

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1226 OF 2011

LILLU @ RAJESH & ANR.

Appellants

VERSUS

STATE OF HARYANA

Respondent

ORDER

1. This criminal appeal has been preferred against the impugned judgment and order dated 20.9.2010 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 243-DB of 2002, by way of which the High Court has affirmed the judgment and order dated 4.3.2002 passed by the Additional Sessions Judge, Jind in Sessions Case No. 37 of 2001, by way of which the appellant no. 1 has been convicted under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and awarded the sentence of seven years rigorous imprisonment with a fine of Rs. 5,000/- and in default

of making payment, to further undergo imprisonment for two years. Further he has been convicted under Section 506 IPC and awarded the sentence of two years rigorous imprisonment. Both the sentences have been directed to run concurrently. The other co-accused, namely, Manoj, Satish @ Sitta and Kuldeep have been convicted separately under sections 376, 506, 366 and 363 IPC. Kuldeep Singh alone has been found guilty under Section 376 (2) (g) IPC, and has been awarded sentence of life imprisonment. Out of these four convicts, Kuldeep Singh and Manoj did not prefer any appeal against the High Court's judgment, while appellant nos.1 and 2 preferred the present appeal. Appellant no.2 had died during the pendency of this appeal in jail, therefore, we are concerned only with the case of appellant no.1 i. e. Lillu @ Rajesh.

2. Mr. J.P. Singh, learned counsel for the appellant, submitted that the prosecution has failed to prove the date of birth of the prosecutrix and that she was about 17-18 years of age on the date of incident. Thus, it was a clear cut case of consent. The statement of Raj Bala, prosecutrix has not been corroborated by any of the witnesses and has not got corroborated by the medical evidence. Dr. Malti Gupta (PW-1), who had examined Raj Bala, prosecutrix medically had deposed

that there was no external mark of injury on any part of her body. The possibility of prosecutrix being habitual to sexual intercourse could not be ruled out. There was no bleeding. Thus, in such a fact-situation, the statement of the prosecutrix that she was unmarried and had never indulged in sexual activity with any person, or was below 16 years, could not be relied upon.

3. On the other hand, the State of Haryana, as usual, remained unrepresented as the government counsel duly appointed by the State considered it their privilege not to appear in court and become the burden on public exchequer. So, the court has to examine the case more consciously going through the record and examine the correctness of the findings recorded by the courts below.

4. The trial court has examined the issue on age and after examining the school certificate (Ext. P-N), which stood duly proved by Lakhi Ram (PW-11), Science teacher, Government High Court, Badhana and Gajraj Singh, teacher, Govt. Primary School, Badhana, came to the conclusion that her date of birth as per the school register was 4.6.1987. So on the date of incident i.e. 7.3.2001, she was 13 years 9 month and 2 days old. She was a student of 6th standard. To

refute the same, no evidence worth the name has been led by the accused-appellant. The said finding stood affirmed by the High Court and in view thereof, it remains totally immaterial whether the prosecutrix was a consenting party or not.

5. So far as the medical evidence is concerned, Dr. Malti Gupta (PW-1), Medical Officer, Civil Hospital, Jind, has deposed that Raj Bala, prosecutrix was habitual in sexual activities and such a statement was made in view of the medical examination. Relevant part thereof reads as under:

"Bilateral breast were moderately developed, There was no external mark of injury seen any where on the body. Axillary hair was not developed. Public hair were partially developed.

On local examination labia majora and labia minora were moderately developed.

There was no bleeding P/V. Whitish discharge was present. Hymen was completely torn.

Vagina admitted two fingers cervix was normal, uterus was of null parous by lateral FF were normal.

....Two swabs were taken from cervix vagina. Public hair were taken and sent for examination. Salwar worn by Raj Bala was taken and sealed following were handed over to the police.

....It is correct that I have given my opinion that hymen was completely torn.

....It is also correct that the margins were completely heeled. I cannot give the exact time.

....I cannot say whether it was torn one year back 2 years back or 10 days back.

....I cannot say whether there was any sign of semen on the swabs taken by me.”

She further deposed:

".... Since there was no matting of hair so I did not opine whether there was any semen on the public hair.

....I do not remember whether I enquired from Raj Bala whether she came to me for medico legal examination after washing clothes and taking bath or not. However, the salwar worn by her was taken into custody. I cannot say from how many days Raj Bala was having sexual activities. The possibility of Raj Bala of habitual sexual intercourse cannot be ruled out.”

6. In fact, much has been argued by Mr. J.P. Singh on two fingers test. Admitting very fairly that in case she was a minor, the question as to whether she had been habitual to sexual activities or not, is immaterial to determine the issue of consent.

7. So far as the two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

8. In **Narayanamma (Kum) v. State of Karnataka & Ors.**, (1994) 5 SCC 728, this Court held that fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much earlier or carried an old tear. The factum of admission of two fingers could not be held adverse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen.

9. In **State of U.P. v. Pappu @ Yunus & Anr.**, AIR 2005 SC 1248, the Court held that a prosecutrix complaining of having been a victim of an offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness.

This Court while dealing with the issue in **State of Uttar Pradesh v. Munshi**, AIR 2009 SC 370, has expressed its anguish and held that even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. On the

contrary, the question still remains as to whether the accused committed rape on the victim on the occasion complained of. Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape her. It is the accused who was on trial and not the victim. So as to whether the victim is of a promiscuous character is totally an irrelevant issue altogether in a case of rape. Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. A prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally.

10. In **Narender Kumar v. State (NCT of Delhi)**, AIR 2012 SC 2281, this Court dealt with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that so far as the prosecutrix is concerned, mere statement of prosecutrix herself is enough to record a conviction, when her evidence is read in its totality and found to be worth reliance. The incident in itself causes a great distress and humiliation

to the victim though, undoubtedly a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Court further held as under:

*“Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of “easy virtues” or a woman of “loose moral character” can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: **State of Maharashtra & Anr. v. Madhukar Narayan Mardikar**, AIR 1991 SC 207; **State of Punjab v. Gurmit Singh & Ors.**, AIR 1996 SC 1393; and **State of U.P. v. Pappu @ Yunus & Anr.**, AIR 2005 SC 1248).*

In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all”.

11. In **State of Punjab v. Ramdev Singh**, AIR 2004 SC 1290, this court dealt with the issue and held that rape is violative of victim’s fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her

supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.

12. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures

should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

13. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot *ipso facto*, be given rise to presumption of consent.

14. In view of the above, the facts and circumstances of the case do not present special features warranting any interference by this Court. The appeal lacks merit and is accordingly dismissed.

.....J.
(Dr. B.S. CHAUHAN)

JUDGMENT
.....J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

NEW DELHI;
April 09, 2013.