

(2007) 01 P&H CK 0141

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 89-SB of 2004

Rajesh Kumar

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Jan. 24, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 313
- Penal Code, 1860 (IPC) - Section 34, 342, 366, 376, 376(2)(g)

Citation: (2007) 2 RCR(Criminal) 692

Hon'ble Judges: Mahesh Grover, J

Bench: Single Bench

Advocate: Jyoti Prasad, Mr. Ashit Malik in Criminal Appeal No. 222-SB of 2004, for the Appellant; S.K. Hooda, D.A.G., Haryana, for the Respondent

Final Decision: Allowed

Judgement

Mahesh Grover, J.

By way of present appeals the Appellants have assailed the judgment and order of the Addl. Sessions Judge, Kaithal dated 20.11.2003/21.11.2003 vide which they have been convicted and sentenced to undergo rigorous imprisonment for a period of seven years each and to pay a fine of Rs. 2,000/- each, in default of payment of fine to further undergo rigorous imprisonment for a period of six months u/s 366 IPC; to undergo rigorous imprisonment for a period of six months each u/s 342 IPC; to undergo rigorous imprisonment for a period of one year each u/s 506 IPC and also to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 10,000/- each, in default of payment of fine to further undergo rigorous imprisonment for a period of two years each u/s 376(2)(g) IPC.

2. On the statement of prosecutrix Suman Devi (PW-8) a case under Sections 376, 506, 342, 366 read with Section 34 IPC was registered against the Appellants namely Ramphal, Rajesh Kumar and Ishwar Singh. According to the prosecutrix and the

statement which she had got recorded before the police, on 22.3.2000 at 10.00 a.m. when her parents were away to collect fodder, she was proceeding to the shop of Banta Ram for purchasing vegetables, and when she reached near the house of Ishwar Singh, Raju doctor, who had his clinic in the house of Ishwar and Ishwar came there. Both of them forcibly took her to the house of Ramphal son of Rameshwar in a room. Raju doctor had broken the string of her Salwar forcibly and committed rape with her. Thereafter both of them threatened her that in case she raised alarm, she would be put to death. After putting lock outside the room they went away. She remained in the room till 9.00 p.m. Thereafter all the three accused persons returned and committed rape with her one by one and she was confined to the room throughout the night. In the morning they again locked the room and went away. At about 12.00 noon she raised the alarm and on hearing the alarm her cousin Parkash, who was passing by in the street, broke-open the planks of the door and took her out of the room. She narrated the whole incident to her parents. A panchayat was arranged in the village but the accused did not participate in the same. Thereafter she got her statement recorded before the police.

3. On the same day she was medico-legally examined by Dr. Sunita Jain. The clothes of the prosecutrix were taken into possession vide recovery memo Ex. PS. Spot was inspected by SI Harinder Singh on 24.3.2000 at about 9.10 a.m. Rough site plan Ex. PT was prepared after the prosecutrix had been associated with the aforesaid exercise. Thereafter the police after completion of the investigation submitted the challan u/s 173 of the Code of Criminal Procedure and all the accused were challaned for the aforesaid offences.

4. The prosecution examined as many as 10 witnesses in support of its case besides producing the various exhibits seized during the course of investigation. In the statement recorded u/s 313 of the Code of Criminal Procedure the Appellants refuted all the allegations of the prosecution and pleaded false implication for the reason that there was civil and criminal litigation going on between the parties. Accused Rajesh Kumar alias Raju doctor further pleaded that Suman Devi prosecutrix was involved with him and she had written letters which established her intimacy with him. Exs. DF/1, DG/1, DH and DJ were the letters exchanged between the two and were brought on record by way of evidence.

5. The trial Court after appraisal of the evidence before it came to the conclusion that the prosecution had been able to establish the case against the Appellants and convicted all of them in the manner stated above.

6. The judgment of the trial court dated 20.11.2003 is the subject matter of present appeal.

7. Learned Counsel for Rajesh Kumar Appellant has contended that firstly the age of the prosecutrix has not been established beyond reasonable doubt. The doctor during the course of examination had recommended ossification test of the

prosecutrix which was not done and the lapse was not explained. It was sought to be contended that in the absence of any conclusive evidence to establish the age of the prosecutrix it could not be said that she had been subjected to rape especially keeping in view the fact that there were no injuries on her person and that she had been involved with one of the Appellants i.e. Rajesh Kumar alias Raju.

8. The next contention raised by the learned Counsel for the Appellants was that the medical testimony does not support the case of the prosecution as no marks of injury have been found on her besides the hymen was found to be intact and according to the opinion of the doctor even though sexual intercourse could not be ruled out yet the allegation of the prosecutrix that she had been subjected to sexual intercourse four times with a span of about 24 hours and that too against her consent cannot be accepted.

9. Thirdly, the clothes of the prosecutrix revealed the presence of semen. No attempt was made to connect the semen found on the salwar with the semen of any of the accused persons. Concededly, some semen was also found on the under-garments of one Ramphal but even this was not connected with the semen found on the salwar of the prosecutrix. In view of this it was sought to be contended that the prosecution had failed to connect the Appellants with the commission of the offence and the benefit of doubt ought to be extended to the Appellants.

10. On the other hand, learned Counsel for the State contended that the age of the prosecutrix was duly established by way of school certificate according to which her date of birth is 4.6.1984 and at the time of commission of offence she was merely 15 years and 9 months of age. In the absence of any other evidence this evidence was conclusive to establish the age of the prosecutrix. That apart, all the accused have committed a heinous offence by subjecting the minor to gang rape and they do not deserve any leniency keeping in view the cogent evidence on record.

11. PW-6 Dr. Sunita Jain, Medical Officer, Primary Health Centre, Thaska Meeraji found prima facie the girl to be approximately 15 years of age with a normal gait, slight contusion was present on the left forearm 2 inch above the left wrist joint about 1 cm. x 1/2 cm. Her local examination revealed that pubic hair were present but not matted. Labia majora was healthy. Slight contusion was present on the medial side of labia minora. Hymen was present but had shrunken margins. Margins of hymen were healthy. Vaginal orifice admitted two fingers tightly. She further opined that the possibility of sexual intercourse could not be ruled out. In cross-examination she further opined as follows:

..... In case a girl of such a tender age as Suman is repeatedly raped by 3-4 persons then her gait would not be normal and she would have the difficulty in walking and there would also be general pain to the lower parts of the body and general body. It is correct that in case the prosecutrix resists the rape, then there would be injuries on his body. If a person is raped on a cot or irregular hard surface,

then certainly the lady shall have the marks of injuries, back buttocks back of legs and back of arms..... It is correct that in the present case the hymen was found intact. By shrunken margins means that the margins were healed. It is correct that tears of hymen heal within 5/6 days. I cannot say that in 7 or 8 days the margins become shrunken. Again said, that after a week, the margins become shrunken. It is correct that margins shrink after 8 to 10 days. If a repeated rape is done, with force, then there would be injuries to vaginal orifice, labia minora, posterior commissure and there may be presence of freshly effused blood in all these genitals mentioned above. In the present case, there was no blood and there was no injury on the above parts.

12. The above medical testimony leaves no room for any other opinion except that the prosecutrix was not subjected to multiple rape. Neither any injury nor any abnormality on the private parts have been found. This in itself belies the entire prosecution version. The presence of semen on the Salwar and the opinion of the doctor that possibility of sexual intercourse cannot be ruled out ipso facto does not imply that she had been subjected to rape. Undoubtedly, if the prosecutrix is less than 16 years of age, consent becomes immaterial. Even if the prosecutrix was a minor and incapable of giving consent in the eyes of law, then in such a situation it was upon the prosecution to prove as to who out of the accused persons had indulged in sexual intercourse with her.

13. As noticed earlier the medical evidence clearly rules out possibility of the prosecutrix being subjected to multiple rape. Evidence of sexual activity is no doubt present and considering the age of the prosecutrix was sufficient to convict a person found to have indulged in it. But the prosecution has failed to establish his identity. The semen found on the clothes of the prosecutrix was not traced out to any of the accused by any evidence. In view of this the charge u/s 376(2)(g) IPC against the Appellants must necessarily fail.

14. Faced with this prospect learned Counsel for the State vehemently argued that the offences under Sections 366 and 342 IPC are made out against the Appellants. According to the case of the prosecution the prosecutrix went missing when she was forcibly abducted at about 11.00 a.m. on 22.3.2000 and was released on the next day at 12.00 p.m. when she had raised a hue and cry attracting the attention of her cousin who was supposed to be passing by. In the entire evidence there is not a whisper as to what the parents had done when they found that the girl was not traceable for such a long time. This is not expected of prudent parents. If a girl had been missing from the house for such a long time attempts would certainly have been made by the parents or the relatives to trace out her whereabouts. That coupled with the fact that the prosecutrix has admitted the exchange of letters with Rajesh Kumar wherein only lends credence to the possibility of her going with him of her own. The aforesaid letters Exs. DF/1, DG/1, DH and DJ were specifically put to her in cross-examination and she did not deny the writing of the aforesaid letters

but only pleaded that she had been coerced to write them. However, further examination of her statement also reveals that she has not been able to explain as to how these letters came into existence or what sort of pressure was exerted upon her.

15. The prosecution has thus failed to bring home the guilt of the accused by not adducing clinching evidence. Some sexual activity of the minor girl should have propelled the prosecution to establish as to who out of all these accused persons had indulged in it, especially when the medical opinion rules out the possibility of a gang rape.

16. For the reasons stated above, both the appeals are allowed and the Appellants are acquitted of the charges framed against them.