

(2009) 02 P&H CK 0211

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 312-SB of 1998

Pala Ram

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Feb. 3, 2009**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 376, 450

Citation: (2009) 2 RCR(Criminal) 628**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Advocate:** Samir Rathore, for Mr. Sumeet Goel, for the Appellant; T.S. Salana, Deputy Adocate General, for the Respondent**Final Decision:** Allowed

Judgement

Harbans Lal, J.

This appeal is directed against the judgement/order of sentence dated 10.3.1998 passed by the Court of learned Sessions Judge, Ferozepur whereby he convicted and sentenced the accused Pala Ram to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 3,000/- or in default of the same to further undergo rigorous imprisonment for six months u/s 376 of IPC and further sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- or in default thereof, to further undergo rigorous imprisonment for two months u/s 450 of IPC with a further direction that the substantive sentences shall run concurrently.

2. Shorn of all unnecessary details, the prosecution case is that on 6.6.1996 at about 7:00 P.M., the prosecutrix (name is not being indicated in the judgment to prevent social victimisation of the victim in view of Premiya alias Prem Parkash v. State of Rajasthan, 2008 (4) RCR (Cri) 539 : 2008 (5) RAJ 490 (SC)) was all alone present in her house. She had bolted the door from inside and was arranging the wheat-chaff, when her father was away to his personal work and her sister-in-law, brother and

mother had gone to attend the marriage at Amarpura. The accused Pala Ram by scaling over the wall entered in the room and removed her salwar and started committing rape forcibly on her. She raised alarm. Meanwhile, her brother Beelu PW came there. He knocked at the door, the bolt of which being loose got opened. He saw the accused committing rape on her. On catching sight of his, the accused made an endeavour to flee from the spot. Beelu by picking up a spade gave two blows, as a result of which, the accused sustained injuries and he ran away from the scene of crime. Her father Chandu Ram came later on in the house. She narrated the entire occurrence to her father, who took her to Fazilka Hospital, where she was medico legally examined. On 7.6.1996 at 12:45 P.M. The ruqa was sent to the Police Station, City Fazilka. On receipt of the ruqa as well as medico legal examined report, ASI Sucha Singh went to the aforesaid hospital and recorded the statement of the prosecutrix. On the basis of the same, the case was registered. The said ASI visited the spot, prepared the rough site plan showing the place of occurrence and arrested the accused. On completion of investigation, the charge-sheet was laid in the Court of learned Illaqa Magistrate. He committed case to the Court of Session for trial of the accused.

3. On commitment, the accused was charged u/s 450 and 376 of IPC to which he did not plead guilty and claimed trial. To bring home guilt against the accused, the prosecution has examined the prosecutrix PW1, Beelu PW2, Dr. Sarita PW3, Dr. Ajay Narang PW4, Head Constable Angrej Raj PW5, Sukhdev Singh Draftsman PW6, Darbara Singh SI PW7, ASI Such Singh Investigator PW8 and closed its evidence by giving up Dr. M.L. Madan being unnecessary.

4. When examined u/s 313 of Cr.P.C., the accused denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded that "I am innocent. Beelu Ram had a fight with me and he caused me injuries in the hospital and later on, this case was planted upon me, when I was in the hospital." He did not adduce any evidence in defence. After hearing the learned Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced the accused as noticed at the outset. Feeling aggrieved with the conviction/sentence, he has preferred this appeal.

5. I have heard the learned counsel for the parties, besides perusing the record with due care and circumspection.

6. Argued, the learned counsel for the appellant that there was an inordinate unexplained delay of 17/18 hours in lodging of the First Information Report in this case as the occurrence allegedly took place on 6.6.1996 at 7:00 P.M whereas this report was lodged on 7.6.1996 at about 12:45 P.M. This delay smacks of concoction and fabrication of the version by the prosecution. The learned trial Court has not taken this fact into consideration. There was no signs of any external violence or injuries on any part of the prosecutrix as divulged by her medico legal examination conducted by PW Dr. Sarita. This Doctor had also recommended her radiological

examination for determination of her age, but as is borne out from the record, no steps were taken in this direction for the reasons best known to the prosecution. The accused- appellant, who had sustained injuries had got himself admitted in the same hospital at about 7:30 P.M. on the date of alleged occurrence, yet he was not arrested on that day. He was hauled up only on 13.6.1996 which is obviously after a lapse of about 7 days which further cast a cloak of suspicion on the prosecution version. The prosecutrix herself had lodged a complaint against her brother Beelu PW in the Court of learned Judicial Magistrate Ist Class at Fazilka. As per this complaint, the accused-appellant had not committed the alleged act with the prosecutrix and she had mentioned his name in her statement before the police only under coercion and at the instance and pressure of her brother PW Beelu, who had held out a threat to put an end to her life, if she refused to make statement in Court against the accused. Her statement was also recorded by the aforementioned learned Magistrate, wherein again she reiterated the above facts. Thus, it is discernible from the prosecution evidence that it is incompatible and unconvincing. As such, no implicit reliance should be placed thereon.

7. To tide over these submissions, Mr. T.S. Salana, Deputy Advocate General, Punjab on behalf of the State maintained that the evidence tendered by the prosecutrix as well as her brother Beelu PW and eye witness being consistent and intrinsically trustworthy, warrants no interference in the impugned judgment. This contention merits rejection for the discussion to follow hereunder :

PW3 Dr. Sarita has stated in the following terms :

On 7.6.1996 at 12:45 P.M., I medico legally examined - (referring to the prosecutrix) daughter of Chandu Ram 15 or 16 years of age, resident of Khui Khera, brought to me by the police and found the followings :

---(prosecutrix) was moderately built and nourished, well oriented and was wearing a printed salwar and kameez, with a weight of 40 Kgs and height of 5", having 14 teeth in upper jaw and 15 teeth in the lower jaw. Pulse was 72 PM and B.P was 110/70 MM of Hg.

On examination, there was no sign of external violence on any part of the body. The secondary sexual characteristics were developed. Pubic and axillary hair was present. Breast developed.

On per-vagina examination - pubic hair present, labia majora and minora well developed. Hymen was torn and the tear of the hymen was an old one. Vagina admitted two fingers easily, uterus was ante-verted and ante-flexed, small size mobile forensic clear. No bleeding was present.

I took two vaginal swabs and sent the same to the Chemical Examiner for confirmation of spermatozoa. Clothes i.e salwar and kameez of the patient were also sent to Chemical Examiner for confirmation of spermatozoa. I also advised x-rays for

confirmation of age.

I handed over to the police, the box with five seals containing two vaginal swabs, a packet with nine seals containing the clothes of the patient, an envelope with seven seals containing sample of the seal, covering letter, MLR and the police papers and one another copy of the MLR.

Ex.P3 is the correct carbon copy of the medico legal report, original of which I have brought today in the court. She was medico legally examined on police request Ex.P4, which bears my endorsement Ex.P4/1. (At this stage a sealed parcel has been opened and salwar MO-4 and shirt MO-5 have come out of it). These are the same clothes, which I had removed from the person of the prosecutrix.

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The prosecutrix arrived in the hospital at 12.30 PM on 7.6.1996. She was brought by ASI Sucha Singh. I did not find any teeth bite injury on any part of the body of the prosecutrix. The possibility of the prosecutrix being accustomed to habitual intercourse cannot be ruled out. I had not received the report of Ossification test.

8. It is in the cross-examination of the prosecutrix PW1 that "the accused caught hold of me and threw me on the ground with force. I received injury on my back. I was wearing green bangles at that time. Some bangles were broken and I also received some scratches on my arms. The accused gave me the bite on my cheek. He also gave teeth bite on my breast and also torn my shirt. But I had not given an teeth bite to the accused. The accused kept me in his grip for one hour. During this one hour, I was making a struggle and I received injuries on my back and arms and on the legs." On a combined reading of this ocular account as well as the medical evidence trickled from the mouth of Dr. Sarita (sic.), it transpires that palpably, there is divergence rather sharp contradiction between the two. Dr. Sarita has stated in candid and categoric terms that on examination, there was no sign of external violence on any part of the body, whereas on evaluating the above referred evidence of the prosecutrix, she had sustained injuries on her back, arms and legs. She was got medico legally examined not on the date of alleged occurrence, rather on the next day i.e. after 17 to 18 hours. The complainant party has not apportioned any reason for not taking the prosecutrix to the hospital for her medical examination soon after the occurrence. There is no dispute or quarrel with the proposition that if there is variance between the medical and ocular evidence, the latter has to be accepted, provided it stands the test of judicial scrutiny in the crucible of probabilities. But here in this case, the medical evidence cannot be brushed aside. If she had sustained injuries on the stated parts of her body, in all human probabilities, to prevent further loss of blood, she would have been rushed immediately to the hospital. As emanates from Dr. Sarita's evidence, the vagina admitted two fingers easily. Under the stress of cross-examination, she has deposed that "the possibility of the prosecutrix being accustomed to habitual intercourse

cannot be ruled out." This evidence speaks volumes of the prosecutrix being habitual to sexual intercourse. As is borne out from Dr. Sarita's testimony, two vaginal swabs, salwar and kamiz of the prosecutrix were sent to the Chemical Examiner for confirmation of spermatozoa. The Chemical Examiner's report has not been tendered in evidence by the prosecution. The record of the trial Court does not reveal any reason worth mention for withholding the same. In the absence thereof, it is very difficult to say that on the vaginal swabs, salwar and kamiz of the prosecutrix, the spermatozoa were found present. The reason for holding back such report may be that no spermatozoa was found on these articles. An adverse inference has to be drawn against the prosecution that such report had gone against it. It is in the evidence of Dr. Sarita that "she had advised X-Ray for confirmation of age of the prosecutrix.

At the fag end of her cross-examination, she has testified that "I had not received the report of ossification test." On the day of her examination as a witness in the Court, the prosecutrix gave her age 16 years. So, is the age given by Dr. Sarita in her evidence. Dr. Ajay Narang PW4 had medico legally examined the accused on 7.6.1996 at 12:45 P.M., i.e., on the next day of the occurrence. It is in his evidence that "Smeghma was not present." Absence thereof on the accused's person coupled with non-tendering of the Chemical Examiner's report gives an inkling that even symptomatic proof of rape was not there. Annexure P.1 is the copy of the compliant purportedly lodged by the prosecutrix against her own brother Beelu Ram PW under Sections 504/323/506 of IPC in the Court of learned Judicial Magistrate First Class, Fazilka. As its contents proceed, on 7.6.1996, Pala Ram (referring to the present accused-appellant) had not committed rape with me (referring to the prosecutrix). It is further mentioned in this complaint that there used to be a dispute in the complainant's house that she should depose against Pala Ram, but the complainant used to refuse by saying that she would not lay any innocent man to suffer. Towards the end of her cross-examination, the prosecutrix has stated that "The accused had got thumb impressions on blank paper and those papers may have been used for the statement. I am not ready to give my thumb impression for comparison in this case." But to the utter dismay of the prosecution, the occasion at which her thumb impressions were obtained by the accused has been left in the womb of mystery. Where was such occasion for the accused has not been unfolded. In Annexure P.2 also it has been stated that "on 7.6.1996 I (referring to the prosecutrix) on Beelu's asking had registered an FIR against Pala Ram that he had raped me but Pala Ram had not raped me." This statement having been recorded before the Judicial Magistrate First Class, Fazilka cannot be ignored easily. If the prosecutrix had not suffered this statement in the aforesaid Court, the complainant party would have taken this matter to its logical conclusion by way of inquiry. There being no plausible reason to discard this documentary evidence, it has to be relied upon. The same further deals a coup-de-grace or strike a death knell to the prosecution edifice.

9. Dr. Ajay Narang PW4 has deposed in his cross-examination that the "Patient (referring to the accused-appellant) was admitted in Civil Hospital, Fazilka at the time of his medico-legal examination." One thing is clear that the accused lay already admitted. It is apt to be borne in mind that the rival theory of defence set up by the accused is that as a matter of fact he had received injuries at the hands of Beelu PW, brother of the prosecutrix and was lying admitted in the hospital at the time of alleged occurrence. The sum and substance of the evidence given by Beelu PW is that on seeing the accused committing rape on his sister, he picked up the rusted spade and gave one or two blows with the same on the accused. It is in his cross-examination that "the community men of the accused were also attracted to the spot with dangs to beat me. They were 6-7 in number." If the accused-appellant had committed rape, his community men would have not come to his rescue. Their coming to the spot rather probablises that the accused-appellant was assaulted by Beelu Ram PW and to wreak vengeance, they came over there duly armed with dangs. The medico legal examination report of the accused though not exhibited is available on the record. As per the same, Pala Ram accused had arrived in the hospital on 6.6.1996 at 7:30 P.M and he was medico legally examined at 7:40 P.M. As many as, three injuries were found on his person. One lacerated wound was also observed in the middle of his scalp. The other lacerated wound was also observed at sagittal line. The third one i.e. lacerated wound was found on the front of his forehead. The bleeding was present in all the injuries. Obviously, all these three injuries were found on the vital parts of his body. May be that, the fight occurred between the accused-appellant and Beelu PW2. In order to exert pressure upon the accused-appellant, the latter got planted a false case of rape by using his sister as a tool who was already habitual to sexual intercourse, particularly, when the taking place of rape has not been established by evidence.

10. As alleged by the prosecutrix, the occurrence took place on 6.6.1996 at about 7:00 P.M. It is in her cross-examination that "the accused kept me in his grip for one hour." If the accused kept her for one hour in the grip of his loins, in that eventuality, by no stretch of speculation, he would have reached the hospital at 7:30 P.M. There being injuries on his head, with a spade, he would have not been able to reach the hospital hurriedly. To add further to it, the alleged occurrence took place in the evening time. Normally speaking, the parents or other members of the family of young girl do not leave her all alone at such hours.

11. It is in the cross-examination of ASI Sucha Singh PW8 Investigator that "the ruqa which was received by me is not on the judicial file." As would be apparent from his cross-examination, he was questioned as to why he had not arrested Pala Ram on that day? He replied that "the accused was admitted in hospital, therefore, he had not arrested him nor he put guard". It is also in his cross-examination that "medico legal examination of Pala Ram was got done on 7.6.1996 at 12:45 P.M. When I got him medico legally examined, the accused was not arrested." The question recorded in his further cross-examination is "when you had got medico legally examined Pala

Ram accused on 7.6.1996, why you had not recorded the statement of Pala Ram accused regarding the injuries suffered by him and why you had not arrested him on that day?" The note recorded in the answer is "the witness is not giving any reply to the question." It is in his further cross-examination that "there were three injuries on the person of Pala Ram accused. These injuries were on the head and the Doctor had advised X-Ray for two injuries. It is correct that the injuries were declared by me as simple before the receipt of the X-Ray report. I have not obtained the report from the Doctor with regard to the X-Ray report of Pala Ram accused." Obviously, he has not assigned any reason for declaring the injuries as simple on his own. He has also not given any reason for not obtaining the X-report from the Doctor. This conduct shows that he was too bent upon to help he complainant party. A suggestion has been put to him in his further cross-examination that "it is wrong say that I have sided with the complainant and conducted partial investigation."

12. To sum up, there is unexplained inordinate delay of as many as 17 to 18 hours in getting the prosecutrix medico legally examined. Secondly, as alleged by her, she has sustained injuries on her back, arms and legs, which were not found by Dr. Sarita during the course of medico legal examination of the prosecutrix. Thirdly, as per Annexure P.1 as well as Annexure P.2, Beelu PW brother of the prosecutrix had forced her to make a statement in the Court that the accused Pala Ram had committed rape on her though as per these documents, she was not ravished. Fourthly, The prosecution has not tendered in evidence the Chemical Examiner's Report to affirm the presence of spermatozoa on the vaginal swabs, salwar and kamiz of the prosecutrix. Fifthly, smegma was absent on the person of the accused-appellant. Sixthly, the prosecutrix was not got determined by way of ossification test despite the direction given by the Doctor. Eighthly, the presence of the accused- appellant at the time and place of occurrence is rendered highly doubtful.

13. In the ultimate analysis, it boils down that the prosecution has not been able to bring home guilt against the accused-appellant beyond a shadow of reasonable doubt. Consequently, this appeal is accepted, setting aside the impugned judgment/order of sentence. The accused-appellant is hereby acquitted of the charged offence.