

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-S-2265-SB of 2004
Date of Decision: July 15, 2015

Balloo @ Aslam ...Appellant

Versus

State of Haryana ...Respondent

CRR No.1014 of 2005

Vakil ...Petitioner

Versus

Balloo @ Aslam and others ...Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. A.P.S. Deol, Senior Advocate
with Mr. Arshdeep Singh, Advocate
for the appellant.

Mr. Manish Sharma, AAG, Haryana.

Mr. Sudhir Aggarwal, Advocate
for the petitioner (in CRR No.1014 of 2005).

FATEH DEEP SINGH, J.

Initially three accused namely Balloo @ Aslam, Illiyas @ Illi @ Ali Mohammad and Rustam were tried in criminal case registered by way of an FIR No.35 dated 8.2.2003 under Sections 376,306,506 and 34 IPC with Police Station Sohna, Gurgaon and by virtue of impugned judgment dated 14.9.2004, the Court of learned Additional Sessions Judge, Fast Track Court, Gurgaon acquitted all the accused for commission of offence under Section 376, 306 and 506 IPC but convicted the present appellant-

Ballloo @ Aslam for commission of offence under Section 376 IPC and hence sentenced him to undergo rigorous imprisonment for seven years with fine of ₹1000/- and in default of payment of fine to further undergo rigorous imprisonment for six months.

It is against these findings the appellant-convict has come in the criminal appeal against his conviction while criminal revision has been preferred on behalf of complainant-Vakil, who happens to be the brother of deceased Kalsum. Since both the matters have arisen out of the common findings and to facilitate brevity are being disposed off conjointly through this judgment.

Heard learned counsel for the parties and perused the records of the case with their invaluable assistance. Briefly spelled out the case of the prosecution as per complainant Wakil PW10 are that her sister Kalsum, who was married about 9-10 months prior to this occurrence had come to their village Kiranj on the eve of death of their father with the complainant and, thereafter, complainant has left for Pune. On his return, on 7.2.2003 his wife Akbri PW7 told him that on 4.2.2003 when Kalsum had gone to answer the call of nature accused-appellant had raped her in the fields of Chet Ram. It was further informed that on 6.2.2003 she along with others had gone to the house of accused to lodge protest but these persons defamed Kalsum, who on 6.2.2003 left the house without informing anyone. Thus, it was on 8.2.2003 the matter was reported to the police leading to the registration of the FIR Ex.PK. As per the prosecution, it was because of the acts of the accused led to the commission of suicide by the deceased. The prosecution in its endeavour had examined

12 witnesses to prove its case and when confronted with the evidence oral as well as documentary in stand taken under Section 313 Cr.P.C the accused denied these allegations tendering certain academic certificates and on closure of the defence the impugned findings were recorded.

Appreciating the arguments of the two sides, the appellant has been convicted under Section 376 IPC. The argument raised by learned Senior counsel for the appellant that there is no evidence to establish the offence of rape as defined in Section 375 IPC, though, has sought to be controverted with much force and vehemence by learned State counsel, who has sought to advert to the averments of PW7 Akbari who claims that deceased has confided in her so. Appreciating these submissions, the first and foremost evidence in a case of rape revolves around medical evidence. The only semblance of evidence has come through the testimony of Dr. Gurvinder Singh, Medical Officer, PW3 who had conducted post mortem examination on the dead body of the deceased by way of Ex.PB on police request Ex.PB/1 and has proved inquest proceedings Ex.PC. Learned counsel for the appellant has drawn attention of this Court to the examination-in-chief of this witness, who has stated that no external injury marks were seen on the private parts/body of the deceased and as per opinion of the doctor the cause of the death is drowning which was ante-mortem in nature and sufficient to cause death in ordinary course of nature and there is categoric assertion by the witness that there was no rape in this case as there was no symptom available are matters which outrightly negate the case of the prosecution. Moreover, absence of ocular evidence to corroborate

as to commission of rape further is a distressing feature for the prosecution.

The next line of submissions revolves around the lack of evidence. It is admitted even by the State that there is only PW7 Akbari who claims that she heard the noise of Kalsum deceased and when she reached the spot she saw accused Balloo running after setting his pants and, thus, clearly not an eye-witness of this offence of rape but has only seen the accused in an odd situation together with the fact that in the light of submission of the appellant's counsel that the occurrence is stated to have taken place on 4.2.2003, whereas, the FIR has been lodged on 8.2.2003 after four days of the occurrence and in the absence of explanation for delay are matters which have never been explained by the prosecution. In view of the golden principle of criminal jurisprudence onus to prove its case lies upon the prosecution and which is supposed to be proved beyond shadow of reasonable doubt and, therefore, creates another suspicious circumstance that goes against the prosecution. As has been pointed out even the alleged person of the village who intervened after the occurrence have not been examined to account for this delay and there is material improvement that has sought to be introduced by this witness in the prosecution story, whereby, she has been confronted with her previous stand by way of Ex.DA. The most astonishing fact that has been noticed by this Court is the admission by this witness that she did not talk to anyone between 4.2.2003 to 7.2.2003 and therefore, is to the detriment of the prosecution. No doubt, in permissive society such offences take their own time to be reported to the police but that does not

absolves the prosecution of its obligation to explain the reasons for such a delay which certainly are not forthcoming together with the fact that there is no substantial and cogent evidence to corroborate these allegations. The other material witness is complainant PW10 Wakil, whose testimony is based on hearsay and even this witness in his cross-examination accepts that his wife did not tell about the incident to anyone till he had come back to the village and they did not inform the police of her disappearance till the recovery of her dead body are matters which have a debilitating effect on the prosecution's version. Thus, no benefit can be gained by the prosecution from testimony of this witness. Since there is attempt by the prosecution to bring about the element of dying declaration made by the deceased before PW7 Akbari, however, the provisions of Section 32(1) of the Evidence Act makes it emphatically clear that it is only when the statement is made by the person as to the cause of his death or the circumstance of transaction which resulted in death and at that very point of time the person must be under expectation of death. The lone testimony in this regard which has been outrightly rejected by the trial Court as testified by PW7 nowhere reproduced the exact words of the dying declaration much less about the allegations of rape and, therefore, this argument of the State becomes untenable and even otherwise, it is settled position of law that it is unsafe to convict a person purely on the basis of a dying declaration. Since there is not even an iota of evidence as to the commission of the offence of rape the trial Court has certainly fallen into an error in holding the appellant convict guilty of commission of offence under Section 376 IPC. The impugned findings certainly are illegal and wrong interpretation of

the evidence as well as law and are not only illegal in their approach but also perverse in its findings and, therefore, needs to be set aside.

As far as the criminal revision by the complainant pertains to the enhancement of sentence of rape from the awarded rigorous improvement of seven years and fine of Rs.1,000/- is concerned, having regard to what has been discussed above and in view of the onus which lay on the prosecution who is under bounden duty to establish its case beyond the shadow of reasonable doubt which it has failed to do so and that though much vehemence has sought to be made in the submissions of counsel for the revisionist Mr. Sudhir Aggarwal, Advocate but in view of the categoric findings holding the impugned findings to be patently illegal and finding no merits even in the revision the prayer of the revisionist needs to be outrightly rejected.

Thus, in the light of above discussions, the impugned judgment is set aside by way of acceptance of present appeal and the revision petition preferred by the revisionist stands dismissed.

(FATEH DEEP SINGH)
JUDGE

July 15, 2015
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