State Of Himachal Pradesh vs Gian Chand on 1 May, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2075, 2001 AIR SCW 1903, 2001 (6) SRJ 128, (2001) 5 JT 169 (SC), 2001 (2) UJ (SC) 785, 2001 SCC(CRI) 980, 2001 (2) LRI 1416, 2001 (3) SCALE 565, 2001 (6) SCC 71, 2001 CRILR(SC MAH GUJ) 434, 2001 CRILR(SC&MP) 434, (2001) 2 UC 41, (2001) 2 ALLCRIR 1435, (2001) 2 ALLCRILR 690, (2001) 2 RECCRIR 666, (2001) 4 SCJ 512, (2001) 43 ALLCRIC 200, (2001) 2 CHANDCRIC 118, (2002) SC CR R 390, (2001) 2 EASTCRIC 172, (2001) 2 ORISSA LR 367, (2001) 2 RAJ LW 330, (2001) 2 CURCRIR 174, (2001) 3 SUPREME 588, (2001) 3 SCALE 565, (2001) 2 CRIMES 256, (2001) 2 CURLJ(CCR) 644, 2001 (2) ANDHLT(CRI) 54 SC, (2001) 2 ANDHLT(CRI) 54

Author: R.C. Lahoti

Bench: Chief Justice, R.C. Lahoti, Doraiswamy Raju

CASE NO.:
Appeal (crl.) 649 of 1996

PETITIONER:
STATE OF HIMACHAL PRADESH

Vs.

RESPONDENT:
GIAN CHAND

DATE OF JUDGMENT: 01/05/2001

BENCH:
CJI, R.C. Lahoti & Doraiswamy Raju

JUDGMENT:

R.C. Lahoti, J.

L...I...T.....T.....T.....T.....T.....T.....T..J The accused-respondent was charged under Section 376 IPC for having committed forcible sexual intercourse with the prosecutrix, a girl of the age of the 5 years and 6 months, on 29.10.1991 at about 6.30 p.m. at Village Baru. On trial, the learned

Sessions Judge found the accused guilty and sentenced him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.5,000 and in default of payment of fine to undergo rigorous imprisonment for a further period of 6 months. The amount of fine, if realised, was directed to be paid to the mother of the prosecutrix. The accused- respondent preferred an appeal. A Division Bench of the High Court has by judgment dated 22.12.1995 allowed the appeal, set aside the conviction and directed the accused-respondent to be released. Feeling aggrieved thereby, the State of Himachal Pradesh has come up in appeal by special leave which has been granted.

PW1 is the mother of the prosecutrix. Her husband had expired a few years before the date of the incident. She was residing in the family house. However, her father-in-law, her two brothers-in-law and she herself had separated in residence and they were living in three separate portions of the house. PW1 has a son and two daughters. The prosecutrix is the youngest of the three children. The accused is brother of wife of PW1s brother-in-law, i.e., jeth or her deceased husbands brother. The accused, being a relation, was often visiting the house. According to the prosecution on the date of the incident, PW1 had gone to the fields for collecting grass. Her son and the elder daughter had accompanied her. They returned to home at about 7 p.m. PW1, on her return, found her youngest daughter lying below a cot on the lintel of the house. Her salwar and shirt were having blood stains. There was blood on the bed sheet and a towel lying on the cot. She looked into the private parts of the victim child and found blood and inflammation therein. On being asked, the prosecutrix told the mother, that when she was playing the accused had committed Bura Kaam (a sinful act) with her. The mother PW1 told about the incident the next morning to her parents-in-law and co-sister (i.e. husbands brothers wife). The father of the accused was summoned and was told of what the accused had done. The father of the accused defended his son saying that he could not have indulged into such a wrongful act. On the third day, in the morning hours, when PW1 was going to police station, Ruldu Ram, PW9, a member of village Panchayat met her on way and agreeing with her advised PW1 to lodge the report with the police. The FIR of the incident was lodged in the morning of 31.10.1991. An offence under Section 376 IPC was registered and the investigation commenced.

On 31.10.1991 at 12.15 p.m. Dr. Mudita Gupta, PW5, conducted medico-legal examination of the prosecutrix and found the following injuries on her person :

> Local Exam - No external injury. On retracting the labia - erythema seen. Hymen torn - irregular edges. Posterior vaginal wall tear about 0.5 cm in length. No blood clot seen. No evidence of healing, no pus seen - foul smell.
>
> Tenderness. No sperms were seen.
>
> The observations noted by Dr. Mudita Gupta were that the prosecutrix had changed her clothes and taken a bath also on the next day of the incident. The victim had passed urine and stool about one hour after the incident. There was no external injury on any part of the body of the victim. Dr. Mudita Gupta opined that possibility of commission of rape on the prosecutrix on 29.10.1991 could not be ruled out.

The accused was arrested on 31.10.1991 and subjected to medico-legal examination on the same day. Dr. Jagdish Gupta P.W.6, who examined the accused, recorded the result of his medico-legal examination as under:-

The general behaviour of the patient was normal. The mental condition was normal. Bath not taken for the last five days. Urine passed many times. Passing motion normally.

No stains were found on the body of the patient. Clothing and under-garments.

No injury marks were present on genitals.

No venereal disease was found.

On examination of genital, pubic hairs were present. Penis normal, prepuse retracted, frenum normal. Testicles were normal. There were following injuries present on his person:-

Multiple contusions, some of them were patterned on back, buttocks posteromedial aspect of thigh. Redish in colour.

Dr. Jagdish Gupta opined that there was nothing to suggest that the accused was not fit to perform sexual intercourse.

At the trial the prosecutrix appeared as PW7 and her mother was examined as PW1. The prosecutrix was 8 years of age at the time of her examination. The Court conducted preliminary examination of the witness and observed that the witness understood the sanctity of oath and then proceeded to examine her after administering oath to her. She stated that the accused was known to her as he was the brother of her Mausi (Aunt) and was on visiting terms with her Mausi residing in her neighbourhood. On the date and at the time of the incident the accused came to her house in the absence of her mother or any other member of the family, untied the string of her salwar and also untied the string of his kachcha (underwear). Thereafter the accused put his organ into her private part. The learned Sessions Judge has noted in the statement of the witness that the witness had specifically stated that the accused had inserted his penis into her private part and due to the act committed by the accused blood had started oozing out of her. The accused remained at the place of the incident for one or two minutes and thereafter disappeared. She had felt pain when the act was committed by the accused. The accused had made the prosecutrix lie down on the cot which was spread on the lintel of the house. At that time the sun had set in and darkness had started spreading. The mother returned to home at about 8 p.m. when she narrated the incident to her. PW1, the mother of the prosecutrix, has corroborated the version of the victim.

The doctors, who had examined the prosecutrix and the accused respectively, appeared in the witness box and stated the results of the respective medico-legal examinations conducted and observations made by them as noticed hereinabove. Ruldu Ram, PW9 corroborated the version of PW1. Smt. Premi, co-sister of PW1, appeared in the witness box as PW8 but she turned hostile and denied having any knowledge of the occurrence. The learned Sessions Judge found the prosecution story having been substantiated fully by the prosecution evidence. He found the prosecutrix and her mother truthful witnesses and worthy of credence. The version of the prosecutrix stood corroborated by the testimony of her mother and the latter testimony stood corroborated by the statement of Ruldu Ram, PW9, the village Panch and the FIR. The learned Sessions Judge also found that the medical testimony corroborates the version of the incident as given by the prosecutrix. The clothes of the prosecutrix were blood-stained. The salwar which was worn by the prosecutrix at the time of the incident and which was seized by the police was sent for chemical examination. According to the report of Chemical Examiner of State of Punjab spermatozoa was detected on the salwar though not on the shirt of the prosecutrix and underwear of the accused. The learned Sessions Judge convicted the accused and sentenced him as stated hereinabove.

A perusal of the judgment of the High Court shows that delay in lodging the FIR, change in the description by PW1 of the exact place where the prosecutrix was raped (i.e. shifting of the scene of incident), and non-examination of two or three little girls who were playing with the prosecutrix soon before the incident - are the factors, which have persuaded the learned Judges of the High Court in forming an opinion that prosecution story was doubtful. The learned Judges have also noted that the prosecutrixs hymen could have been ruptured by a fall also and there was no corresponding injury on the private parts of the accused which factors taken together rendered the prosecution story doubtful.

Here it would be worthwhile to mention that in his statement under Section 313 of the Cr.P.C. the accused denied the prosecution story and at the end of the statement stated that he was suffering from mental disorder at the time of the incident. While the learned Sessions Judge found the plea raised by the accused of no significance, the learned Judges of the High Court have observed that in view of the mental condition of the appellant who was suffering from schizophrenia before and after the occurrence there is a reasonable doubt as regards one or more of the ingredients of the offence. In support of such observation the High Court has referred to the decision of this Court in Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat - (1964) 2 Cr.L.J. 472.

We have heard the learned counsel for the parties. Shri Anil Soni, the learned counsel appearing for the State of Himachal Pradesh has vehemently attacked the judgment of the High Court submitting that on the evidence available the findings arrived at by the learned Sessions Judge were not liable to be interfered with and the judgment of the High Court verges on perversity. An entirely

unmerited acquittal and that too from a serious charge where an innocent girl of tender years was raped by a distant relation of hers in her own house has occasioned a gross failure of justice and therefore the judgment of the High Court deserves to be set aside, submitted the learned Counsel for State. Shri Shrish Kumar Misra, the learned counsel for the respondent has supported the judgment of the High Court. Having carefully considered the contending submissions, we are of the opinion that the appeal deserves to be allowed and the judgment of the High Court deserves to be set aside. We have given our thoughtful consideration to the submission made and have independently appreciated the evidence to satisfy our judicial conscious. We deal with each of the reasonings which have prevailed with the High Court in doubting the prosecution story.

Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case. In the present case, PW1__the mother of the prosecutrix is a widow. The accused is a close relation of brother of late husband of PW1. PW1 obviously needed her family members consisting of her in-laws to accompany her or at least help her in lodging the first information report at the police station. The incident having occurred in a village, the approach of the in-laws of PW1 displayed rusticity in first calling upon the father of the accused and complaining to him of what his son had done. It remained an unpleasant family affair on the next day of the incident which was tried to be settled, if it could be, within the walls of family. That failed. It is thereafter only that the complainant, the widow woman, left all by herself and having no male family member willing to accompany her, proceeded alone to police station. She was lent moral support by Ruldu Ram, the village Panch, whereupon the report of the incident was lodged. The sequence of events soon following the crime and as described by the prosecution witnesses sounds quite natural and provides a satisfactory explanation for the delay. It was found to be so by the learned Sessions Judge. The High Court has not looked into the explanation offered and very superficially recorded a finding of the delay having remained unexplained and hence fatal to the prosecution case. It is common knowledge and also judicially noted fact that incidents like rape, more so when the perpetrator of the crime happens to be a member of the family or related therewith, involve the honour of the family and therefore there is a reluctance on the part of the family of the victim to report the matter to the police and carry the same to the court. A cool thought may precede lodging of the FIR. Such are the observations found to have been made by this Court in State of Punjab Vs. Gurmit Singh & Ors., (1996) 2 SCC 384 and also in the case of Harpal Singh (1981) SCC Crl. 208. We are satisfied that the delay in making the FIR has been satisfactorily explained and therefore does not cause any dent in the prosecution case.

According to the High Court, the FIR states the occurrence of rape to have taken place in the room on the first floor of the building but according to the statement of PW1 as recorded in the Court, the rape was committed on the prosecutrix in the open on the lintel of the house thus, according to the High Court, there was a doubt raised about the place of the incident which was an infirmity in the

prosecution story. The room and the lintel are situated close to each other. PW1 is not an eye-witness to the incident. When she reached home she found her daughter, the victim of rape lying on the lintel of the house below the cot. A perusal of the site plan shows the distance between the two places is insignficant. Moreover, such minor inconsistency coming from the mouth of PW1, who is not an eye- witness, was of no significance and caused no infirmity in the prosecution case when the overall narration of the incident given by her is found to be natural and trustworthy. It is pertinent to note that PW1 was only corroborating the statement of PW7, the young victim of rape and the latters testimony was found to be very natural and inspiring confidence by the learned Sessions Judge who had recorded her statement. The learned Sessions Judge had himself inspected the site of the incident and noted in his inspection note inter alia that the other houses were situated at a distance and another house situated nearest to the house where incident had taken place was about 50 yards away. The main road was at a distance of 100 or 150 yards from the house as shown in the site plan and there was also a tree which blocked the vision to some extent from the main road towards the first floor and rooms as shown in the site plan on the first floor. Thus, the place of the incident was secluded one and not visible from distance. Similar facts were deposed to by the investigating officer. The learned Sessions Judge had rightly noted in his judgment, relying on the evidence adduced and the observations made at the time of spot inspection, that the room and the lintel are situated near to each other and therefore the so-called inconsistency was immaterial and insignificant. The High Court was not right in ignoring this finding of the trial court or even otherwise making this insignificant discrepancy, if at all it is a discrepancy, a major lacuna in the prosecution case. It is not so.

So far as non-examination of other witnesses and an adverse inference drawn by the High Court therefrom is concerned, here again we find ourselves not persuaded to subscribe to the view taken by the High Court. The prosecutrix PW7 has stated that soon before the incident she was playing with three girl-children of the same age as of hers and they were present when the accused committed rape on her. One of the girls picked up a broom and had tried to scar away the accused by striking the broom on him. This little friend of the victim had also raised a hue and cry but none from the neighbourhood came to the spot. These girls were none else than daughters of her uncle. What the High Court has failed to see is that these girls were of tender age and could hardly be expected to describe the act of forcible sexual intercourse committed by the accused on PW7. Secondly, these girls would obviously be under the influence of their parents. We have already noted the co-sister of PW1 turning hostile and not supporting the prosecution version. How could these little girls be expected to be away from the influence of their parents and depose freely and truthfully in the Court? Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. The Court has first to assess the trustworthiness of the evidence adduced and available on record. If the Court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence which tough available has

been withheld from the Court then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. It is now well-settled that conviction for an offence of rape can be based on the sole testimony of prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc. if the same is found to be natural, trustworthy and worth being relied on. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. ____ is the law declared in State of Punjab Vs. Gurmit Singh & Ors. (1996) 2 SCC 384. [Also see State of Rajasthan Vs. N.K. -(2000) 5 SCC 30, State of Himach Pradesh Vs. Lekh Raj & Anr. - (2000) 1 SCC 247, Madan Gopal Kakkad Vs. Naval Dubey and Anr. - (1992) 3 SCC 204]. In the present case we are clearly of the opinion that in view of the accused being a relation of the in-laws of the mother of the prosecutrix and the other young girls who are alleged to have been not examined being from the family of such in-laws, it is futile to expect that such girls would have been allowed by their parents to be examined as witnesses, and if allowed, could have freely deposed to in the Court. The question of drawing an adverse inference against the prosecution for such non-examination does not arise.

The observations made and noted by Dr. Mudita Gupta during medico legal examination of PW7 clearly make 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 the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa. [See - Narayanamma Vs. State of Karnataka - (1994) 5 SCC 728]. Slightest penetration of penis into vagina without rupturing the hymen would constitute rape. [See - Madan Gopal Kakkad Vs. Naval Dubey - (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 Modis 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.

Lastly, remains the observation of the High Court regarding mental state of the accused-respondent. The plea taken by the accused was that he was suffering from some mental disorder and not that he was insane at the time of incident. In his defence the accused examined Dr. R.S. Dalwalia, DW2. He had examined the accused on 9.6.1992 on a requisition made by jail authorities for his psychiatric examination. He was diagnosed to be a case of schizophrenia and necessary treatment was prescribed for him. Before the commencement of trial the learned Sessions Judge had also held an enquiry under Section 329 of the Code of Criminal Procedure to find out if the accused-respondent was fit and capable to defend himself. Vide order dated 24.6.1993 the learned Sessions Judge recorded a finding that the accused was fit to make his defence and accordingly the trial was proceeded ahead. The only provision of law relevant to the plea of the accused is Section 84 of the Indian Penal Code, 1860 which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Such is neither the plea nor evidence adduced by the accused. In Dahyabhais case (supra) relied on by the High Court, this Court has held - when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime. The High Court has picked up and quoted another passage from the judgment dealing with burden of proof according to which the burden of proof on the accused is no higher than that which rests upon a party to civil proceedings and it is sufficient if the evidence adduced by the accused raises a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused though not establishing conclusively the plea of insanity at the time of commission of the offence. We fail to understand and appreciate how the passage quoted by the High Court advanced the plea of the accused or raised any doubt about his guilt. On the contrary, the passage reproduced hereinabove from the judgment of this Court in Dahyabhais case (supra) supports the prosecution. In the case of Dahyabhai itself wantonness, vengeful mood or determination of the accused to see that the victim did not escape was held not sufficient to prove that the accused was doing the act under some hallucination. The plea raised before and entertained by the High Court, in the present case, was one of the accused suffering from schizophrenia. Schizophrenia is one of a group of severe emotional disorders, usually of psychotic proportions, characterized by misinterpretation and retreat from reality, delusions, hallucinations, ambivalence, inappropriate affect, and withdrawn, bizarre, or regressive behavior; Popularly and erroneously called split personality. [See - Medical- Legal Dictionary, Sloane- Docland, p. 628]. We are not persuaded to hold even prima facie, on the material available on record, that the accused was suffering from unsoundness of mind and that too of a nature which would have rendered him incapable of knowing the nature of the act which he was doing or incapable of distinguishing between wrong or right as per law. The entire discussion by the High Court on this aspect of the case was irrelevant and meaningless. The learned counsel for the respondent has very fairly not persisted in pressing this plea before us.

In State of Punjab Vs. Gurmit Singh & Ors., (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. For the foregoing reasons we hold the judgment of the High Court wholly unsustainable in law. We are unhesitatingly of the opinion that the Division Bench of the High Court ought not to have interfered with the well-reasoned, detailed and well-articulated judgment of the Sessions Court wherein we find no infirmity. For the foregoing reasons the appeal is allowed. The judgment of the High Court is set aside and the judgment of the Sessions Court holding the accused guilty of an offence punishable under Section 376 IPC along with the sentence passed is restored. The bail bonds of the accused-respondent are cancelled. He shall be taken into custody to serve out the sentence passed by the trial court.