

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 24.08.2015

1. Criminal Appeal No. 32-DB of 2010

Naresh & Others

...Appellants

Versus

State of Haryana

...Respondent

2. Criminal Revision No. 707 of 2010

Daya Ram

...Petitioner

Versus

State of Haryana & Others

...Respondents

**CORAM: Hon'ble Mr. Justice Hemant Gupta
Hon'ble Mrs. Justice Raj Rahul Garg**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters? Yes
3. Whether the judgment should be reported in the Digest?

Argued By: Mr. Sanjay Vashishth, Advocate for the appellants.

Mr. R. D. Yadav, Advocate for the petitioner/revisionist.

Mr. Vivek Saini, Assisatant Advocate General, Haryana.

Raj Rahul Garg, J.

This order shall dispose of above mentioned two cases.

Naresh son of Ami Lal, Krishan son of Desh Raj and Billu @

Balram son of Desh Raj assailed the judgment of conviction dated 21.12.2009 rendered by Learned Additional Sessions Judge, Rewari whereby all the accused were acquitted of the charge framed against them under Section 325/506 IPC. There were total 6 accused in this case. Accused Guddi @ Saroj and Roshni have also been acquitted whereas appellant-accused Naresh was held guilty under Sections 363/366A/376(2)(f) IPC; accused Krishan and Billu @ Balram were held guilty for committing offence punishable under Sections 323/326 read with Section 34 IPC. Vide order on sentence dated 23.12.2009, convicts Billu @ Balram and Krishan, each, were sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 500/- with default clause for committing offence punishable under Sections 323/34 IPC and to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000/- with default clause for committing offence punishable under Section 326/34 IPC. Further, accused-appellant Naresh was directed to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000/- with default clause for committing offence punishable under Section 363 IPC; to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000/- with default clause for committing offence punishable under Section 366A IPC and to undergo rigorous imprisonment for life with a fine of Rs. 10,000/- with default clause for committing offence punishable under Section 376(2)(f) IPC. Accused Ami Lal had died during the course of trial.

Daya Ram, complainant of this case, filed aforesaid revision petition with the grouse that the acquittal of Guddi @ Saroj and Roshni wife of

Desh Raj is not correct and the impugned judgment is liable to be modified to that extent. Complainant also prayed for enhancement of sentence of appellants-accused Billu @ Balram, Naresh and Krishan and further prayed that even the sentence of fine may also be enhanced to Rs. 20,00,000/- in the interest of justice and fair play.

Briefly, prosecution case is like this; that on 09.11.2007, Daya Ram along with his grand-daughter (prosecutrix) met the police party while they were standing at Bus Stand, Dahina Jainabad for patrol duty and handed over an application to ASI Sube Singh in which the incident of the present case was stated. As per complainant, on 09.11.2007, prosecutrix, aged about three years, was watching the fire works near the house of Ramesh son of Sagar Mal Soni along with other children of *Mohalla* at about 8.30 PM. At that time, children raised a noise as to where the prosecutrix had gone. On hearing their noise, complainant and his neighbor Rattan Singh son of Rajender Singh reached there. Children told them that Naresh son of Ami Lal had enticed away prosecutrix and had taken her towards his house. On this, complainant and Rattan Singh had gone to the house of Naresh and saw Naresh raping the prosecutrix by making her lay on the cot in the courtyard of his house. On seeing them, Naresh picked up an axe (*Kulhadi*) and gave a threat to their life in case they step forward. Thereafter, by climbing the stairs leading to the roof of his house, he had made good his escape. Blood was oozing out from the private parts of the prosecutrix . *Gudari* was also smeared with blood. After picking up the prosecutrix, they came out in the street where Vikram had met them who was also coming towards that side. Krishan, Billu @ Balram sons of

Desh Raj and Ami Lal son of Chander Singh armed with *Lathi* and *Kulhadi* came there. Krishan gave a *Kulhadi* blow on the right ankle of Vikram. When complainant tried to save his nephew Vikram then Billu @ Balram gave a *Lathi* blow on his right shoulder. Ami Lal gave a *Lathi* blow on his right hand. In the meanwhile, Roshni wife of Desh Ram and Guddi daughter of Desh Raj also reached there. They had also thrown brick bats towards them which hit complainant's right foot. On hearing the shouts, complainant's real brother namely Dhanpat also reached there. Dhanpat and Rattan Singh could save them from the clutches of the accused. Vikram was brought to Civil Hospital, Rewari for treatment. Complainant along with prosecutrix had gone to the police for lodging the report. This report is Ex. PA. On this report, ASI Sube Singh made his endorsement, Ex. PA/1 and sent the same to the police station for registration of the case, whereupon, formal FIR, Ex. PH, was recorded.

On the next day i.e. 10.11.2007, ASI Sube Singh reached Civil Hospital, Rewari and gave an application, Ex. PW-13/A to the Medical Officer, GH Rewari for recording the statement of injured Vikram. On that application, doctor opined that injured Vikram was fit to make statement. On the same day, ASI Sube Singh got complainant Daya Ram medico-legally examined by moving application Ex. PW-13/B. On the same day, he got medico-legally examined prosecutrix by moving application Ex. PW-13/C. Dr. Archana Yadav medico-legally examined prosecutrix. As prosecutrix did not allow further examination as she was very irritable, therefore, she was referred to PGIMS, Rohtak for further examination. MLR of prosecutrix is Ex. PD. At PGIMS Rohtak, Dr. Neena Garg, Senior Resident medico-legally examined prosecutrix

and after going through the FSL report she opined that possibility of sexual assault cannot be ruled out. Her report is Ex. PW-16/A. Thereafter, ASI Sube Singh prepared rough site plan, Ex. PW-13/D, with correct marginal notes. On the spot, a piece was cut from the *Gudari*. That piece and pants were converted into sealed parcel with the seal 'VS' and a blood stained towel were taken into police possession, vide memo Ex. PC. Seal was handed over to Rattan Singh, witness, after use. Accused Naresh and Ami Lal were arrested. Accused Naresh was medico-legally examined by moving application Ex. PE/1. On 12.11.2007, Constable Dalip Singh handed over a parcel, which he obtained from the doctor at PGIMS, Rohtak, to ASI Sube Singh and the same was taken into police possession, vide memo Ex. PW-13/E. The same was deposited with MHC, Police Station, Khol.

On 17.11.2007 accused Krishan and Ballu @ Balram was arrested. Statements of witnesses were recorded. Accused Roshni and Guddi who were on bail were joined in the investigations. X-Ray reports of Daya Ram and Vikram were obtained. As per X-Ray report, Ex. P-14/A, Vikram was reported to have suffered fracture medial malleolous of right ankle. Report FSL, Ex. PX, Ex. PY and Ex. PY/1, were obtained. After completion of necessary investigations, challan was put in the court.

Finding a prima-facie case against all the accused, they were charge-sheeted for the offence punishable under Sections 323/325/326/506 read with Section 34 IPC. Besides the aforesaid offences, accused-Naresh was also charge-sheeted under Sections 363/366A/376(2)(f) of IPC.

After taking entire prosecution evidence, statements of accused

under Section 313 Cr.P.C. were recorded wherein accused denied each allegation of the prosecution and pleaded their innocence. They also alleged their false implication in this case. Accused Krishan has taken the defence that he was unable to walk and was on bed rest on the day of alleged incident. Prior to 3-4 days of the alleged incident, he had suffered fracture of his leg and Dr. Atam Parkash Yadav of Rewari applied plaster on his leg. He had gone to jail with fractured leg. Accused-Roshni has taken the defence that she was not present at the spot. She has been falsely implicated being lady member of the family of co-accused. Guddi-accused has also taken the similar defence. After hearing both the sides and appraising the entire evidence and material coming on record, the learned Trial Court rendered the impugned judgment of conviction and also passed order on sentence as mentioned in the earlier part of this judgment. However, accused Guddi and Roshni were acquitted whereas Ami Lal had died.

We have heard counsel for the parties besides appraising the entire evidence and material coming on record.

It was argued by the learned counsel for the appellants-accused that on the same set of evidence co-accused Guddi @ Saroj and Roshni have been acquitted whereas appellants have been convicted. Since co-accused Guddi and Roshni have been acquitted by giving them benefit of doubt, therefore, on the basis of same evidence, available on record, appellants are also entitled to acquittal. This argument of learned counsel for the appellants-accused is not sustainable as the learned Trial Court has assigned detailed reasons for the acquittal of these two lady accused. Even this fact is to be

discussed in detail in the following paragraphs of this judgment while deciding the revision petition.

It was next argued by learned counsel for the appellants-accused that as per prosecution case, Krishan gave *Kulhadi* blow on the right ankle of Vikram whereas Trial Court convicted both the accused for the said injury under Section 326/34 IPC. Accused-Krishan did not get recovered *Kulhadi* nor the same was taken into police possession. As such conviction under Section 326 IPC is not sustainable. It was also argued by the learned counsel for the appellants-accused that PW-14 Dr. Birender Yadav deposed that on 11.11.2007 he gave X-Ray report of Vikram son of Mohinder Singh, which is Ex. P-14/A. Vikram had fracture of medial malleolus on his right ankle. He also proved X-Ray report of Daya Ram, complainant, as Ex. PW-14/B, having no bone injury. The aforesaid X-Rays were got conducted from a private doctor. PW-14 in his cross-examination admitted that there is no reference of MLR number on these X-Ray reports. He also deposed that the said patients were never admitted in his hospital. Under these circumstances, it is not known as to how and under what circumstances they got their X-Ray done from a private doctor. There is nothing on record to show as to why the X-Ray was not got done from Civil Hospital itself. Non-mentioning of MLR number on the X-Ray report makes report Ex. PW-14/A doubtful and cannot be taken into consideration. In order to appreciate the above argument advanced by learned counsel for the appellants-accused, we have to take into consideration the statement of Vikram, PW-11. He narrated the entire occurrence as per prosecution case regarding causing of injury on his person by Krishan. He deposed that Krishan and Billu

came there from their house. Krishan was having an axe; Billu was having a *Lathi*. Krishan had inflicted blow on his left ankle with *Kulhadi*; Billu had inflicted *Lathi* blow on the right shoulder of his uncle Daya Ram. Ami Lal also came there having a *Lathi* and inflicted blow on the hand of his uncle. Thereafter, Roshni and Saroj pelted stones on them. By those stones, his uncle received injuries on his leg. On their shouts "*Bachao Bachao*", Dhanpat and Rattan came at the spot and saved them. Accused also threatened them of dire consequences. They had gone to GH, Rewari. Their medico-legal examinations were conducted. Thus, Vikram has nowhere stated that he suffered fracture of his right ankle. Dr. Manish Dayal, PW-7, medico-legally examined Vikram. He deposed that he found injury on the person of Vikram which is as follows:

"There was smooth edged incised wound over the medial malleolous of right leg of size 1 cm x 0.7 cm x 0.5 cm bone deep with profuse bleeding. Movements were painful. Advised x-ray surgeon's opinion."

Thus, this doctor also did not state that for this injury Vikram got conducted X-Ray or that there was fracture, found on his person. The complainant party did not muster its courage to put aforesaid X-Ray report to this doctor. This doctor simply stated that if fracture is found in the present injury, in that eventuality, injury would be grievous in nature. This doctor was examined on 22.09.2008. The X-Ray report, Ex. PW-14/A, is dated 11.11.2007. Thus, when the doctor was examined as witness, X-Ray was there. Non-putting of this X-Ray report to doctor also speaks volumes about the genuineness of the X-Ray report. As no MLR number found mention on the X-Ray report and as the report is from a private doctor, the same cannot be made the basis of conclusion that Vikram suffered fracture of right ankle in this incident. As

Vikram did not suffer fracture, therefore, no offence under Section 326 IPC is made out and the offence which could be said to be only under Section 324/34 IPC. So is ordered, accordingly.

The contention of learned counsel for the appellants-accused that as the aforesaid injury was caused only by accused-Krishan and not by Billu @ Balram, therefore, he cannot be convicted under Section 326 IPC, is not sustainable. Attracting the provisions of Section 34 IPC, he is also liable for the injury caused by Krishan on the person of Vikram. As such the offence under Section 324/34 IPC is also established. If *Kulhadi* was not recovered from accused-Krishan, it does not go against the case of prosecution. There is overwhelming evidence available with statement of Daya Ram PW-1, Rattan Singh PW-3 and Vikram PW-11 that accused-Krishan had given *Kulhadi* blow on the right ankle of Vikram. Dr. Manish Dayal, PW-7, reported that the injury on the person of Vikram was from a sharp-edged weapon. Though, it was written in the MLR, Ex. PF/2, that the weapon of offence was blunt, yet, the doctor when appeared in the court as witness categorically stated that the same was mentioned inadvertently, whereas, the injury was from a sharp-edged weapon.

It was next argued by the learned counsel for the appellants-accused that 3-4 days prior to the alleged occurrence, accused-Krishan had a fracture of his leg. Dr. Atam Parkash Yadav of Rewari applied plaster on his leg. He was also admitted in jail with plaster on his leg. Umar Mohammad, Sub Assistant Superintendent, District Jail, Narnaul, as DW-1, proved this fact by deposing that as per the jail record, his right leg was plastered when he firstly

confined in jail. He has placed on record copy of Entry No. 3697 in Register No. 1, kept in the jail, as Ex. DW-1/B. He also placed on file original release order issued by learned JMIC on 18.01.2008; copy of which is Ex. DW-1/C and also photocopy of application Ex. DW-1/D which was given by Krishan to Superintendent, District Jail, Narnaul at the time of entry in jail on 18.11.2007. Thus, as Krishan was having fracture of his right leg, it was not possible for him to be present at the spot or at least inflict injury on the person of Vikram. Accused Krishan has examined Umar Mohammad, Sub Assistant Superintendent, District Jail, Narnaul as DW-1 but he did not care to examine Dr. Atam Parkash Yadav of Rewari who applied plaster on his leg. He also failed to give the circumstance under which he broke his leg. There is also no medical record on the file produced by this accused so as to show as to on which date he suffered fracture and when the plaster was applied. Under these circumstance, the afore-discussed defence, taken by accused-Krishan, is not probable.

It was next argued by learned counsel for the appellants-accused that appellant-Naresh has been falsely implicated in this case. The alleged occurrence took place on 09.11.2007 at about 9.30 PM whereas FIR was lodged on 10.11.2007 after giving a considerable thought. There might be some incident of causing hurt etc. happened. Registration of false case, by introducing prosecutrix of the age of three years, cannot be ruled out. It was further contended that the totally false version has been introduced by the prosecution otherwise there would not have been any circumstance to abstain from lodging the complaint immediately on 09.11.2007 itself.

The above argument of learned counsel for the appellants-accused is not sustainable as, if we peruse the copy of the FIR, Ex. PA, and that of formal FIR Ex. PH, it clearly shows that the information was received in the police station on 10.11.2007 at 00.35 Hours. Thus, prior to this, the statement of complainant was recorded by the police and thereafter only Ruqqa was sent to police station for registration of the case whereupon formal FIR Ex. PH was recorded. After picking up of prosecutrix from the house of accused-Naresh, the co-accused caused injuries on the person of Daya Ram and Vikram. Vikram was sent to hospital whereas Daya Ram-complainant along with prosecutrix had gone to the police and made statement before the police, whereupon FIR Ex. PA in this case was registered. In this case FIR is prompt. Even prosecutrix was medico-legally examined on 10.11.2007 itself at 2.30 AM i.e. the very night of the incident and Daya Ram and Vikram were medico-legally examined at 12.35 AM on 10.11.2007. What to speak of delay in FIR, rather it is the case where the FIR is prompt one. Dr. Archana Yadav, who conducted the medico-legal examination of the prosecutrix, categorically stated that:

“There was alleged history of some Naresh picking her up from front of house and sexually assaulted her. This history was told to me by her grand-father. Patient was wearing orange T-shirt and was not wearing any underwear or pant. Her clothes were intact. Some stains were present on shirt. Patient was conscious and orientated. There was no mark of fresh injury on any part of body, thigh and chest. Breasts were not developed. Axillary and pubic hair were absent. On local examination: bleeding was present on labia. The patient was very irritable and did not allow further examination. However, a tear was seen at the junction of labia posteriorly of size about 2 x 1 cm which was

bleeding on touch, bright red fresh blood was coming out of wound. Patient did not allow further examination. So, the patient was referred to PGIMS Rohtak for further examination. The patient was brought by Sube Singh, ASI. My original MLR is Ex. PD which is in my hand and signed by me. I have gone FSL report of the present case and I am of the opinion that possibility of sexual intercourse cannot be ruled out."

PW-15 Dr. Anju Bala deposed that prosecutrix was admitted on 10.11.2007 for further examination. Her admission slip is Ex. PW-15/A. Dr. Neena Garg, Sr. Resident at PGIMS Rohtak examined her. Dr. Neena Garg, PW-16, categorically stated that the patient was earlier examined at GH, Rewari from where she was referred to PGIMS Rohtak for examination and opinion. Her medico-legal examination was already conducted. On examination, in PGIMS Rohtak, there was no bleeding and lesion about 1 cm was present on the posterior fourchette. Vaginal Swab was taken and were handed over to Constable Dalip Singh for forensic examination. Thereafter, seeing the report FSL, she gave her opinion that possibility of sexual assault cannot be ruled out. *Gudari* was taken into police possession, vide memo Ex. PC. This fact was proved by Rattan Singh, PW-3, as well ASI Sube Singh, PW-13. Report FSL, Ex. PX, says that human semen mixed with blood was detected on Ex. 1A (*Gudari*). Human semen mixed with traces of blood was detected on Ex. 2 (towel) and human semen was detected on Ex. 4 (underwear). Traces of blood too small for serological tests were detected on Ex. 1B (pant). Thus, with this evidence on record, the contention of learned counsel for the appellants-accused that the complainant has put up his grand-daughter of the age of three years only in order to settle his grouse with the accused is absurd

and highly deplorable. There is, in fact, not an iota of evidence on the file to show as to what sort of enmity was between the two families which compelled the complainant to put up his three years old grand-daughter against the accused.

It was further argued by learned counsel for the appellants-accused that had this incident been genuine, in that eventuality, the medical examination of prosecutrix would have been got done in the first instance whereas in this case complainant Daya Ram as well Vikram were medico-legally examined on 10.11.2007 at 12.35 AM and the prosecutrix was got medico-legally examined on that very day at 3.00 AM. This fact itself creates doubt regarding genuineness of the prosecution case. The above argument of learned counsel for the appellants-accused is devoid of any merit. Prosecutrix was to be got examined from a lady doctor. It might be possible that the lady doctor was not available in the hospital during night time. It must have taken time in calling her. Had accused put this question to the doctor who examined Daya Ram, Vikram and prosecutrix, they would be able to give a suitable reply. Even if, had this very question asked to the Investigating Officer, the position would have been made crystal clear but the appellants-accused did not put even a single question to the aforesaid doctors. Even otherwise, the time gap between the examinations of Vikram and that of prosecutrix is not much. In such a short time, causing of injuries, as reported by the doctor after medico-legal examination, on the person of prosecutrix by a friendly hand, is not possible. As such, the aforesaid argument of learned counsel for the appellants-accused has no legs to stand. In the present case, the oral evidence is fully

corroborated by the medical evidence and even by the report FSL, Ex. PX, Ex. PY and Ex. PY/1. With the statements of PW-1 Daya Ram-complainant, PW-3 Rattan Singh who accompanied Daya Ram to the house of Naresh when they saw Naresh committing the offence of rape against the prosecutrix, it is established on the file that appellant-accused Naresh had kidnapped the prosecutrix with an intention to commit rape on her on 09.11.2007 at about 8.30 PM. The aforesaid two witnesses categorically stated that on the day of occurrence; prosecutrix along with other children was watching crackers. The children raised alarm when they did not find prosecutrix, whereupon Daya Ram-complainant and Rattan Singh PW-3 reached there; to whom the children told that accused-Naresh had taken away the prosecutrix towards his house. Thereafter, both of them had gone to the house of Naresh and saw accused-Naresh committing rape upon the prosecutrix on a cot. They further deposed that on seeing them appellant-Naresh picked up an axe and threatened them to kill and thereafter could make good his escape through roof of his house by using the ladder. Short of repetition, medical evidence and report FSL which we have already discussed above in detail, further prove the case of prosecution.

PW-1 Daya Ram-complainant, PW-3 Rattan Singh, PW-11 Vikram and PW-12 Dhanpat further supported the occurrence of causing injuries on the persons of Daya Ram and Vikram by the accused-Krishan and Billu @ Balram. Dr. Manish Dayal, PW-7, proved the injuries on the persons of Daya Ram and Vikram by proving their MLRs, Ex. PF/1 and Ex. PF/2. Thus, with this evidence on file, prosecution has succeeded in bringing home guilt against the

appellants-accused. As such appeal filed by appellants-accused is devoid of any merit.

By way of filing of revision petition, the counsel for complainant Daya Ram argued that accused Guddi and Roshni have been wrongly acquitted on the same set of evidence as they also participated in the commission of crime by throwing brick bats on the persons of complainant party. Therefore, they should also be convicted along with the co-accused. Learned counsel for the revisionist also argued that the sentence awarded to appellants-accused is not sufficient. It does not commensurate with the crime committed by them. As such, it requires to be enhanced.

The above argument of learned counsel for the revisionist is not sustainable as while acquitting Guddi @ Saroj and Roshni wife of Desh Raj, the learned Trial Court has recorded detailed reasons. The learned Trial Court took into consideration while acquitting aforesaid two lady accused that had they pelted stones on the injured, they would have suffered some injuries on account of that whereas per MLR, Ex. PF/1 and Ex. PF/2, PW-11 Vikram suffered one incised injury on his right leg caused by sharp-edged weapon i.e. *Kulhadi* and three injuries were found on the person of Daya Ram, PW-1. One injury was on his right little finger, one abrasion on right heel and one reddish linear bruising over the right shoulder. One injury each on the person of Daya Ram was caused by accused Ami Lal and Billu as well. Under these circumstance, the very presence of aforesaid two lady accused at the spot becomes doubtful. As per prosecution case, the aforesaid two lady accused came in the last. As such, there was no question of sharing of common

intention by them with co-accused namely Krishan, Billu and Ami Lal who had already caused injuries to Daya Ram and Vikram. Under these circumstance, the learned Trial Court held that the provisions of Section 34 IPC are not attracted respecting them. The aforesaid findings of the learned Trial Court cannot be termed either perverse or misreading of evidence. As such no interference is called for at our end in this revision petition against acquittal of Guddi @ Saroj and Roshni.

Naresh-accused being neighbour was a person in a position of trust to the prosecutrix. As such, for committing offence of rape, the learned Trial Court awarded life imprisonment to appellant-accused Naresh which cannot be termed as not commensurate with the offence committed by him. The co-accused have caused simple injuries on the person of complainant and Vikram, therefore, also we do not find that the sentence awarded to the appellants-accused is required to be enhanced.

Thus, finding no merit in this revision petition, it is ordered to be dismissed. Since the offence under Section 326 IPC is converted into one under Section 324 IPC, therefore, the sentence awarded to the accused in this case is reduced to two years. Sentence regarding fine shall remain the same. Except this modification in the impugned judgment, it is maintained and the appeal filed by the appellants-accused is ordered to be dismissed.

For the reasons, recorded above, finding no merit in the revision petition, filed by the complainant Daya Ram, it is also ordered to be dismissed. If these appellants are on bail, their bail bonds, shall stand cancelled and they be taken in custody for serving the remaining period of sentence. Copy of the

judgment be sent to concerned Chief Judicial Magistrate for compliance and the compliance report be sent accordingly.

(Hemant Gupta)
Judge

(Raj Rahul Garg)
Judge

24.08.2015
Waseem Ansari