

(1996) 08 P&H CK 0089

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 371-SB of 1995

Jaswinder Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Aug. 27, 1996

Citation: (1996) 3 RCR(Criminal) 824

Hon'ble Judges: V.S. Aggarwal, J

Advocate: D.P. Singh, J.S. Brar, R.S. Cheema, Advocates for appearing Parties

Judgement

V.S. Aggarwal, J.

1. By this common judgment Criminal Appeal No. 371SB of 1995, titled Jaswinder Singh v. State of Punjab and Criminal Appeal No. 248SB of 1993 titled Gurjit Singh v. State of Punjab can conveniently be disposed of together as the facts involved in both the appeals are identical.

2. More than two centuries ago Earl of Chatham (Speech on Wilkes case 9th January 1770) said:

"Where law ends, tyranny begins."

The speaker appeared prophetic. Rule of law must reign supreme under wellknown canons of jurisprudence. One such known canon in criminal jurisprudence is golden thread of proof beyond reasonable doubt. It runs through the web of our criminal jurisprudence. It is for the prosecution to prove everything for establishment of charge against the accused. Still ground realities have to be taken care of. The dedication to this doctrine of benefit of doubt should not be allowed to reign sodden and supreme.

3. The facts of the present case would make the position clear. Harjinder Kaur is the prosecutrix. She was a student of class 10th. Her father Gurdip Singh is a constable. The grandmother of Harjinder Kaur had taken one room on rent at Tarn Taran. Harjinder Kaur was living with her grandmother.

4. On 1.10.1993 after closure of the school at about 1.00 p.m., the prosecution case is that Harjinder Kaur was passing through Bohri Chowk, Tarn Taran. Jaswinder Singh and Baljit Singh met her. They asked her to accompany them on their Hero Honda motorcycle. She was threatened that in case she raised any alarm, she along with her brothers and parents would be killed. Afraid of the threat, she sat on the motorcycle and was taken by both of them towards Grain Market. At the Grain Market, a Maruti Car was parked. The driver of the vehicle (Maruti Car) was a young man of 19/20 years. She was thrown on the rear seat. Liquor was poured in her mouth by force. Her eyes were tied. She was taken to a room at some unknown place and was made to lie on a wooden bed. The cloth tied on her mouth was opened. She grappled with the appellant accused. Jaswinder Singh had broken the string of her Salwar. Baljit Singh caught her by her arms. The driver of the car caught her by legs. Thereupon, Jaswinder Singh raped her followed by Baljit Singh and driver of the Maruti Car. She was raped throughout the night. Her request to be left alone was not adhered to.

5. On 2.10.1993, the prosecutrix was taken to Sandhu Nursing Home, Tarn Taran and was admitted there. On 3.10.1993, the parents of the prosecutrix came to Sandhu Nursing Home. They got her discharged from the Nursing Home and got her admitted in the Civil Hospital and was examined there. The prosecutrix told her that she can identify the driver of the vehicle and that Jaswinder Singh and Baljit Singh belong to her village. On the basis of her statement Ex. PA, formal first information report was recorded.

6. Inspector Balbir Singh had taken up the investigation. He prepared the rough site plan, took the swabs and other parcels containing the clothes of the prosecutrix into possession which were sealed and deposited in the Malkhana. On 7.10.1993 Jaswinder Singh and Baljit Singh were arrested. Jaswinder Singh made a disclosure statement that he had kept concealed six photographs and two negatives in his house. The statement was recorded. In pursuance of that he got recovered the photographs and the negatives from a box. They were taken into possession vide a recovery memo. Gurjit Singh was arrested on 9.10.1993. The prosecution case is that he was told to keep his face muffled and was produced before a Judicial Magistrate for test identification parade. The said accused refused. The accused were medically examined. Gurjit Singh in presence of Kuldeep Singh had made a disclosure statement that car used by him was standing in the house of Jasbir Singh. In pursuance of that, car was recovered and taken into possession. Baljit Singh had also made a disclosure statement that the Yamaha motor cycle has been kept at his residential house. He led the police party and got recovered the motorcycle. On these broad facts, challan as against the accused appellants was submitted.

7. During the course of trial, the prosecution had examined 15 witnesses. It was followed by the statements of the accused persons. The prosecution evidence was put to them in the form of different questions. They denied all the incriminating

evidence that was put to them and pleaded their innocence. No defence evidence was produced. The learned trial court on appraisal of the evidence held that in the facts of the present case, there was no delay in recording of the first information report. It was held that prosecutrix was above 16 years of age. However, the trial court concluded that prosecutrix had been raped against her wish. The benefit of doubt was given to Baljit Singh because he had not been identified during the trial. The other two accused namely Jaswinder Singh and Gurjit Singh were held guilty of the offences punishable under Sections 366 and 376 IPC. They were each sentenced to undergo 10 years rigorous imprisonment and a fine of Rs. 1,000/ each for the offence punishable under Section 376 IPC. In default of payment of fine, they were to undergo further rigorous imprisonment for 3 months. For the offence punishable under Section 366 IPC, they were sentenced to one year rigorous imprisonment. Both the sentences were directed to run concurrently.

8. Aggrieved by the said judgment and the order of sentence, the appellants have preferred two separate appeals.

9. The first and foremost question that comes up for consideration is pertaining to the age of the prosecutrix. An attempt was made to urge that she was below 16 years of age at the time of the incident. Harjinder Kaur when stepped into the witness box gave her age as 16 years and was examined six months after the incident. There is no birth certificate available pertaining to the age of the prosecutrix. Jagdish Kaur PW5, Principal, Government Girls Senior Secondary School, Tarn Taran had brought admission record of Harjinder Kaur. The date of birth recorded was 1.4.1978 but during crossexamination, it was admitted that she had noted down the date from the record received from Arya Samaj School and there was no other verification. The father of the prosecutrix had made no statement about her age when he appeared as PW2. In this process, the school certificate was not corroborated because the date of birth recorded therein was simply reproduction of what was carried forward from another school. Dr. Baljit Singh PW4 had examined the xray of the prosecutrix and opined that she was 20 years of age. According to this witness there can be variation of age on either side. Keeping in view that there is no authentic proof about the age of the prosecutrix, therefore, it must be held that prosecution failed to prove that she was below the age of 16 years on 1.10.1993.

10. Learned counsel for the appellants urged that prosecutrix Harjinder Kaur was a woman of loose character and no reliance should be placed upon her testimony. Certain facts in the present case cannot be ignored. Jagdish Kaur, Principal of the school where prosecutrix was studying appeared as PW5. She during crossexamination stated that Harjinder Kaur remained absent from the school and her name was struck off on 21.9.1993. She was absent for more than 10 days. In other words, she was not attending the classes since the middle of September, 1993. During her crossexamination Harjinder Kaur admitted that their domestic

servant was missing and her parents were kept in custody for 4 days till the servant was recovered. She denied that she had been found in compromising position with that servant. These facts were highlighted and though it is not established that the prosecutrix was found to be having any such relationship with her servant, but she was absent from the school since the middle of September, 1993. Merely because if she was absent from the school, will it imply that she was a woman of loose character ? The answer would be in the negative. Even if for the sake of argument, the said plea is admitted, it does not mean that such a woman can be raped and sexually assaulted by any person. This question had been considered by the Supreme Court in the case of State of Punjab v. Gurmit Singh and others, 1996(2) SCC 384 and in paragraph 16 it was observed :

"Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, 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. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court"

Necessarily, therefore, the argument in its broad perspective cannot be accepted and has to be rejected.

11. Harjinder Kaur was the main witness and is the prosecutrix. She recited the sequence of evidence as to how she was taken and thereafter raped. In her own words, her statement reads :

"On 1.10.1993 on the closing of the school at about 1.00 a.m. I was going to my house and when I reached Bohri Chowk Amritsar, Jaswinder Singh and Baljit Singh came on a Hero Honda and met me. I identify Jaswinder Singh accused now present in court. However, Baljit Singh is not amongst the accused, now present in court. I have seen Baljit Singh who is now present in court, as an accused but he is not the person who had met me. I had named Baljit Singh s/o Harbans Singh, but actually I did not know the father's name of Baljit Singh. Jaswinder Singh told me to sit on the Hero Honda and caught hold of me from my hand and threatened to kill my parents in case I failed to do so. Jaswinder Singh was accompanied by one person who was called Baljit Singh. They made me to sit in the Hero Honda in between them and took me to Grain Market, Tarn Taran. One Maruti car having black glasses was standing there which was bearing registration No. PCP 5649. I do not remember the registration No. of Hero Honda. I was thrown in the car after tying me eyes with a piece of cloth. At that time Gurjit Singh, accused now present in court was near the car when I was thrown inside the car. While I was put into the car liquor was poured in my mouth. That car was driven by accused Gurjit Singh. I became unconscious in the car and I was taken in a room but do not know the place. Then Jaswinder Singh, Baljit Singh and Gurjit Singh committed rape on me but Baljit Singh was some other person. Jaswinder Singh had broken the string of my salwar and that Baljit Singh

had caught hold from my arms and Gurjit Singh had caught hold of my legs. They continued raping me for whole of the night."

During the crossexamination the witness stated that the motorcycle that was standing outside the Court was not the same in which she was kidnapped/abducted. She stated that Bohri Chowk, Tarn Taran from where she was removed is a thoroughfare and large number of people were present there. She also stated that only subsequently she learnt that she was in village Mal Mohri. She had not seen the house of Baljit Singh and that she had not shown to the police where she was raped. She was taken to the Hospital by two accused who remained there for about two hours. She had resisted and gave bites and nail scratches while they raped her.

12. It was urged that since the place from where she was removed is a thoroughfare, it cannot be held that she was taken without her consent. The expression "consent" is occurring in Section 375 of the Indian Penal Code would be pregnant with meanings. There is no controversy that if a woman is above 16 years of age and has sexual intercourse with her consent with another male, it will not be a rape as defined in Section 375 IPC. In normal circumstances consent would be to agree or to feel together. Webster's Third New International Dictionary explains "consent" as under :

"To express a willingness (as to accept a proposition or carry out a particular action): give assent or approval."

Stroud's Judicial Dictionary, Fourth Edition explains "consent" to be an act of reason accompanied with deliberation. It further mentions that every consent is an act involving submission. A woman consent to intercourse may be hesitant, reluctant or grudging but if she consciously permits it, there is "consent". It is not established that she consented consciously.

13. The statement of the prosecutrix is explicit as to how she was threatened or taken on a motorcycle; thereafter in a car and removed to a house where she was raped. The said statement of the young girl requires hardly any corroboration. She had no animus to implicate persons falsely. Corroboration as such would not be required. In any case it is available on the record. The prosecutrix was examined by Dr. Karnail Kaur PW3. She had found:

"Multiple scratches were present over the medial anterior and lateral surface of both arms and on medial surface of left forearm varying from 4 to 9 cm x 1 to 2 M.M.

On examination of the genital: Blood stains were present over the medial sides of both thighs and on vulva. There were present vulval lacerations 1.5 cm x 0.5 cm on right side labia minora and 1.8. cm x 0.5 cm side left labia minora. The vulva was swollen and tender to touch.

It was further found by Dr. Karnail Kaur that examining fingers were stained with blood. This medical examination supports the fact that there was a gang rape on the person of the prosecutrix.

14. Further corroboration is provided by photographs Mark A1 to A6. The prosecutrix stated that in the said photographs appellant Jaswinder Singh has been shown with her. Nature of the photographs itself reveals that prosecutrix had been raped. In fact she was removed to the hospital on the next day where she was found. These photographs and the medical examination of the prosecutrix leaves no doubt of her having been raped.

15. Learned counsel for the appellants urged that there was inordinate delay in recording of the First Information Report because the incident is of 1.10.1993. It transpired from the statement of PW13 Balbir Singh that the First Information Report was got recorded on 3.10.1993. The whole sequence of events need not be restated. The prosecutrix was abducted and raped on 1.10.1993. On 2.10.1993 she had been admitted to a private Nursing Home. In the evening only the police reached there. Some amount of deliberations in such a ghastly offence would be required. If the prosecutrix and her parents had to be thinking, the Court is not required when the family honour is at stake in normal Indian house, there has to be a thinking, rather than rushing to the police immediately.

16. In that event to urge that prosecutrix was a consenting party, learned counsel again referred to the photographs Mark A1 to A6. He argued that this shows a consent of the prosecutrix. But the said argument necessarily must be rejected. The prosecutrix urges that they had poured alcohol forcibly in her mouth. One agrees with the trial court that photographs were taken forcibly because they reveal that prosecutrix was taken in his grips by one of the accused. From very look of the photographs it appeared that accused and the prosecutrix were in passion. In fact the said fact weighs heavily against the appellants in the photographs. Sir Walter Scot in the Heat of Mithothian ChapterII observed :

"Where the heart is prepared for evil, opportunity is seldom long wanting."

It stands true in case of said appellant Jaswinder Singh. Evil designs were patent. There was no occasion for him to be photographed with the prosecutrix in those obnoxious poses while she was obviously under the influence of liquor which was administered to her. Not only she was raped but attempt was made to blackmail her if the occasion arose subsequently. As against Jaswinder Singh, the prosecution proved its case beyond all reasonable doubt.

17. So far as appellant Gurjit Singh is concerned, he is alleged to be the driver of the vehicle. The prosecutrix identified him in court. The Investigating Officer Balbir Singh PW13 stated that the said accusedappellant was arrested on 9.10.1993. He was produced before the Magistrate and he refused to take part in the test identification parade. The statement of the prosecutrix on the contrary shows that

she had seen the said appellant in the police station on the 5th of the month i.e. before his arrest is shown by the police. In other words, he was justified in refusal to take part in the test identification parade. The only evidence, thus, against him would be his identification in court for the first time. The said identification is of little value because admittedly, this appellant was not known to the prosecutrix before the incident. Reference to some of the precedents in this regard would be in the fitness of things. In the case of Kanan and others v. State of Kerala, AIR 1979 SC 1127, the Supreme Court held that when an accused is not known to the witness and there is no test identification parade held, the identification in court is not sufficient to hold and fasten on him the verdict of guilty. Subsequently, in the decision State (Delhi Administration) v. V.C. Shukla and another, AIR 1980 SC 1382 the same view found favour with the Supreme Court. This decision was followed again in the case of Mohan Lal Gangaram Gehani v. State of Maharashtra, AIR 1982 SC 839. In paragraph 25 it was observed :

"In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the Court, in the absence of a test identification parade, the evidence of P.W. 3 was valueless and could not be relied upon as held by this Court in V.C. Shukla v. State (Delhi Administration), 1980(3) SCR 500 : AIR 1980 SC 1382, where this Court made the following observations (at p. 1396 of AIR) :

"Moreover, the identification of Tripathi by the witness for the first time in the Court without being tested by a prior test identification parade was valueless."

18. The position herein is identical. Appellant Gurjit Singh was not known to the prosecutrix. He had been shown to her before the test identification. Offer was given and the identification was for the first time in court. Keeping in view the said lacuna, he is entitled to the benefit of doubt.

19. For these reasons, appeal filed by Gurjit Singh is accepted. The judgment and the order of sentence passed by the trial court against him is set aside. He is acquitted giving him the benefit of doubt. Appeal filed by Jaswinder Singh fails and is dismissed.