

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-1-SB-2004

Date of decision: 08.04.2015

Malook Singh and another

... Appellants

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR.JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. G.S. Bhatia, Advocate
for the appellants.

Mr. Daljit Singh Virk, AAG, Punjab.

1. Whether reporters of local papers may be allowed to see the judgment? YES/NO
2. To be referred to the reporters or not? YES/NO
3. Whether the judgment should be reported in the digest? YES/NO

RAMESHWAR SINGH MALIK J.(ORAL):

Present appeal is directed against the impugned judgment of conviction and order of sentence of even date i.e. 22.10.2003, passed by learned Addl. Sessions Judge (Fast Track Court), Ferozepur, whereby appellants were held guilty and convicted for the offences under Section 376 (2) (g)/366 of Indian Penal Code ('IPC' for short).

Briefly put, facts of the case are that the prosecutrix, aged about 17 years, was married with Balwant Singh who was resident of Village Molwi Wala on 21.02.2003. On 23.02.2003, it was Sunday. She came back to her parents' house to meet her parents. On the intervening night of 25/26.02.2003, at about 4 a.m., the prosecutrix was urinating in the courtyard

of her parents' house. The electric bulb in the courtyard was on. Rest of the family members were sleeping inside the room. Accused Malook Singh, Babbu Singh and juvenile Veeru [who was tried separately under Juvenile Justice (Care and Protection of Children) Act, 2000], came in the courtyard of house of the prosecutrix. Accused Malook Singh enfolded the prosecutrix and put his hand on her mouth. All the three accused lifted the prosecutrix and took her in one of the rooms of the house of Malook Singh. They bolted the room from inside. Veeru forcibly put off the salwar of the prosecutrix and raped her against her consent. Both accused Malook Singh and Babbu Singh remained inside the room, watching the rape scene. Mangal Singh, father of the prosecutrix arrived there. He knocked the door of the room from outside. All the accused fled away from the scene of occurrence, after immediately opening the door. Mangal Singh took his daughter to his house. During scuffle, the prosecutrix also received injuries on her legs and shoulders. The Panchayat tried to patch up the matter unsuccessfully. In the evening of 26.02.2003, the prosecutrix along with her father Mangal Singh and aunt Krishna, went to Civil Hospital, Ferozepur, where the medical examination of the prosecutrix was conducted by Dr. Renu Singla. During the course of rape, one gold necklace, one Tikka and one finger ring of the prosecutrix were also lost.

On 27.02.2003, ASI Kesar Singh went to the Civil Hospital, Ferozepur and recorded the statement (Ex.P2) of the prosecutrix. He made endorsement Ex.P2/A and got an FIR registered against the accused. He visited the spot and prepared rough site plan Ex.P4, of the place of occurrence. He also took in possession one underwear and salwar of the

prosecutrix, along with a vial containing vaginal swabs taken from the vagina of the prosecutrix by Dr. Renu Singla, vide recovery memo Ex.P15, in the presence of ASI Lekh Raj. The swabs and clothes of the prosecutrix were sent to the Chemical Examiner who furnished his report Ex.PB, according to which semen was detected on the vaginal swabs. All the accused were arrested by ASI Kesar Singh. He got conducted medical examination of all the accused from Dr. S.P. Kataria, who furnished his report Ex.PD/1, opining that the accused were able to do sexual intercourse. After completion of investigation, investigating officer presented the police report under Section 173 of the Code of Criminal Procedure ('Cr.P.C.' for short), against all the three accused, under Sections 376/366/452/323/341 IPC. The case was committed and charge against all the accused, was framed for the offences under Section 366/376 (2) (g) IPC. The accused pleaded not guilty and claimed trial.

During trial, an inquiry was held in compliance of the order passed by this Court and accused Veeru was held to be a juvenile in conflict with law. Proceedings against him were referred for trial to the Board, constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 and his name was struck off, from the charge-sheet framed against all the three accused, by the learned trial Court.

With a view to prove its case, prosecution examined PW1 Dr. Renu Singla who deposed that on 26.02.2003, she medico-legally examined the prosecutrix, aged 17 years. PW1 further deposed that the secondary sexual characters were fully developed. There were 14 teeth in upper and lower jaws each. X-ray of long bones was advised for confirmation of age.

Dr. Renu Singla (PW1) found the following injuries on the person of the prosecutrix: -

1. *Two reddish blue contusion first about 8 cm x 4 cm on the lateral aspect of right thigh starting from the head of femur and second about 6 cm x 3 cm and was about 10 cm below the first.*
2. *Two reddish blue contusion first about 10 cm x 8 cm on the lateral aspect of the left thigh starting from the femoral head. Second was about 6 cm x 4 cm and was 10 cm below the first one.*
3. *Two superficial lacerated wounds. 2.5 cm x 2.5 cm on the medial aspect of the right lower leg and about 20 cm above the medial malleolus.*
4. *Reddish blue contusion about 6 cm x 3 cm on outer and upper part of left leg near the knee.*
5. *Reddish blue contusion 5 cm x 3 cm on the outer aspect of the right upper arm near the shoulder.*

According to PW1 Dr. Renu Singla, she conducted vaginal examination of the prosecutrix and found that vagina admitted two fingers tightly. Uterus was normal in size. Two vaginal swabs were taken and sealed in a bottle. Salwar and underwear were also put in a separate parcell of cloth. The articles were sent to the Chemical Examiner for confirmation of spermatozoa. Duration of injuries was found within 12 to 24 hours. Kind of weapon used was blunt. She proved the MLR as Ex.PA and pictorial diagram as Ex.PA/1. It was further deposed by this witness (PW1) that after receiving Chemical Examiner report Ex.PD, she forwarded the same to the police vide

letter Ex.PC. Dr. S.P. Kataria PW2 stated that he medico-legally examined all the accused on police application Ex.PD and tendered his report Ex.PD/1, to the effect that there was nothing to suggest that the accused could not perform sexual act. PW3 ASI Kesar Singh, the investigating officer, deposed that the investigation was conducted by him, as noticed hereinabove. According to him, after receiving wireless message that the prosecutrix was admitted in Civil Hospital, Ferozepur, he went there and moved application Ex.P1 to know the condition of injured, whether she was fit to make statement. When the doctor declared the prosecutrix fit to make the statement, he recorded her statement Ex.P2. PW3 also proved FIR Ex.P3, site plan Ex.P4, recovery memo Ex.P5, application Ex.P6, memo of arrest Ex.P7 and Ex. P8.

PW4 Head Constable Surjit Singh and PW7 Constable Sukhdev Singh proved their affidavits Ex.P9 and Ex.P10, in order to complete the link evidence, regarding the material sent to the office of Chemical Examiner, Patiala. Prosecutrix appeared as PW5 and her father Mangal Singh appeared as PW6. Mangal Singh PW6, an eye-witness, deposed the entire story of occurrence, as alleged by the prosecutrix and noticed hereinabove. Thereafter, the prosecution closed its evidence.

Statements of the accused namely Malook Singh and Babbu Singh were recorded under Section 313 Cr.P.C. All the incriminating material brought on record against them, was put to them. Both the accused denied their involvement in the crime and alleged false implication, due to previous enmity. Accused also led their defence evidence. They examined DW1 Hakam Singh and DW2 Lal Singh, both residents of Village Jamma

Rakhiyan Hithar. Both these witnesses deposed that about 08 months ago, Mangal Singh told them that the accused had kidnapped his daughter. Panchayat was convened. Accused were present in the village and were shown to Mangal Singh. At that time, daughter of Mangal Singh was missing. These witnesses DW1 and DW2 further deposed that after one month, compromise was arrived at. It was reduced in writing which was duly signed by the prosecutrix, her mother as well as by the members of the Panchayat.

After going through the evidence brought on record and hearing learned counsel for both the parties, the learned trial Court came to the conclusion that the prosecution had duly proved its case, bringing home the guilt against both the accused. Accordingly, the learned trial Court held both the accused guilty and convicted them for the offences under Section 376 (2) (g)/366 IPC, vide impugned judgment of conviction dated 22.10.2003. Thereafter, the convicts were heard on the quantum of sentence. Both the convicts-appellants were sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.3,000/- each for the offence under Section 376 (2) (g) IPC. In default of payment of fine, they were further ordered to undergo rigorous imprisonment for a period of 06 months each. Convicts-appellants were sentenced to undergo rigorous imprisonment for a period of 05 years each and to pay a fine of Rs.1,000/- each for the offence committed by them under Section 366 IPC. In default of payment of fine, they were ordered to undergo rigorous imprisonment for a period of 03 months each. However, both the sentences of imprisonment were ordered to run concurrently. Hence, this appeal.

During the pendency of the appeal, appellant No.1- Malook Singh died on 11.02.2012. In this regard, affidavit dated 17.03.2015 of S.I. Jagdish Lal, Station House Officer, Police Station Mamdot filed in the Court today, has been taken on record. Custody certificate by way of affidavit dated 17.03.2015 of Surinder Singh, Superintendent, Central Jail, Ferozepur filed in the Court today, is also taken on record. In terms of the custody certificate, appellant Babbu @ Babbu Singh had undergone the actual period of sentence for 01 year and 13 days without remission and for a period of 01 year and 29 days with remission as on 18.03.2004. He was released on bail in compliance of the order dated 11.03.2004 passed by this Court, in CRM-M-12-2004 in CRA-S-1-SB-2004. It is also pertinent to note here that appellants sought and were granted permission to place on record copy of judgment dated 21.11.2003 as Annexure P-1 by CRM-M-4391-2004 and it was taken on record by this Court vide its order dated 30.01.2004. In terms of this judgment dated 21.11.2003 passed by Principal Magistrate, Juvenile Justice Board, Faridkot, Veer Singh @ Veeru, co-accused of the present appellants was acquitted, finding it to be a case of consented sexual intercourse.

Learned counsel for the surviving appellant-Babbu @ Babbu Singh, while placing heavy reliance on the judgment of acquittal dated 21.11.2003 whereby Veer Singh @ Veeru, co-accused of the present appellants was acquitted by the Juvenile Justice Board, submits that since it was the same incident and similar set of evidence against all the co-accused, appellant is also entitled for acquittal. He submits that there was no independent witness examined by the prosecution, in the present case. The prosecutrix was a consenting party and it has been so held by the Juvenile

Justice Board in its judgment of acquittal dated 21.11.2003. Learned counsel for the appellants next contended that the charge for commission of alleged offence under Section 376 IPC was only against his co-accused namely Veer Singh @ Veeru and even he has been acquitted by the Juvenile Justice Board vide its judgment dated 21.11.2003. To substantiate his arguments, learned counsel for the appellants places reliance on judgment of the Hon'ble Supreme Court in **Gurucharan Kumar and another Vs. State of Rajasthan 2003 (2) SCC 698** and a judgement of this Court in **Amit and another Vs. State of Punjab and another 2013 (3) RCR (Crl.) 545**. He prays for allowing the present appeal.

Per contra, learned counsel for the State submits that judgment cited by learned counsel for the appellants were not applicable to the present case, being distinguishable on facts. He further submits that the prosecution has duly proved its case. Presence of the appellants has been established at the time and place of occurrence. The learned trial Court has recorded cogent findings before arriving at a judicious conclusion, holding the appellants guilty of the heinous crime under Section 376 (2) (g)/366 IPC. He next contended that judgment of acquittal dated 21.11.2003 rendered by the Juvenile Justice Board, acquitting Veer Singh @ Veeru, co-accused of the appellants, alone cannot be a ground for acquittal of the appellant. He prays for dismissal of the appeal.

Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that in the given fact situation of the present case, instant appeal

deserves to be allowed and the appellant Babbu @ Babbu Singh is entitled for acquittal. To say so, reasons are more than one, which are being recorded hereinafter.

It is a matter of record and not in dispute that in all, there were three accused namely Veer Singh @ Veeru, Malook Singh and Babbu @ Babbu Singh. Even as per the allegations levelled by the author of FIR, the charge of rape was only against Veer Singh @ Veeru. The only allegation against Malook Singh and Babbu @ Babbu Singh, as per the prosecution version enfolded in the FIR Ex.P3, was that they remained inside the room, watching the rape scene. Thus, the allegation of rape, as such, was not even levelled by the complainant against Malook Singh and Babbu @ Babbu Singh. In identical circumstances, this Court in the case of Amit (supra) held that the learned trial Court should have waited for the decision of the learned Juvenile Justice Board who was trying the main accused.

The relevant observations made by this Court in Paras 21, 30 and 32 of its judgment in Amit's case (supra), which can be gainfully followed in the present case, read as under: -

“When the main culprits are found not to have committed rape upon the prosecutrix, then the so called aides i.e. the present appellants cannot be held liable for rendering assistance to the main accused in committing the main crime, which itself has not been proved.

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The learned trial court erred in making a presumption that the juveniles committed the rape and thereby considering

the first fact in issue to be proved and thereby convicting the appellants under explanation 1. The juveniles were not before the learned Trial court; therefore the learned trial court erred in arriving at a finding that the juveniles committed rape based on the statement of prosecutrix. The learned trial court could have waited for the decision of the learned Juvenile Justice Board, trying the main accused, on the charge as to whether juveniles have raped the prosecutrix or not. Moreover the prosecution's burden of proof in criminal cases is to prove the guilt of accused beyond all reasonable doubts and conviction in criminal cases cannot be based on presumptions. Therefore the first fact in issue remains not proved and hence, the requirements of the section are not fulfilled to sustain conviction under this section. Accordingly, it is held that the present appellants are not guilty of the charges framed against them.

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Keeping in view the statements of the prosecutrix, her mother and father recorded in both the trials, this court is of the opinion that the statement of the prosecutrix in this case is a tutored version, and no conviction can be based on such like testimony especially when the main accused against whom the rape was alleged have been acquitted by the Juvenile Justice Board vide judgment dated 18.12.2010, Annexure A.1. Allegations against the present appellants are that of aiding the

offence, which itself has not been proved. Considering the totality of the circumstances of the case, this Court comes to the conclusion that the prosecution has failed to prove the case against Amit alias Monu and Golu alias Deepak, the present appellants beyond reasonable doubt.”

During the course of hearing, when this Court put a pointed question to learned counsel for the State as to what was the distinguishing feature between the case of the present appellant and his juvenile, co-accused Veer Singh @ Veeru, he had no answer and rightly so because it was a matter of record. In such a situation, although the appellant Babbu @ Babbu Singh may not be entitled for acquittal only on the basis of judgment of acquittal rendered by the Juvenile Justice Board, yet it is equally true that the said judgment of acquittal cannot be ignored by this Court, it being qua the same incident and based on an identical set of evidence.

The cogent findings recorded by the learned Principal Magistrate, Juvenile Justice Board in Paras 13 to 16 of the judgment of acquittal dated 21.11.2003, read as under: -

“After going through the record and considering the arguments, we came to the conclusion that this is a false case in which, the accused has been involved. There are serious lapses on the part of the prosecution and the Investigation Agency. The prosecution has missed a very important link i.e. comparison of semen of the accused namely Veeru with the vaginal swabs in which the semen has been found of the prosecutrix. Has this been done, then, it will be a fool proof case. Now it is highly

improbable that a girl, who has been married only about six days.

Now coming to the other aspects of the case, we find that it is highly improbable story that as per the version of the prosecution, the prosecutrix in the early morning at about 4.00 a.m. got up to urinate in the courtyard of the house of her father. The accused persons, who are living four killas away, have knowledge that she will come and they will pick up her for the purpose of raping. It is always that if such crime is to be committed, then it is always prior preparation of minds. It cannot be said that these persons were sitting and while seeing the prosecutrix, the immediately, came into action and took her to the house of Malook Singh. All these circumstances go to show that this girl was already having relations with these persons before marriage. When she came to her parents house, the prosecutrix and the accused persons have set the time for meeting, but they were caught and this false story of having committed the rape was made out only to convince her husband Balwant Singh that she was of moral character. Otherwise, it cannot be said that the accused persons were having knowledge that the prosecutrix will come for urine on 4.00 a.m.

There is delay of 33 hours, which is unexplained. There was good cause for the prosecution to explain the delay, but the same has not been explained. The conduct shows that there was consultation with the legal brain to make the prosecution case

more strong and to involve the innocent persons and there are additions and alterations in the FIR, which make the prosecution case more doubtful. An application was moved by the prosecutrix namely Raj Rani before the Senior Medical officer on 26.02.2003 to get her medically examined, which is Ex.DA. In this application, the names of the accused persons have not been mentioned. It has been mentioned that some unidentified persons have taken her and committed rape on her. There is nothing in the evidence of the prosecution that the names of the accused were not previously known to the prosecutrix, if such was the case, they why the name of the accused was not mentioned in the application and why the name of some unidentified persons has been used. This also makes the case doubtful. It is in the evidence of the prosecution that the house of the prosecutrix's father is four killas away from the house of Malook Singh and the same is in one line and there are many houses intervening. When her raula and cries can be heard by her father Mangal Singh, they why it was not heard by the other persons, whose houses are treated nearby. Moreover, the house of Malook Singh has four rooms and Malook Singh's father, mother and one married brother are living in the same house, then why they have not come forward to rescue the complainant. There is no evidence that the police has involved them in the investigation. No independent witness has been examined. It was early morning and cries of the prosecutrix can

be heard by whole of the village, if those have been heard by the father of the complainant. No body has come forward nor the police has tried to join them in the investigation. So, it also makes the case doubtful.

From the ongoing circumstances, we find that the police has falsely implicated the juvenile in conflict with law as the prosecutrix seems to be a consenting party in the sexual intercourse. The prosecution has miserably failed to bring the important link on the file. The case is highly doubtful. No independent witness has been examined. In the totality of the circumstances, we find that there is no merit in the prosecution case. It is a case of consented sexual intercourse. Accordingly, we acquit the juvenile namely Veer Singh in conflict with law.”

In view of the peculiar facts of the case noticed hereinabove, judgment of Hon'ble Supreme Court in Gurucharan Kumar's case (supra) also comes to the rescue of the appellant. The relevant observations made by Hon'ble Supreme Court in Paras 31 & 32 of its judgment in Gurucharan Kumar's case (supra), aptly apply in the present case and the same read as under: -

“We are, therefore, of the considered view that the prosecution has failed to prove its case beyond reasonable doubt, and that the appellants are entitled to acquittal. According, we allow the appeal, set aside the judgment and order of the High Court as well as that of the trial Court and acquit the appellants of the charges levelled against them. They are on bail. Their bail

bonds stand discharged.

*As noticed earlier accused Parvin Kumar, husband of the deceased, Geetu has not preferred an appeal before this Court, on account of the fact that he has already served out the sentence imposed against him. However, though we cannot obliterate the sufferings of Parvin Kumar, we can certainly obliterate the stigma that attaches to him on account of his conviction for a heinous offence under Section 304B of the Indian Penal Code. This Court has laid down a judicious principle that even in a case where one of accused has not preferred an appeal, or even if his Special Leave Petition is dismissed, in case relief is granted to the remaining accused and the case of the accused, who has either not appealed or whose Special Leave Petition has been dismissed, stands on the same footing, he should not be denied the benefit which is extended to the other accused. This has been held in **Harbans Singh v. State of Uttar Pradesh & Ors., (1982)2 SCC 101, Raja Ram & Ors. v. State of M.P., (1994)2 SCC 568, Dandu Lakshmi Reddy v. State of A.P., (1999)7 SCC 69 and Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra, JT 2002(2) SC 158.***

Reverting back to the fact situation of the present case and respectfully following the abovesaid relevant observations made by the Hon'ble Supreme Court as well as this Court, in identical fact situation, this

Court feels no hesitation to conclude that the prosecution has failed to prove its case. Guilt was not brought home against the surviving appellant-Babbu @ Babbu Singh as well as his co-accused Malook Singh (deceased). Firstly, there was an inordinate and unexplained delay of more than 33 hours in lodging the FIR. The learned trial Court has recorded the delay to be 36 hours in Para 10 of the impugned judgment. Further, the prosecution has also failed to prove the prosecution story regarding the alleged occurrence, in the manner the occurrence was alleged to have taken place. Admittedly, there was no independent witness examined, including any of the neighbours of the prosecutrix.

The medical evidence has also not supported the prosecution version. As per report of the Chemical Examiner Ex.PB, no semen was detected on the underwear and salwar of the prosecutrix, which falsifies the story put forth by the prosecution. Link evidence was also conspicuously missing in the present case. Despite the availability of vaginal swabs of the prosecutrix on which semen was found, the prosecution did not make any effort to get it compared with the semen of accused Veer Singh @ Veeru, as the allegation of rape was levelled only against this juvenile accused namely Veer Singh @ Veeru.

It has also come on record in the allegation levelled by the complainant that during the course of occurrence, one gold necklace, one Tikka and one finger ring of the prosecutrix were lost. This allegation also makes the prosecution story, as put forth, to be highly doubtful. It is so said because it is a matter of common knowledge that the prosecutrix would not be sleeping, while wearing gold necklace and Tikka (a gold ornament which

adorns the forehead of a woman). Further, it seems to be highly probable that the prosecutrix either herself had gone out of her house or she had invited the accused at the time of alleged occurrence which was stated to be 4 a.m. of winter night i.e. 25.02.2003. In the absence of an invitation, the accused persons would not have a dream that the prosecutrix would be available in the courtyard of her house at 4 a.m.

Similarly, appellant-Malook Singh was not living in his four bed room house all alone. His parents as well as one married brother were also living with him in the same house. It does not appeal to reason that if the prosecutrix would have raised an alarm, no member of the family of Malook Singh, including his aged parents, would not come at the place of occurrence, which was only an adjoining room. All the abovesaid relevant facts, when put together, would clearly indicate that the prosecutrix was certainly a consenting party.

Based on the discussion in the foregoing paragraphs, it is unhesitatingly held that the prosecution has failed to prove its case beyond reasonable shadow of doubt. In fact, the case of the prosecution was highly doubtful. No such occurrence had taken place, in the manner, alleged by the prosecution. It was a clear case of consent and the accused were falsely implicated. Under these circumstances, it can be safely concluded that the learned trial Court has misdirected itself, while recording conviction of Malook Singh (deceased) and the surviving appellant namely Babbu @ Babbu Singh, therefore, the impugned judgment of conviction and order of sentence cannot be sustained.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that impugned judgment of conviction and order of sentence of even dated i.e. 22.10.2003 passed by learned Addl. Sessions Judge (Fast Track Court), Ferozepur are not sustainable in law and the same are hereby set aside. Surviving appellant-Babbu @ Babbu Singh is acquitted of the charges framed against him. Since he is on bail, his bail bonds shall stand discharged.

Resultantly, with the abovesaid observations made, instant appeal stands allowed.

[RAMESHWAR SINGH MALIK]
JUDGE

08.04.2015
vishnu