statement before relying upon the same, as a rule in such cases amounts to adding insult to the injury. The Court while appreciating the evidence of the prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charges levelled by her. There is no requirement of law to insist upon the corroboration of her statement to base conviction of an accused. The testimony of the prosecutrix stands at par with an injured witness. Since her honour, repute and respect remain at stake, therefore, she would be the last person to shield the real culprit. The question of believing the prosecutrix, even though she may be a child witness and sole witness is no longer *res integra*. There is adequate case law available to support the proposition that a conviction can be based on the sole testimony of the prosecutrix alone. After examining the case laws as a whole, it could safely be observed that the following parameters and factors that need to be kept in mind while appreciating the evidence of the prosecutrix in case of a rape of girl child:-

(i) Such cases need to be dealt with sensitivity and not like cases involving other penal offences. In other words, the whole approach of the Court must be quite different.

(ii) The traditional non-permissible bonds of Indian society must be kept in mind while examining the cases involving sexual offences. Social factors play an important role about the nature and quality of available evidence.

(iii) The sole testimony of the prosecutrix is enough to convict a person accused of rape, if testimony is free from any blemish, concoction or tutoring.

(iv) Such testimony does not need corroboration but if there is some doubt of complicity then the Court may look for assurance to the acceptability of the testimony short of its corroboration.

(v) If the testimony of the prosecutrix is reliable and trustworthy, then minor contradictions are not enough to throw out the evidence and other issues such as non-examination of the available witnesses, non-examination of the doctor and non-production of the medical report would not be fatal to the case of the prosecution.

18. In the light of these principles, if we examine the testimony of the prosecutrix (PW-6), I find no reason to disbelieve her. She has made clean breast of the facts in the natural course of events, without any embellishment or any padding. She is very straightforward to say that due to fear of the accused she neither went to school nor disclosed about the act done by him to her parents. After she was persuaded time and again, she disclosed the same to her mother. When her parents were apprised of the fact, they immediately took her to the hospital for medical examination. Notwithstanding the fact that after passing of 14 days nothing was bound to come in the medical evidence, yet the ocular version given by the prosecution with regard to the commission of rape upon her while coming from her mouth cannot be disregarded, thrown away or ignored for want of medical evidence, particularly in view of presumption u/s 114-A of the Evidence Act. Consequently, I have no hesitation to hold that the prosecutrix was a truthful witness.

19. As regards the delay in lodging the FIR, mere delay in lodging the FIR is not fatal but the court should examine only that said delay has been duly explained in cases of rape since the honour and repute of the family remains at stake. There may be cases where time is consumed for consultations within the family or people are hesitant to bring the honour of the family in the streets. There may also be cases where on account of fear and threat the witnesses may avoid going to police station immediately. There may be cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cause stigma on her for rest of her life. There are cases where initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for delay in lodging the report. The Apex Court in case *Ram Dass and others v. State of Maharashtra*, 2006 (4) RCR (CrI.) 967 : 2006 (3) Apex Cri 635 (SC) while discussing the aspect of delay observed as under:

"... In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straitjacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See. AIR 1956 SC 216: *Pandurang and others v. State of Hyderabad*). Thus mere delay in lodging of the report may not be itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the

facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact."

20. While examining the facts and circumstances of the present case at the cost of repetition it may be observed that the prosecutrix took the commission of rape to the heart. She remained silent out of fear for few days. She even did not go to school, ultimately, she tore out her abdomen on 22.1.1997. Thus, in the given circumstances of the case, this delay in lodging the FIR stands duly explained.

21. As regards the defence plea set up by the accused that he has been involved by the father of the prosecutrix at the instance of Ishwar Singh Ex- MLA also seems to be concocted version because Shingara Singh while appearing as PW-7 has denied his relations with Ishwar Singh with whom the accused pleaded rivalry due to being a candidate for ruling H.V.P. alliance. Though the accused has pleaded rivalry due to contest in the elections, yet it is observed that there was no such elections on or nearby the date of occurrence.

22. No other point has been urged in order to assail the impugned judgment.

23. For the foregoing reasons, this appeal being devoid of any merit is hereby dismissed. The revision petition for enhancement of sentence also having no substance stands dismissed.