

(2012) 07 SHI CK 0020

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 421 of 2011

Salig Ram Dayal

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision: July 27, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428, 53
- Penal Code, 1860 (IPC) - Section 376(1)

Hon'ble Judges: Surinder Singh, J

Bench: Single Bench

Advocate: Rajesh Verma, for the Appellant; P.M. Negi, Dy. Advocate General, for the Respondent

Final Decision: Dismissed

Judgement

Surinder Singh, J.

In this jail appeal challenge is to the judgment of conviction and sentence passed in Sessions Trial No. 8 of 2011 decided on 24.8.2011 by the learned trial Court, whereby the appellant hereinafter referred to be as "the accused" is sentenced to undergo rigorous imprisonment for a period of seven years for the offence of rape, punishable u/s 376(1) of the Indian Penal Code, on deaf and dumb and of a low intelligence prosecutrix aged about 35 years and to pay a fine of Rs. .10,000, in default of payment of fine to further undergo simple imprisonment for six months. The fine amount, if recovered is also ordered to be paid as compensation to the guardian of the victim under whose care and custody victim resides. The benefit of pre and during trial custody of the appellant is also ordered to be accorded as per Section 428 of the Code of Criminal Procedure. In brief, the prosecution story can be stated thus. On 25th January, 2011 at about 9 a.m., accused (75 years) visited the house of PW3 Smt. Sundri Devi in village Dugar and asked her to send the prosecutrix with him as usual to bring a bundle of wood from "Khara-Cho forest". Relying on his being an elderly person, she sent her for the purpose.

(ii) When the prosecutrix did not return for about two hours, PW3 Smt. Sundri Devi asked her son PW2 Kulwant Singh to find out the reason. Kulwant Singh went towards the jungle and found an axe and a towel of the accused by the side of a fallen tree, but could not spot the prosecutrix, however heard some noise coming from thorny bushes in the Nallah and noticed the accused committing rape upon her. He cautioned the accused. On hearing him, the accused fled away from the spot. Thereafter, he took the prosecutrix to his house.

(iii) The string of her Salwar was loose to which she held with one hand and a small bundle of 2-3 woods by another hand on her head. PW3 Sundri Devi asked the prosecutrix by making gestures as to what had happened then by expression of signs she told her that she was raped by the accused. Kulwant Singh affirmed this fact.

(iv) PW2 Kulwant Singh went to the house of the accused, but he did not find him there. PW1 Promila Devi wife of PW2 aforesaid informed Shri Baljeet Singh, Up-Pradhan and sent for Ambulance. Thereafter the prosecutrix was taken to CHC Barsar for treatment. Police was accordingly informed. On the basis of statement Ext.PW1/A of PW1 Smt. Promila Kumari, FIR Ext.PW15/A was formally registered.

(v) The prosecutrix was referred from CHC Barsar to Rural Hospital Hamirpur on 26.1.2011. She was attended upon by PW5 Dr. Shalini Kapoor, who clinically examined her. The clothes which were worn by the prosecutrix were sealed and taken into possession and handed over to the police. The doctor did not find any external injury on her person. The prosecutrix was advised gynecologist opinion and consultation alongwith psychiatric opinion. She took vaginal swabs and slides which were sealed and handed over to the police for forensic examination. Thereafter the prosecutrix was sent to D.R.C. centre for final opinion.

(vi) PW6 Dr. Tanupriya, Gynecologist on the same day examined the prosecutrix. She also did not notice any injury on her private part, but observed that the prosecutrix was not understanding her commands as she was deaf and dumb. She also advised her USG of pelvic organ. On examination the Doctor found her fingers stained with blood and came to the conclusion that the possibility of sexual activity with her could not be ruled out, but reserved the final opinion till the receipt of the report of USG reports, which were later handed over to her by the Radiologist. Based upon the reports, Doctor gave her final opinion Ext.PW6/C.

(vii) On 7.2.2011, PW13 Dr. Anil Jishtu, Senior Audiologist of the department of ENT examined the prosecutrix for hearing and speech assessment. Further PW17 Dr. Brij Bhushan Sharma an Audiologist and Pathologist also examined the prosecutrix on 8.2.2011 and found the prosecutrix of poor mental abilities, limited speech and language abilities. She did not express her needs. Even she had not achieved self help skills, however, she needed someone to help her for her daily routine activities. In his opinion, the prosecutrix could comprehend on simple commands, but only

recognized her family members and neighbours. His findings were that she was able for inadequate speech and language with mental retardation. On the ear assessment, doctor found hearing loss to be 65 DBHL. The report is Ext.PW13/A. The report of the Speech Therapist is Ext.PW13/B.

(viii) The accused was arrested and was examined by PW9 Dr. Ajay Kumar on 26.1.2011. On his medical examination, he found that the accused had not changed his under-shirt, which was white in colour. It was taken into possession alongwith specimen of pubic hair and two smegma slides which were sealed and handed over to the police for forensic examination. Doctor did not find him incapable of performing sexual intercourse. He also noticed the injuries over epigastrium which were simple in nature having been caused within 2 to 72 hours. He issued MLR Ext.PW9/B. As per the report of the forensic science Ext.PW6/A, the underwear of the accused was stained with human semen but however, no semen or blood was found on his under vest, pubic hair.

(ix) On the application Ext.PW18/A & B by the police to PW18 Dr. Veena Gupta, blood samples of the accused as well as the prosecutrix respectively were taken on 19.4.2011 for DNA test. Blood sample of each of them were put into small bottles, sealed with hospital's seal "DHH" at three places and were handed over to the police.

(x) PW19 C. Rajesh Kumar took these blood samples with two sealed envelopes sealed with DHH to FSL Junga vide RC No. 66/11 on 20.4.2011, copy whereof is Ext.PW19/A. On its deposit, he obtained receipt and handed over to MHC.

(xi) The DNA report of the FSL, Junga is Ext.PW20/A, which concluded that the DNA profile of the prosecutrix matches with the under-vest of the accused and the genotype profile containing multiple peaks obtained from the vest of the accused and further tallies with his underwear completely matching with the genotype profile and containing multiple peaks obtained from the vest and underwear of the accused.

(xii) On the forensic examination of the Salwar of the prosecutrix vide FSL report PW6/A received from Regional Forensic Science Laboratory, the human blood and semen were found. Blood traces and the semen were also found on the vaginal swabs. The semen was also detected on the underwear of the accused and his smegma slides. Precisely all these items were sent for forensic examination and DNA profiling.

2. After recording the statements of the witnesses and collecting the reports, as aforesaid, challan was presented in the Court for the trial of the accused. Later, a supplementary challan was also presented on getting the DNA reports. On the above allegations, the accused was charge-sheeted, tried, convicted and sentenced for the offence aforesaid, hence the present appeal.

3. Vide order dated 9.12.2011, Shri Rajesh Verma, Advocate was appointed as the counsel for the appellant on the fee as per the Schedule of the Legal Services Authority. He vehemently argued that the case of the prosecution is false against the accused. There is evidence on record that the complainant party was having inimical relations with him and further that the prosecutrix was not examined as a witness to connect him with the alleged crime. It is also argued that the DNA report is false and concocted one.

4. On the other hand, Shri P.M. Negi, learned Deputy Advocate General countered the above arguments and referred to the evidence on record. He further submitted that even the observation of the learned trial Court in para-30 suspecting the blood stains on the vest of the accused is also wrong and incorrect, as the DNA report nowhere reveals that the vest was having the blood stains. According to him, DNA profiling report stands connected with the accused and DNA profile of the prosecutrix also establishes the offence charged against the accused vis-à-vis statement of PW2 Kulwant Singh and other circumstances appearing on record, coupled with the medical evidence and also the scientific evidence on the record. It is further argued that the prosecutrix was mentally retarded and she was not able even to give her consent. Thus, she is to be treated as a minor.

5. I have examined the rival contentions of the parties in the light of the evidence on record cautiously and carefully.

6. The perusal of the cross-examination by the accused reveals that though he tried to impute the allegation of enmity on PW2 Kulwant Singh for having committed an unnatural offence with his Buffalo to depose against him in this case, but this suggestion has been denied by him and also other members of the family.

7. On the reappraisal of evidence, I find that the story of the prosecution stands fully substantiated from the statement of PW3 Smt. Sundri Devi. She stated that on 25.1.2011, the accused as usual had taken the prosecutrix to bring woods from the jungle. When they did not return, she sent her son PW2 Kulwant Singh to find out the reason and when he reached in the jungle, he noticed accused committing rape on the prosecutrix. He cautioned the accused. The accused fled away from the spot and prosecutrix was brought to home.

8. PW3 aforesaid ascertained about the rape on her from seeing the condition of the prosecutrix and thereafter she was taken to the hospital for her medical examination. The police was accordingly informed.

9. PW2 Kulwant Singh also supports the prosecution case. He was subjected to a lengthy cross-examination, but nothing material could be extracted there from. The defence raised by the accused was denied but stated that he had taken liquor and had slept in the field of the accused and did not commit any unnatural offence, as alleged.

10. An attempt was made by the prosecution to examine the prosecutrix as PW4. Learned trial Court tested her competence to make the statement but except PW3 Smt. Sundri Devi no other person knew about the signs and gestures of the prosecutrix. Since PW3 was already examined as a witness and no other persons was found conversant and familiar with the signs and gestures of the prosecutrix, it was also observed by the learned trial Court that the prosecutrix was unable to tell anything except pointing to her abdomen. On 29.6.2011 the learned trial Court made an attempt to examine the prosecutrix with the help of PW16 Smt. Krishna Sharma, a Speech Impairment Teacher of H.P.I.C.S.A., Sunder Nagar. Certain questions were framed and put through PW16 Smt. Krishna Sharma to the prosecutrix, but the gestures of the witness conveyed nothing, learned trial Court thus, observed that no conclusion from the statement of the prosecutrix could be arrived at regarding the incident.

11. PW21 SI Parkash Chand during investigation had taken into possession the underwear of the accused which was worn by him at the time of alleged incident, which was sealed with seal impression "H" and taken into possession vide memo Ext.PW8/A in the presence of Balajit Singh and PW8 Puran Singh. The parcels which were deposited with MHC, Police Station Barsar were got analyzed from Forensic Science Laboratory by him. He got collected the report of DNA samples. He also stated that the underwear and vest of the accused which he was wearing at the time of his medical examination were sealed by the doctor and handed over to the police for its forensic examination.

12. On the critical examination of the aforesaid evidence, I find substance in the prosecution case relying upon the statements of PW2 Kulwant Singh and his mother PW3 Smt. Sundri Devi both are confidence inspiring. There is no denial of the fact that the prosecutrix was not accompanying the accused to the jungle. The physical appearance of the prosecutrix when brought home had shown that she was ravished. The forensic report Ext.PW6/A corroborates this fact. It proves the presence of the semen stains on the vaginal swabs of the prosecutrix and her Salwar.

13. The scientific evidence further connects the accused with the offence. The DNA profile found on the clothes and blood matched with that of the accused. The DNA report is Ext.PW20/A. In fact, all the recovered articles i.e. eight in numbers were examined in the Forensic Science Laboratory, DNA Division for its isolation and purification using the organic extraction protocol. The DNA profile was checked for quality and quantity by 0.8% agarose gel electrophoresis and ethidium bromide staining. The DNA was also objected to Multiplex PCR for co-amplification of 15 Autosomal STR loci and Amelogenin using AmpF/ STR Identifier Plus PCR Amplification Kit (Applied Biosystems, U.S.A.). The amplified products along with controls were run on automated DNA Sequencer (ABI 3130, Applied Biosystems, U.S.A.) DNA profiles were prepared and analysis was carried out using Genera

14. In the opinion of the Expert, the DNA profile was of good quality which was possible to amplify on the fifteen Autosomal STR loci and Amelogenin with the AmpF/STR Identifiler Plus PCR Amplification Kit. Accordingly, the net conclusion was as follows:-

CONCLUSIONS:

On the basis of the above analysis performed on the aforesaid exhibits it is concluded that:-

(i) The genotype profile generated from exhibit P-7 (source: blood sample of Seema Devi) completely matches with the genotype profile containing multiple peaks obtained from exhibits P-3b (vest of Salig Ram) and P-4 (underwear of Salig Ram).

(ii) The genotype profile generated from exhibit P-8 (source: blood sample of Salig Ram) completely matches with the genotype profile containing multiple peaks obtained from exhibits P-3b (vest of Salig Ram) and P-4 (underwear of Salig Ram). Table (allelic data) and Work sheets are parts of the said report.

15. Thus, the DNA profile established the identity of the assailant i.e. the accused satisfactorily, having committed the offence in question. The observation of the learned trial Court in para-30 of the judgment that "it was not made out that the blood which was found on the vest of the accused completely matched with the blood sample of the victim, is wrong as no blood or semen was detected by the Forensic Science Laboratory as per report Ext.PW6/A", but record proves that from the vest of the accused only DNA profile was prepared to match to whom this exhibit belonged and it stood fully connected that it was that of the accused.

16. DNA profiling has been expressly included among various forms of medical examination in amended Explanation to Section 53 of the Code of Criminal Procedure. DNA profile is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can also be readily matched with existing profiles that are already in the possession of law-enforcement agencies. Matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. In *Surendra Koli versus State of Uttar Pradesh and others*, [(2011) 4 SCC 80], identity of the dead body of a girl was established on the basis of DNA tests conducted by matching her DNA with that of the parents and brother and the Apex Court held that matching of DNA proved the identity of the deceased girl.

17. In [Santosh Kumar Singh Vs. State thr. CBI](#), the Apex Court held that Court cannot substitute its own opinion for that of an expert, more particularly, in a science such as DNA profiling which is a recent development.

18. Thus the non-examination of prosecutrix is not fatal in the case for the reasons that she being deaf and dumb was also of very low intelligence of 33. incapable of any understanding like a minor of tender age and otherwise also the accused stands fully connected with the offence as per the statement of PW2 Kulwant Singh, coupled with the forensic science reports and DNA profiling. The semen stains were found on her Salwar as well as vaginal swabs. Thus, on the basis of the statement of the prosecution witnesses as that of the scientific evidence, it is fully proved that the offence of rape was committed by the accused on the prosecutrix. Therefore, I do not find any error in the conviction of the accused for the offence charged.

19. Shri Rajesh Verma, learned counsel for the accused, however, submitted that on the day of alleged incident, the accused was aged about 75 years and is presently undergoing the sentence. He is suffering from old age diseases, and is having an aged wife at home, therefore, leniency in sentence may be shown.

20. Though, the offence in the instant case is of such a nature, where too much leniency cannot be shown to the accused keeping in view the condition of the prosecutrix, who is a disabled person though aged about 35 years, but of low understanding like a child, the accused is quite aged and worldly wise. Thus, keeping in view the extenuating and mitigating circumstances, the sentence is reduced to five years from seven years, without disturbing the fine amount and default clause. The fine amount, if realized from the accused, shall be paid to the guardian of the victim as compensation, as ordered by the learned trial Court.

21. Learned trial Court shall send a modified warrant of sentence to the concerned Jail. The appeal is dismissed with the above modification in sentence. Send down the records.