Before Swatanter Kumar & S.S. Saron, JJ

KULDIP SINGH—*Appellant*

versus

STATE OF PUNJAB—*Respondent*

Crl. Appeal No. 328/DB of 2000

20th January, 2003

Indian Penal Code, 1860—Ss. 354, 375, 376 and 511—Conviction of an accused for committing rape of seven year old girl—Contradictions/discrepancies in statements of girl and her father—Plea of absence of penetration—Whether sufficient for acquittal of an accused for an offence under Section 376—Held, no—Medical evidence duly supported by statement of girl and her father clearly establish atleast partial penetration—Sufficient to constitute an offence of rape—Appeal liable to be dismissed—Accused does not deserve any leniency in regard to punishment—Plea on the question of quantum of sentence also rejected—Order of sentence upheld.

Held, that the prosecutrix has clearly stated in her examination that the accused gave bites on various parts of body including cheeks and thereafter inserted his fingers into her vagina and thereafter also committed bad rape on her. Injuries on her body including her private parts have duly been noticed by the doctor. She had bleeding. Her hymen was found to be torn. This medical evidence duly supported by the statement of her father and herself, though with some discrepancies, clearly establishes that there was apparent, atleast partial, penetration.

(Para 21)

Further held, that complete penetration is not absolute requirement for completing the offence of rape. Even partial penetration would suffice if other ingredients as stated in Section 375 are satisfied and the facts and circumstances of a case attract any of the clauses from Firstly to Sixthly stated in the provisions of S. 375. Penetration under the provisions of S. 375 would be sufficient to constitute offence of rape. As per the simple language of the Section, penetration is sufficient to constitute sexual inter-course, the foundation of the offence

of rape. In other words, de hors other offending circumstances and incriminating evidence mere penetration per se would constitute an offence of rape.

(Para 19)

K.S. Ahluwalia, Advocate *for the appellant*

A.S. Grewal, Sr. D.A.G., Punjab *for the respondent*-State.

JUDGEMENT

SWATANTER KUMAR, J. (ORAL)

(1) This Criminal Appeal is directed against the judgment of conviction and order of sentence both dated 13th March, 2000 passed by the learned Additional Sessions Judge, Sangrur,—*vide* which accused was held guilty of offence under Section 376 of the Indian Penal Code and was awarded sentence to undergo rigorous imprisonment for twelve years and to pay a fine of Rs. 20,000 and in default of payment of fine to further undergo rigourous imprisonment for one year. It also directed that if the fine is recovered a sum of Rs. 15,000 shall be paid to the complainant towards compensation.

(2) Learned counsel appearing for the appellant primarily, with some emphasis, has argued that even if the case of the prosecution, as stated in the words of the prosecutrix PW.4, in absence of penetration only constitute an offence punishable under Section 376 read with Section 511 of the Indian Penal Code and if not under Section 354 of the Indian Penal Code but cannot in fact and law be an offence under Section 376 of Indian Penal Code, hereinafter referred to as the Code, simplicitor.

(3) In order to substantiate his contention, learned counsel for the appellant placed reliance upon the judgments of the Hon'ble Supreme Court in the cases of ***State of Maharashthra*** versus ***Rajendra Jawanmal Gandhi etc. (1)*** and ***Madan Lal*** versus ***State of Jammu and Kashmir (2)*** and a judgment of the Hon'ble Single Judge of Delhi High Court in the case of ***Smt. Sudesh Jhaku*** versus ***K.C.J. and others (3).***

(1) AIR 1997 S.C. 3986
(2) AIR 1998 S.C. 386
(3) 1998(3) Criminal Law Journal 2428

(4) In order to appreciate the merit of this contention, we consider it appropriate to refer to the facts giving rise to the present appeal.

(5) Ms Sandeep Kaur daughter of Bhim Singh is an unlucky girl, who lost her mother while she was in her lap and even lost her elder sister. She was living alone with her father. He was working as a mason. At his instance F.I.R. No. 121, dated 13th June, 1999 under section 376 Indian Penal Code was registered at Police Station Dhuri District Sangrur. The F.I.R. reads as under :—

> "I am a resident of village Manwala and do the work as Mason. My wife Manjit Kaur had died about 3 years back. I have only daughter Sandeep Kaur aged about 7 years. I go for my work in the morning. When I go on my work, my daughter Sandeep remains all alone at my house in my absence. Yesterday on 12th June, 1999 in the morning I after taking my meals, had gone for my work in the house of Balaki Bazigar Basti Dhuri and after my departure, my daughter Sandeep remained all alone in my house. When I returned to my home from my work at about 9.30 P.M., I heard the shrieks, then I flashed the light of the torch held in my hand by running towards inside and saw that Kuldeep Singh son of Karnail Singh Ramdasia, resident of Manwala was committing rape on my daughter Sandip Kaur on the cot in the room. On seeing me, he pushed me and ran away in the cover of darkness. On seeing it, I raised a raula, which attracted Major Singh *alias* Lilu, son of Nikka Singh resident of the same village (our village), who came there. The blood was oozing out of vagina of my daughter. Due to dark at night I could not come. Now I have come to inform. Action may be taken. Statement has been heard which is correct.

(6) The Investigating Officer had taken the prosecutrix for medical examination and she was examined by Dr. Om Parkash PW.3, who found various injuries on her body. The injury mainly consisted bite mark at cheeks at the back and injuries on the thigh and legs of the prosecutrix. Hymen torn and blood was collected from the place

of occurrence. The clothes of the accused Kuldeep Singh as well as prosecutrix were also sent for chemical examination. As per the report of the Chemical analysis exhibit PS and PT respectively, semen was found on exhibit III, which was under garment (Kachha) of the accused Kuldip Singh. However, no spermatozoa was found in the vaginal swab, vaginal smear, salwar and Jampar of the prosecutrix. The Investigating Officer further completed the investigation after recording the statment of the witness under Section 161 of the Cr.PC. and presented the challan. The accused Kuldip Singh was charged under section 376 of the Indian Penal Code,—*vide* order of the learned Additional Sessions Judge, dated 17th September, 1999. The prosecution examined as many as 10 witnesses to prove his case and produced various recovery memos, report of the medical legal examination. The prosecution evidence was closed by Assistant Public Prosecutor,—*vide* his statement dated 28th February, 2000, where he gave up Tarsem Lal PW as he was already examined and tendered in evidence chemical examiner exhibit PS and PT to which no objection was raised by the defence.

(7) Statment of the accused under Section 313 of Cr. P.C. was recorded on 29th February, 2000 in which accused claimed to be innocent and stated that he had not committed any rape. No defence was led on behalf of the accused.

(8) The learned Additional Sessions Judge, as already noticed,—*vide* his judgment and order of conviction convicted the accused as aforesaid, giving rise to the filing of present appeal.

(9) The father of the prosecutrix, who was complainant, was examined as PW-5. He stated that after completion of daily work when he returned home, he heard the shrieks of his daughter. As he was carrying torch, he saw that the accused was laying over his daughter on the cot which was lying in the room. The accused had committed rape of his daughter there was no sheet on the bed which was made of Jute strings. Immediately thereupon the accused ran away after giving him a push. He affirmed his statement made in the F.I.R. Ex. PK. The prosecutrix was examined in Court as PW-4 and after being satisfied that she was capable of stating correctly in the Court, the learned Additional Sessions Judge, recorded her statement. She categorically stated that the accused had committed bad act with her

by inserting his fingers in her private parts and her father had come much later and accused had gone. She was taken to the Doctor on the same night.

(10) The learned counsel for the appellant-accused emphasised on the statement and some contradictions which are appearing in the statments of PW-5 and PW-4. According to him, PW-4 has stated that accused has only inserted his fingers in her private parts and as such no offence under Section 376 of the I.P.C. was made out, even if her statement to be taken correct in its entirety.

(11) We are not impressed with the contention raised on behalf of the appellant. Firstly, the Court must take note of the fact that at the time when PW 4 was subjected to examination in Court and ruthless cross-examination. She was aged only 7 to 8 years. Her state of mental and physical agony is a factor which the Court cannot ignore and treat her at par with the normal matured witness for whom statement before a Court may be a very normal phenomena. It is true that there are certain contradictions in the statemnets of these two witnesses but those contradictions no-way destroy the ingredients of the offence. In order to effectively resolve this aspect of the matter, reference to medical evidence on record would be essential. She was examined by PW-3 Dr. Om Parkash. While describing she was examined on 13th June, 1999 itself in the Civil Hospital, Sangrur, in the afternoon. As per the medico-legal report prepared by the Doctor, which is Ex. PE, the following injuries were found on the person of the prosecutrix :—

1. Abrasion with clotted blood 2.5 cm on back of left side of chest in the superacepuor region.

2. Bite marks on both cheeks over an area of 2.5cm x 3cm. These were tender to touch.

3. Contusion of reddish blue on back of left thigh over an area of 4 "x 5".

4. Contusion of reddish blue on back of right thigh over an area of 4 "x 5".

5. Contusion of reddish blue of 2.5cm on upper lateral of right thigh.

6. Vertical linear placed clotted blood multiple over medical and front of Both thighs and legs extending from vulva to ankle joint.

7. On local examination, Secondary seec charactor not present. There was odema and arythema both sides of vulva and tender. Fourchete torn both sides and tender. There were laceration present on Vaginal interoitus, oozing was present. Hymen torn and oozing present. Vaginal interoitus admitted two fingers. Very painful examination.

(12) The Doctor also identified and confirmed Jampar Ex. P4 and Salwar Ex. P5 belonging to the prosecutrix, which was produced in the Court after examination by Chemical Expert before the cross-examination of this witness commenced.

(13) As per report Ex. PE the hymen of the prosecutrix was torn. The blood was oozing and there were white marks as referred to in the above report.

(14) Dr. R.P. Jindal PW-1 Medical Officer had examined Kuldip Singh accused and he was found him capable to perform sexual inter course.

(15) We have already pointed out that in addition to the above, semen was noticed on the under garments of the accused. The above medical evidence seen in the light of the statements of PW 4 and PW 5 clearly shows that the accused has brutally raped the young girl of only seven to eight years as the tenderness and swallowness resulted from bites of the accused. It has come in evidence that the accused had removed the clothes of the prosecutrix. According to the father when he entered the house with the torch the accused was lying over his daughter and was doing the "bad act." On noticing the father, he had get up and after pushing him had left the place of occurrence. According to the girl, who obviously must have fainted because of serious injuries on her body and her private parts bleeding, had stated that the accused had put his fingers in her private part. It is all the circumstances cumulatively seen, indicate beyond reasonable doubt that the accused had committed sexual inter course forcibly on her, she being a child of 7 to 8 years and being covered under clause Sixthly to Section 375 of the Indian Penal Code. Having attracted that

clause, we may now refer to the judgment relied upon by the learned counsel for the appellant in the case of **Madan Lal** *versus* **State of Jammu and Kashmir** *(supra),* the medical evidence was not in conformity with the statement of the prosecution witnesses inasmuch as it was noticed "the Doctor who examined the prosecutrix on 23rd May, 1986 at 10.30 a.m. stated that there was no mark of violence on any part of the body and on local examination there is no mark of violence on her private parts like vagina, the hymen was intact and on examination of vaginal smear no living or dead sperm was found on the slide." In the face of this evidence, the Hon'ble Apex Court came to the conclusion while rejecting the contention of the accused that it was not an offence of assault under Section 354 I.P.C. but was an offence of attempting to rape under Section 376 I.P.C. read with Section 511 I.P.C. relying upon the statement of the prosecutrix. This case is of no help to the appellant.

(16) Similarly in the case of **State of Maharasthra** *versus* **Rajendra Jawanmal Gandhi etc** *(supra),* the High Court had come to the conclusion on appreciation of prosecution evidence that it was an offence under Section 376 read with Section 511 of the I.P.C. and an offence under Section 376 I.P.C. was not made out. We have already referred to the oral and medical evidence as afore-noted and have come to the conclusion that this was an offence punishable under Section 376 of the I.P.C. At this stage, it may be necessary to refer to recent judgment of the Apex Court in ***State of Rajasthan*** versus ***Om Parkash (4)*** where the Hon'ble Supreme Court observed that child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscence than this. It is crime against humanity. While making these observations, their Lordships also observed that Courts are expected to have a different approach in such cases because of a girl child is in a very vulnerable female child being exposed to various harassments.

(17) Still another judgment of the Apex Court in the case of ***State of Himachal Pradesh*** versus ***Gian Chand (5)*** held as under :—

> "15. The observations made and noted by Dr. Mudita Gupta during medico-legal examination of PW7, clearly make

(4) AIR 2002 S.C. 2235
(5) JT 2001 (5) S.C. 169

out the prosecutrix having been subjected to rape. The prosecutrix has spoken of "penetration" in her statement. The discovery of spermatozoa in the private part of victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa (See-**Narayanamma** *versus* **State of Karnataka**-[JT 1995 (5) SC 436 = (1994) 5 SCC 728]. Slightest penetration of penis into vagina without rupturing the hymen would constitute rape. [See-**Madan Gopal Kakkad** *versus* **Naval Dube**-[JT 1992 (3) SC 270 = (1992) 3 SCC 204]. The suggestion made in the cross-examination of Dr. Mudita Gupta that injury of the nature found on hymen of prosecutrix could be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to prosecutrix or her mother during cross-examination. Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall ? There is nothing to draw such an inference not even a suggestion, to be found on record. Answer to the suggestion made to Dr. Gupta cannot discredit the prosecution case in the absence of any other material to support the suggestion. So is the case with absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance, external marks of violence may not be found (See Modi's Medical Jurisprudence, 22nd Edn. p. 502). It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see, Modi *ibid*, page 509) that even in the case of a child victim being ravished by a grown up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries even if caused, might have healed.

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17. **In State of Punjab *versus* Gurjit Singh and others** [JT 1996 (1) SC 298 = (1996) 2 SCC 384], one of us, Dr. A. S. Anand, J. (as His Lordship then was) has thus spoken for the Court "A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." The approach adopted by the High Court runs into the teeth of law so stated and hence, stands vitiated."

(18) The above mentioned-particulars go to show that mere fact that semen was not there or found on the body or in the vagina of the prosecutrix would not be sufficient to discard the version of the prosecution where medical evidence, statements of eye witnesses father of the girl, the prosecutrix is duly supported by medical evidence and the report of the chemical analyst. The Legislative intent underlying the provision of Section 375 of the I.P.C. to cover a wide range of cases under the expression rape is fully utilised by the language of the Section which reads as under :—

"A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances failing under any of the six following descriptions :—

First :—Against her will.

Secondly :—Without her consent.

Thirdly :—With her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly :—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly :—With her consent, when, the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly :—With or without her consent, when she is under Sixteen years of age.

Explanation :—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception :—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

(19) The Legislature has illustratively defined and explained the ingredients which would constitute rape. First explanation has to be read ejus dem gener is to the Section and clauses First to Sixthly define rape. Complete penetration is not absolute requirement for completing the offence of rape. Even partial penetration would suffice if other ingredients as stated in the Section are satisfied and the facts and circumstances of a case attract any of the clauses from Firstly to Sixthly stated in the above provisions. Penetration under the above provisions would be sufficient to constitute rape of offence. As per the simple language of the Section, penetration is sufficient to constitute sexual inter-course, the foundation of the offence of rape. In other words, de hors other offending circumstances and incriminating evidence, mere penetration per se would constitute an offence of rape. The learned counsel appearing for the accused while heavily relying upon a judgment of learned Single Judge of Delhi High Court in the case of **Smt. Sudesh Jhaku** versus **K.C.J. and others (supra)** pointed out that absence of complete penetration by penis of the man accused into vagina of the prosecutrix would ipso facto be sufficient

for acquittal of an accused for an offence under Section 376 of the Code. We have carefully gone through this judgment. No such absolute proposition of law is intended to be laid in the said judgment. In our humble view this is misreading of the contents of judgment. In any case, this question is no more res integra and has been settled long before the pronouncement of the Delhi High Court judgment, in the case of ***Madan Gopal Kakkad*** versus ***Naval Dubey and another (6)*** where the Hon'ble Apex Court after discussing various facts of this offence, held as under :—

> "44. The First Explanation to Section 375 of Indian Penal Code which defines Rape read thus :
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> "Explanation Penetration is sufficient to constitute the sexual intercorse necessary to the offence of rape."
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> 45. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) **Natha** *versus* **Emperor, 26 Cr. L.J. 1925 page 1185 : (2) Abdul Majid** *versus* **Emperor AIR 1927 Lahore 735 (2) : (3) Mussammat Jantan** *versus* **The Crown 1934 Punjab Law Reporter (Vol. 36) page 35 : (4) Ghanashyam Mishra** *versus* **State 1957 Cr. L.J. 469 = AIR 1957 Orissa 78 : (5) D. Bernard** *versus* **State** 1974 Cr. L.J. 1098. In re Anthony AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete Act of sexual intercourse is not at all necessary. In Gour's "The Penal Law of India" 6th Edn. 1955 (Vol. II) Page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape."
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> 46. Reference also may be made to **Prithi Chand** *versus* **State of Himachal Pradesh 1989 (1) SCC** 432 though the facts therein are not similar to this case.

(6) JT 1992(3) S.C. 270

47. In the case on hand, there is acceptable and reliable evidence that there was slight penetration though not a complete penetration. The following evidence found in the deposition of PW 13 irrefragably proves the offence of rape committed by the respondent."

(20) We may also usefully refer to the other judgments which have taken the view as expressed by us in the cases of ***Lalta Prasad*** *versus* ***State of Madhya Pradesh (7) Prithi Chand*** *versus* ***State of Himachal Pradesh, (8)*** and ***Anil Kumar*** versus ***State of Kerala, (9).***

(21) In the light of the above well enunciated principles now we may revert back to the evidence in the present case. The prosecutrix has clearly stated in her examined that the accused gave bites on various parts of body including cheeks and thereafter inserted his fingers into her vagina and thereafter also committed bad rape on her. Injuries on her body including her private parts have duly been noticed by the doctor. She had bleeding. Her hymen was found to be torn. This medical evidence duly supported by the statement of her father and herself, though with some discrepancies, clearly establishes that there was apparent, atleast partial, penetration.

(22) We may refer to a judgment of Gujarat High Court in the case of ***Mohd. Zuber Noor Mohammed Changwadia*** versus ***State of Gujarat (10),*** where in some what similar circumstances and the evidence appearing to be a weaker nature in that case still the Bench held as follows :—

"It may be stated that in the cross-examination the defence has taken out certain contradictions and omissions. Having gone through all these contradictions and omissions, we are of the view that they are minor and, in any case, do not affect the main version of the prosecution case that the appellant had committed rape on the prosecutrix. We would like to mention the manner in which the prosecutrix was cross-examined by the defence. The prosecutrix although being a minor girl of 11 years of age at the time of recording her evidence

(7) AIR 1979 S.C. 1276
(8) AIR 1989 S.C. 702
(9) 1994(3) I.L.R. 748
(10) 1999 Crl. L.J. 3419

in the Court was cross-examined by the defence for almost three days and was asked all relevant and irrelevant questions. Under circumstances, it is quite likely that it would not be possible for any witness and more particularly a witness of the age of prosecutrix to give appropriate answers to the questions of the type put to her. Under the circumstances, if the prosecutrix has contradicted her police versions or has come out with certain omissions, we do not find any fault with her. In view of this, when she has stated in her cross examination that she does not remember as to when her signature was taken on the complaint but she signed the same as the police asked her to sign, there is nothing wrong with her conduct. We should not lose sight of the fact that the prosecutrix was a minor of nine years when the heinous crime of rape was committed on her and she came to her house crying with profused bleeding and informed her mother about the incident, it is quite natural that she was not a free state of mind to give all the details either to her relatives or to the police. There is no reason for us not to believe her evidence when she stated that she was almost in an unconscious state of mind. The pains and shock to the prosecutrix were quite apparent and, therefore, considering the age and the mental condition, even if she had not given certain details, in our opinion, the same would not be a ground to discard her evidence. The fact that she was deposing before the Court after a lapse of about two years, there are bound to be some improvements in her version before the Court, especially when she said that she went to the school at 3.00 p.m. attended the class for about 15 minutes and during recess hours at 4.00 p.m. the appellant committed rape on her. Her earlier version was that when she went to the school, there were no students and the accused was all alone. However, due to lapse of time and considering her age, even if this obvious improvement is there in her evidence, in view of the other circumstances on record which directly connect the appellant with the crime, we would not like to given any weightage to these contradictions and improvements in her evidence.

Without there being any enmity, the prosecutrix points finger at him as the culprit and that the incident happended in the broad daylight, is one more circumstance that would go against the appellant.

(23) In view of the above settled position of law and there being definite evidence in the shape of statement of the father which is more reliable though some discrepancies in the statement of the prosecutrix, we find no reason to interfere in the judgment of the learned trial Court. We dismiss the appeal on merits.

(24) However, the learned counsel for the appellant wishes to address further on the question of quantum of sentence and prays for short adjournment.

(25) List on 23rd January, 2003.

Order dated 23rd January, 2003

(26) On 20th January, 2003 after the judgment had been dictated in Court affirming the judgement of the learned trial Court on conviction of the accused under Section 376 IPC, the learned counsel appearing for the appellant made a specific request that he wanted to address arguments separately on the question of quantum of sentence. We had found the request to be reasonable and consequently we adjourned the matter for today.

(27) We have heard the learned counsel on the quantum of sentence. It is contended that accused is a young person of 19 years and does not have bad antecedents. He is not involved in any other crime.

(28) Keeping in view the facts and circumstances of the case, particularly the medical evidence showing injuries caused by bite at various parts of the body of the prosecutrix and even blood was collected from the place of occurrence, we are of the considered view that despite his young age, the accused does not deserve any leniency in regard to punishment. The arguments raised on behalf of the appellant in this regard are, therefore, rejected. Resultantly, we also sustain the punishment awarded by the learned trial Court.

R.N.R.