

Devo Vs. the State

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Court : Himachal Pradesh

Decided On : Dec-07-1993

Reported in : 1994CriLJ2971

Judge : A.L. Vaidya, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 90, 375 and 376; ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Criminal Appeal No. 128 of 1993

Appellant : Devo

Respondent : The State

Advocate for Def. : Gopal Sisodia, Law Officer

Advocate for Pet/Ap. : Deepak Gupta, Adv.

Disposition : Appeal dismissed

Judgement :

A.L. Vaidya, J.

1. The present appellant Devo was convicted under Section 376 of the Indian Penal Code for committing the offence of rape and has been sentenced to undergo imprisonment for a period of seven years and to pay a fine of Rs. 2000/-

and in default of payment of fine the convict has further been ordered to undergo imprisonment for six months vide judgment dated 9th July, 1993 by the Addl. Sessions Judge (I) Kangra Division at Dharamsala.

2. The present appellant is the resident of village Bohd situated at a distance of about 3 KM from Nurpur town of District Kangra. The prosecutrix, Kumari Anita, was also the resident of the same village. It has been the prosecution case that this prosecutrix suffered from polio and as a consequence thereof she was handicapped and on that account did not have her schooling. Her father is one Shri Bishamber who in the year 1990 was running a tea stall at Amritsar for earning his livelihood. The prosecutrix at the relevant time was residing with her mother, Smt. Asha Devi, (PW 3) in village Bodh. The prosecutrix has one sister named Kumari Mamta who was suffering from paralysis. Both these sisters, being handicapped, were looked after by the mother. The occurrence took place on 16th February, 1990 and, admittedly, the age of the prosecutrix at that time was 19 years.

3. According to the prosecution, on February 16, 1990, Smt. Asha Devi, the mother of the Prosecutrix, had gone to village Baral for fetching fodder and for this purpose she left the house at about 2.30 in the after- noon and in her absence both the sisters were all alone in the house. This appellant Devo at that time was running a vegetable shop in the village which shop was situated near the house of the prosecutrix. The appellant when came to know that the two sisters were all alone in the house, he went to their house and entered the courtyard. The prosecutrix came in the courtyard to talk to the accused but at that very time the accused took the prosecutrix, taking undue advantage of her physical disability, to the cattle shed situated besides the courtyard and there he was alleged to have committed sexual intercourse with the prosecutrix against her will, and without her consent and after satisfying his lust the appellant ran away from the spot leaving behind the helpless prosecutrix in a most deplorable state, According to the prosecution, the prosecutrix after the commission of the crime came out of the cattle shed and sat on Charpoy which was lying in the courtyard and waited for the arrival of her mother.

4. Smt. Asha Devi, the mother of the prosecutrix, came back to the house at about 3.30 in the after-noon and after noticing her daughter in that state was horrified. The prosecutrix at that time, according to the prosecution, was lying naked on the Charpoy. She was weeping and on the query of her mother, she narrated the alleged occurrence to the mother who thereafter contacted some persons of the village and then rushed to the Police Station, Nurpur. She lodged the report in the Police Station. The mother of the prosecutrix then rushed to Amritsar to inform her husband and when her husband came to the village, consoled the prosecutrix. In the meanwhile the accused absconded and his whereabouts could not be traced till April 23, 1990 when he was arrested. The prosecutrix was medically examined and after completing the investigation the present appellant was put under trial for the alleged commission of the offence under Section 376 I.P.C.

5. The said conviction and sentence have been assailed in the present appeal on various grounds, however, the main being that even if the appellant was connected with the occurrence it was the result of the consent of the prosecutrix and on that account the offence did not come within the ambit of Section 376 IPC.

6. I have heard the learned counsel for the parties and have also minutely gone through the record.

7. According to the learned counsel for the appellant, his simple defence, as stated by the appellant during his statement made under Section 313 Cr.P.C. has been simple denial, but on the other hand, there is some legal evidence examined during the trial which had connected the appellant with the alleged occurrence and, as such, simple denial of the occurrence by the accused will not be in a way helpful to his defence. It has further been contended that from the evidence examined on behalf of the prosecution it stood established that the sexual intercourse committed by the accused was the result of the free consent given by the prosecutrix and, accordingly, this defence which was available from the prosecution evidence in itself could be availed of by the accused and in that view of the matter the offence under Section 376 IPC was not established beyond all reasonable doubt. It is not so simple a matter, as has been contended on behalf of the appellant. In order to come to a specific conclusion the evidence and the

circumstances present and established during the trial have to be appreciated and scrutinized in a legal manner.

8. Section 90 of the Indian Penal Code deals with the term 'consent'. This Section does not define 'consent' but describes what is not 'consent'.

9. Section 90 IPC says that a 'consent' is not a true 'consent' if it is given :-

(1) by a person under fear of injury; and the person obtaining the (2) by a person under a consent knows or has reason to misconception of fact; believe this (3) by a person of unsound mind; and who is unable to understand (4) by a person who is intoxicated; the nature and consequence of that to which he gives his consent (5) by a person under twelve years of age

10. In so far as the 'consent' by a person of unsound mind and by a person who is intoxicated is concerned, such a person should be unable to understand the nature and consequences of that to which he gives his consent. The unsoundness of mind should be of that gravity on the basis of which the person giving a 'consent' is not in a position to understand the nature and consequences of that to which he has given his consent. Similarly, the intoxication should also be of that degree which adversely affects the mental ability of the person giving consent. 11. There can be certain cases where due to physical and mental disability, which cannot be termed as an unsoundness of mind, the person because of that disability is not in a position to actually understand the nature and consequences of the alleged 'consent' if at all given by such person. In that event the factum of such person having given a consent' has to be appreciated accordingly and it will depend upon the circumstances established in any particular case.

12. Consent is an act of reason, accompanied with deliberation, the mind weighing as a balance, the good and evil of each side. Consent thus means an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done. Thus, the person giving the consent should know the nature of the act that is being done which is essential to a consent to an act.

13. Offence of rape has been defined under Section 375 IPC which included the sexual intercourse committed on a woman against her will, without her consent. There are other circumstances also which have been provided under Section 375 IPC but so far as the present case is concerned these two circumstances are very much relevant.

14. The first clause of Section 375 IPC, that is, 'against her will' only intended to refer to a fully conscious normal person, that is, who is in exclusive possession of her senses and reason and is capable of exercising of her own volition. This term 'against will' 'consent' would ordinarily refer to the same act of mind. Both these factors are the functions of volition, but as the term 'consent' is susceptible of some variation in construction, and may include a subsequent consent which the word 'will' necessarily excludes. The word 'will' implies consciousness, cognition and mental determination. It is that faculty or power of mind by which one determines either to do or not to do something. In the present case the prosecutrix is a disabled young lady and in order to appreciate her statement made on oath before the trial court the factum that the alleged act was committed against her will and without her consent has to be looked into in the background of the aforesaid observations.

15. In a case of present nature where the occurrence is alleged to have taken place without there being any third person present at that particular moment. The other sister of the prosecutrix who was alleged to be the other occupant of the house at that particular time again was a disabled girl. In such circumstances the prosecutrix herself is the best witness to prove whether the accused committed sexual intercourse with her without her consent or against her will. For the proof of such an offence it is otherwise seldom that direct evidence is available beyond the evidence of the raped female. A conviction ordinarily for rape almost entirely depends on the credibility of the woman so far as the essential ingredients of the offence are concerned. The other evidence being merely of corroborative nature. Thus the testimony of the prosecutrix is very much vital.

16. The prosecutrix in the present case has been examined as PW 4. This court being the court of appeal had absolutely no occasion to observe anything about

the said witness but such an occasion was definitely available before the Addl. Sessions Judge who personally recorded the evidence of the prosecutrix observing her physical and mental condition of mind. In this behalf the following observations made by the learned Addl. Sessions Judge would be very much relevant in order to appreciate the deposition made by the prosecutrix on oath:

- (1) The speech of the witness impaired due to polio;
- (2) The witness is incapable of understanding fully the questions on account of her infirmity;
- (3) The prosecutrix cannot walk straight on account of polio attack. She limps and her right arm and right leg are damaged.

17. The trial court did not make this observation that the prosecutrix was incapable of understanding. During the course of her examination the learned Judge made the aforesaid remarks with respect to the power of understanding possessed by the lady when the prosecutrix was asked a question regarding her mother and she kept mum for a while and thereafter the learned Judge made the observations regarding her understanding. These observations in a way only reflected that the prosecutrix was a disabled young girl and her sense of understanding was observed not to have fully matured on account of her infirmity because one of the questions put to her could not be replied by the prosecutrix and the learned Judge while observing the prosecutrix in that behalf made such observations.

18. The prosecutrix while appearing as PW 4 deposed on oath that she was an uneducated girl who had no schooling. According to her, she was suffering from polio and at this juncture the court made the observation that the speech of the witness had been impaired due to polio. She stated that she knew the accused as he was the resident of her village. She further added that this accused had raped her. According to her, one year back the accused had come to her house at about 2.00 or 2.30 in the after-noon and he then lifted her bodily when she was sitting on a cot in the courtyard of her house. She further added that the accused took her to the cattle shed and tore her clothes and stripped her Salwar and thereafter he raped her. She further added that after committing the said act he ran away. She

also stated that while the accused was committing sexual intercourse with her he had gagged her mouth and when the accused disappeared she started crying. She further added that she came back to the courtyard and sat on the Charpoy while her Salwar was left at the cattle shed. She also disclosed that at that time her mother had gone to bring grass and when her mother returned then she was sitting on the Charpoy in the courtyard and she disclosed the entire occurrence to her mother. At this stage a question was put to the witness as to what her mother did after she narrated the incident to her, the witness kept mum for sometime. Learned trial court then made an observation that the witness was incapable of understanding fully the question on account of her infirmity.

19. The witness identified her Salwar, Banyan and shirt which were Ex. P 1 to Ex. P3. To a question put up by the court she replied that when she revealed the occurrence to her mother then her mother took her to police station and Hospital. She also stated that when the accused raped her at the cattle shed then he had bitten her on the left cheek and on account of that she sustained the abrasion. At this stage of the examination of the witness the trial court observed that the prosecutrix could not walk straight on account of the polio attack. She limped and her right arm and right leg were damaged.

20. During cross-examination she stated very specifically that the person who had raped her was the accused. However, one sentence was stated by her that it was correct that the accused did not rape her. She added that she felt severe pains when sexual intercourse was committed by the accused and at that time she tried to free herself from the clutches of the accused. According to her, the accused had kept her legs on the shoulders at the time of committing the offence. She also disclosed that at the time of rape she did not bite the accused nor repelled him by attacking with her hands or by scratching him with her nails. In the next breath she stated that the accused had overpowered her by holding her by her shoulders. She also stated that at the time of commission of rape she tried to repel the accused by her hands and she had scratched the penis of the rapist at the time of the rape. According to her, she did so when she had severe pain. She also stated that one Prem was residing in their house as a tenant. She also stated that before the arrival of her mother some persons had come to the courtyard of their house

where she was sitting on the cot there. She had stated that about 15 persons had come there. She also stated that those persons were also their neighbours. The witness further added that one Ram Piari followed her mother to the courtyard.

21. Dr. Sushma Sharma (P W 1) examined the prosecutrix in Civil Hospital, Nurgur, on 16th February, 1990, the day of occurrence. Ex. P A is the medico legal certificate issued by her.

22. According to the Doctor, she observed the following injuries on the person of the prosecutrix:

1. There was a circular abrasion of reddish colour with contusion present on the left side of the cheek of the prosecutrix. The zone of the healthy skin was present and it was measuring 2 cm. in diameter.
2. There was a reddish abrasion on the right forearm below the elbow 5 cm. x 1 cm. In size.
3. There small multiple abrasions present on the breast. Its numbers were three - one on the right side and two on the left side.
4. There was reddish abrasion 4 cm. x 1 cm. present on interior surface of the right thigh on the upper one third portion.
5. There was reddish abrasion 4 cm. x 1/2 cm. on left thigh. It was situated on the interior medial surface at the junction of upper-one-third and lower two-third of the thigh.

On local examination the doctor observed as under:

The pubic hair of the prosecutrix were well developed. The melting on the same were present. The pubic hair were cut. Those were preserved for the purpose of sending the same for chemical examination. There was no injury on the vulva. Conjestion Was present on the lavia minora and majora. Blood Was present on the vagina and vulva. Loose hair were present over the vulva and vagina.

Regarding Hymen the doctor's opinion has been as follows :

The hymen ruptured fresh. The blood was oozing out from the ruptured hymen as per vaginal examination. There were blood stains on the inner side of both the thighs. Blood stains were found on the clothes which the prosecutrix was wearing at that time. The clothes were spoiled with soil on the back side and the Salwar was found torn. There were stains of the blood on the shirt and the Salwar. The Banyan was also found torn from the top.

23. The doctor also took the vaginal smear of the prosecutrix which was sealed and handed over to the constable.

24. According to the Doctor, the duration of the injuries found on the person of the prosecutrix was ascertained to have been sustained by the prosecutrix within twentyfour hours of her medical examination. The medical examination was conducted at about 10.00 at night on the day of occurrence.

25. The doctor further deposed that Chemical Examiner's report Ex. PB was placed for her perusal and on perusal of the report and on the basis of her observations, as referred to above, she was of the opinion that the prosecutrix had been subjected to sexual intercourse. The doctor also took into possession Salwar, Shirt and Banyan of the prosecutrix. Salwar Ex. P 1, Shirt Ex. P2 and Banyan Ex. P3 were the same. She also added that injury No. 1 could not have been caused by teeth bite. She also opined that this injury could have been caused by nails. The doctor was not subjected to any cross-examination except she was asked the date and time when she medically examined the prosecutrix.

26. PW 3 is Smt. Asha Devi, the mother of the prosecutrix. This lady stated on oath that prosecutrix Kumari Anita was her elder daughter. Her age was about 21 to 22 years. She stated that her husband was running a tea stall at Amritsar. According to her,, she had gone to fetch sewing machine from a village Barala at about 2 afternoon. This village Barala is situated at a distance of about one Km. from her village Bohd. Mrs. Ram Piari had accompanied her to village Barala. She also stated that when she left for village Barala, then her daughters Anita and Mamta remained present in their house in village Bohd. The remaining children of her had gone to School. She further added that Mamta was mentally deranged besides suffering from polio. Kumari Anita was also suffering from polio. The right

hand of Kumari Anita was paralytical. Her right leg was also suffering from the same defect. She stated that she returned from village Barala in between 3.00 and 3.30 p.m. along with Smt. Ram Piari.

27. The witness further disclosed that when she reached at her house, she found Kumari Anita lying naked on the Charpoy. She was weeping and she revealed that accused Devo came there, who called her towards the cattle shed and inside the cattle shed, he committed rape (Balaatkar). According to this witness, the prosecutrix also disclosed that Devo at that time asked her to come to him as he wanted to deliver some message. The witness was also informed by the prosecutrix that she went to the accused and the accused had pushed her inside the cattle shed and thereafter raped her. The prosecutrix raised hue and cry. A report to the Police Ext. PD was made by this witness and thereafter, the medical examination was conducted. This witness identified the clothes Exts. P 1 to P3 which the prosecutrix was wearing when she was raped. She stated that Devo was running a vegetable Khokha near her house. She also went to Amritsar to inform her husband about the incident.

28. A lengthy cross-examination was conducted upon her. Certain minor discrepancies have been pointed out on behalf of the accused which I think are not very much relevant as they do not adversely affect the version given by this witness. She stated that she had not told the police that on account of polio, Anita was mentally retarded. According to her, she did not tell that her faculties of understanding and perceiving had been adversely affected by polio attack. She also disclosed that when she reached her house, she found that Anita was lying on the cot in the posture of half lying and half sitting. The salwar had stripped from her leg. According to this witness, the prosecutrix had washed her salwar before her arrival. She also stated that Anita was wearing that salwar when the witness took her to the police station, which was almost wet. She stated that shirt and Banyan had not been washed. She denied the suggestion that the prosecutrix had told her that some unknown person had raped her. She had been very specific in deposing that Anita informed her that Devo son of the Chuha, the accused had raped her. She also denied the suggestion that accused was implicated after deliberation.

29. PW 2 is Dr.A.R. Dutta, who examined the accused on 23-4-1991 at about 11-45 a.m. The medico-legal certificate issued by the doctor was Ext. PC on record and on the basis of the same, the doctor opined that the accused was capable of sexual intercourse.

30. PW 5 is Shri Bishambar, the father of the prosecutrix who deposed that on 17-2-1991, he was at Amritsar, who deposed that Anita had been raped. This witness on receiving the information, rushed to his village and reached there in the evening of 17-2-1991. In his presence, the police took into possession some soil from the cattle shed vide recovery memo Ext. PE. Ext. P4 was the soil.

31. PW 6, Shri Krishan Lal, Head constable, PW 7, Shri Mohinder Singh, Inspector, PW 8, Shri Devi Singh, Sub-Inspector and PW 9, Shri Joginder Singh, Head constable were the police officials who were associated in the investigation of the case. PW 10 is Shri Nidhi Singh, Sub Inspector who stated that on 22-4-1990, the investigation of the case was handed over to him and on 22-4-1990 he received a telephone from Shri Hari Singh from village Dhari Jalot at about 10.39 p.m. that the accused was staying at the house of his father-in-law. On receipt of the telephone, he rushed to that place and arrested the accused on 23-4-1990.

32. On the basis of the aforesaid evidence examined during the trial on behalf of the prosecution, it has been submitted on behalf of the appellant that there are certain circumstances which, if taken into consideration do not rule out the possibility of the sexual act having been committed with the free consent of the prosecutrix. In this behalf, the learned counsel has contended that the cross-examination conducted on the prosecutrix clearly revealed that the consent of the prosecutrix in the occurrence was vitiated. In this behalf, some references to the cross-examination have been made.

33. Needless to say, Kumari Anita was a handicapped young girl, whose one hand and one leg had been adversely affected by polio. As observed by the trial court, there was some defect in her speaking due to polio and during cross-examination, she could not even understand fully the questions put to her regarding the fact as to what mother did after she narrated the occurrence to her. Taking into consideration all the aspects, the cross-examination conducted on her will not in

any way help the case of the accused to prove the consent on the part of the prosecutrix, especially when there are certain circumstances which proved on record and those taken into consideration repel the submissions put forth on behalf of the appellant.

34. It has also been contended on behalf of the appellant that there was no marks of injury on the person of the prosecutrix or on the person of the accused found at the time of occurrence. According to learned counsel, there is nothing on record to suggest that the prosecutrix was threatened by the accused and it was under that threat that she submitted to the desire of the accused.

35. The aforesaid submission put forth on behalf of the appellant will not carry any legal weight whatsoever as has been contended in case some proved circumstances during the trial are taken into consideration which would reflect that the prosecutrix was not a consenting party. Those circumstances are summarised as under:-

(i) The physical and mental facility of the prosecutrix has been observed by the trial court as already referred to above.

(ii) The prosecutrix just after the occurrence was found in a most pitiable condition lying naked on the Charpoy.

(iii) The clothes which the prosecutrix was wearing at that time have been found to be torn as has been stated by the mother of the prosecutrix and PW 1, the doctor, who medically examined the prosecutrix. The doctor in very clear terms deposed that there were blood stains on the inner side of both the thighs. The clothes which the prosecutrix was wearing at that time were having blood stains. The clothes were soiled with soil on back side and the salwar was found torn. There were blood stains on the shirt and the salwar. The banyan was also found torn from the top. The doctor found certain injuries on the person of the prosecutrix which have already been referred above and those injuries were five in number.

(iv) The prosecutrix in her cross-examination before the court stated that she had scratched the penis of the accused at the time of rape and it has been contended

that no injury to that effect has been found on that part of the accused when he was medically examined. It may be referred here that the accused absconded from the spot just after the occurrence and was arrested on 23-4-1990 after more than two months of the occurrence when he was examined. Under natural circumstances, the likelihood of such injury being caused within this period cannot be ruled out.

(v) Ext. PJ is the report of the Serologist. It was opined that the shirt and pubic hair of the prosecutrix were stained with human blood.

(vi) Ext. PB is the Chemical Examiner's report, who opined that spermatozoa was detected on the Salwar of the prosecutrix and on vaginal slides. However, according to Chemical Examiner, no spermatozoa was detected on the shirt and Banyan of the prosecutrix and on the dust mixed with blood and also on the pubic half,

36. On the basis of the aforesaid proved circumstances coupled with the statement of the prosecutrix along with medical evidence and Experts' reports it is clearly established that the sexual intercourse committed with the prosecutrix by the accused was not only against the will of the prosecutrix, but also without her consent. The accused who happened to be young man of about 22 years of age with normal health has taken an advantage of the disability of the young lady, the prosecutrix and committed the offence which stood clearly reflected from the proved circumstances discussed above. In such a case, it would not lie in the mouth of such person to talk of consent.

37. Last but not the least, it has been argued that other witnesses including Smt. Ram Piari, who reached the spot just after the occurrence have not been examined and this creates doubt in the prosecution case. I think such an inference is not at all available to the accused, especially when it was only the prosecutrix who was the sole eye-witness of the occurrence. It cannot be said on any ground that the version given by the mother cannot be believed. Even if other witnesses have been examined, that would not have in a way improved the prosecution case, especially when the prosecutrix and the mother of the prosecutrix were equally competent witnesses, and their version has to be accepted as a truthful

and correct to the occurrence. Moreover, in the present case, the doctor who examined the prosecutrix fully corroborated the version of the prosecutrix.

38. There are two other important factors which have to be taken note of. Firstly, there is nothing on record to suggest even remotely as to why the accused was being implicated by the prosecutrix or her mother. There is nothing on record to show that the parties had strained relations at any time. Secondly, the accused after occurrence absconded from the spot and was arrested after about two months. These circumstances in themselves may not help the prosecution ease, but on the basis of the proved circumstances about the occurrence clearly established beyond all reasonable doubt the offence against the accused, these additional circumstances give full support to the case of the prosecution.

39. No other point has been stressed.

40. In view of the foregoing reasons, I do not find any merit in the present appeal and accordingly dismiss the same. The judgment of the trial court convicting the appellant under Section 376 I.P.C. and sentencing him as referred to above is, however, maintained.