

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA No.D-1141-DB of 2014 (O & M)
Date of decision: 28.04.2015

K_____

.....Appellant

versus

Naresh Kumar and another

.... Respondents

CORAM : HON'BLE MR.JUSTICE S.S. SARON
HON'BLE MR.JUSTICE RAMENDRA JAIN

Present: Mr. Sudhir Rana, Advocate
for the appellant.

S.S. Saron, J.

The appeal has been filed by the appellant K. (name withheld) against the judgment and order dated 07.04.2014 passed by the learned Additional Sessions Judge, Karnal whereby Naresh Kumar (respondent No.1) has been acquitted of the offences punishable under Sections 420, 376 (2) (n), 323 and 506 of the Indian Penal Code ('IPC' - for short). Along with the appeal, a criminal miscellaneous application has been filed seeking condonation of 11 days delay in filing the appeal.

The learned Additional Sessions Judge, Karnal has acquitted Naresh Kumar (respondent No.1) as the prosecutrix while appearing in Court as PW1 did not support the prosecution case. She completely resiled from her statements made before the police. She was cross examined by the learned Public Prosecutor at considerable length. The learned public prosecutor after the

statement of the prosecutrix had been recorded tendered in evidence the FSL report Ex.P6 and gave up the Director FSL Madhuban being unnecessary. He rather stated that the prosecutrix, who was the star witness in the case had totally resiled and had not supported the prosecution case. Therefore, in view of the statement of the said witness i.e. the prosecutrix, he closed the prosecution evidence as the case would not improve by examining the remaining witnesses, who were official witnesses.

The learned Additional Sessions Judge after recording the aforesaid statement of the learned Public Prosecutor observed that since there was no incriminating evidence against the accused (respondent No.1) so recording of his statement under Section 313 of the Code of Criminal Procedure ('Cr.P.C.' - for short) was dispensed with. In view of the fact that there was no evidence against respondent No.1, he was acquitted.

Aggrieved against the acquittal of respondent No.1, the prosecutrix has filed the present appeal. It is submitted that the appellant/prosecutrix gave her statement while appearing as PW1 and she did not support the prosecution version and turned hostile. In her cross-examination, she stated that the complaint Ex.P1 bears her signatures but she did not know its contents. It was not got typed by her and rather, it was got typed by some police official. She was confronted with portion 'A' to 'A1' and 'B' to 'B1' of her complaint (Ex.P1). She stated that her statement (Ex.P2) also bears her signatures but the same were obtained on blank papers and she did not make such a statement before the police. She also denied having made statements (Ex.P3 and Ex.P4) to the police.

She further stated that she made the statement (Ex.P5) under Section 164 Cr.P.C. under pressure of the police and his relatives. It is submitted that the appellant is an uneducated lady and doing the work of labour and she has a son.

It has primarily been submitted by the prosecutrix while appearing as PW-1 that she gave the statement in Court because she and her child were under the threat of being killed by respondent No.1. It is submitted that as the appellant was under pressure of being killed so she was made to sign some blank papers as per direction of respondent No.1 on gun point. Therefore, according to the appellant, respondent No.1 has wrongly been acquitted.

We have given our thoughtful consideration to the entire case and perused the record of the learned trial Court that had been requisitioned.

FIR in the case was registered on the basis of a typed application dated 30.01.2014 (Ex.P1) submitted by K (complainant/prosecutrix). The application was addressed to the Senior Superintendent of Police, Karnal. The subject of the application mentioned that it was an application against ASI Naresh Kumar (respondent No.1) regarding committing rape on her after alluring her and in collusion with his wife beating her and also holding out threats to her life; besides, misusing his position. It was submitted by the complainant that she was an illiterate lady and was earning livelihood for herself and her family by doing labour. She had given an application at Police Station Nissing, District Karnal in January, 2013 against her husband Roshan Lal resident of village Gondhar.

At that time Naresh Kumar (respondent No.1) was posted at Police Station Nissing. While proceeding with the above application, the accused (respondent No.1) informed the applicant that now it would be very difficult for her to live with her husband; therefore, she and her husband should sign on some blank papers and he would get them a divorce.

The complainant then stayed separately from her husband along with her child for some days at Nissing. The accused (respondent No.1) started visiting her house and showed sympathy towards her. He represented that he had got a divorce for her and that he wanted to marry her; besides, he was unmarried till then. The complainant got allured by him. In this manner, he by taking advantage of her illiteracy, helplessness and faith started sexually abusing her daily. The above accused (respondent No.1) was then transferred from Nissing to Nilokheri 'Chowki' (Post). He took the complainant with him to village Takhana and started living with her. This was 3 kilometers from Nilokheri 'Chowki'. She kept insisting for marriage but he evaded the issue.

The accused (respondent No.1) then on 28.01.2014 called the complainant near the 'Gaushala' of village Takhana. When the complainant reached there, the accused got down from a vehicle. There was another lady with him and he, as they got down, started beating the complainant. He said that the lady with him was his wife and that he could not marry the complainant; besides, in case she informed anyone regarding the incident or made a complaint in this regard, then they would kill her. It was, therefore, prayed that keeping in view the facts as stated, strict legal action be taken

against the accused (respondent No.1) and justice be imparted to her for which she would be grateful.

Police proceedings were recorded that an application No. 409-CMISE dated 02.02.2014 of the complainant was received through post at the Police Station against EASI Naresh Kumar (respondent No.1) then posted as Escort Guard Karnal regarding marrying by cheating, and beating and holding threats to life as also committing rape. On receiving the application and on the basis of its content and the investigation report of the Deputy Superintendent of Police, Indri, Shri Baljinder Singh, the offences under Sections 420, 323, 506 and 376 (2) (n) IPC were found to be made out. Case FIR No.73 dated 15.02.2014 for the aforesaid offences was registered. The police file along with the original application for further investigation was forwarded to Lady ASI Sharada Rani through EHC Mukesh Kumar for further investigation. The special report though e-mail was being sent immediately from Police Station Nissing to the e-mail ID of the higher officer through the medium of internet. The First Information Report was typed by Kuldeep Singh No.716/Karnal Computer Operator.

Before registration of the FIR on 15.02.2014 on the basis of the application dated 30.01.2014 (Ex.P1), statement (Ex.P2) of the appellant was recorded by the Deputy Superintendent of Police, Indri, Shri Baljinder Singh, on 08.02.2014. In the said statement, the prosecutrix reiterated the allegations made by her in the complaint (Ex.P1). It is then on the basis of the report of Shri Baljinder Singh, Deputy Superintendent of Police, Indri that the FIR was registered.

During investigation, statement (Ex.P5) of the prosecutrix in terms of Section 164 Cr.P.C. was recorded by the learned Judicial Magistrate Ist Class, Karnal. In the said statement, the prosecutrix/appellant inter alia stated that she and her husband had divorced on 'panchyati' basis and thereafter she started residing with her parents at Nissing along with her son. Then she took a room at Nissing, where she and her son started residing. Naresh Kumar ASI (respondent No.1) started visiting her house and used to say that a 'panchayati' divorce had been effected between her and her husband and that now he wanted to marry her. Naresh Kumar ASI also said that whatever money he had received from her husband for getting a divorce, he wanted to return the same to her. She, however, said that he could keep the money but he gave her Rs.2000/-. Naresh Kumar ASI then started residing with them. After sometime Naresh Kumar (respondent No.1) was transferred to Nilokheri and he took them to village Takhana and started residing there. Naresh Kumar (respondent No.1) had been giving false assurances of marrying. Naresh, on one day, called her outside the village near the 'Gaushala' of village Takhana. At that place, there was one lady with him. Naresh said that she was his wife and that he could not marry the complainant. Naresh Kumar (respondent No.1) gave a beating to her and said that in case she informed anybody, then he would kill her. Naresh, it is stated, then was not ready to keep her with him.

The statement of the prosecutrix was signed by her and it was attested by ASI Sharda, Police Station Nissing and also signed by the learned Judicial Magistrate, Ist Class, Karnal on 17.02.2014.

It was certified by the learned Magistrate that the prosecutrix was examined in camera. She was accompanied by ASI Sharada. She was brought at 2.30 a.m. and her examination was recorded at 3.50 p.m. In the view and opinion of the learned Magistrate, the prosecutrix had made a statement voluntarily and without any fear, threat, promise or inducement.

The prosecutrix was medically examined on 17.02.2014 by Dr. Shweta Monga. The medico legal report is on the file but has not been exhibited on record in evidence. The report mentions history of rape three months back. In the medical examination that was conducted, it was mentioned that no external mark of injury (fresh) seen on her body. Examination of external genitalia mentioned that no fresh injury was seen on her breast, inner part of thigh and inner areas, besides, breasts were well developed, pubic hair and axillary well developed. Examination of per vaginal mentions uterus-NPS, vagina admitted two fingers easily and hymen absent. It is further mentioned that the incident had occurred three months back so no vaginal swab and clothes were taken. According to the doctor's opinion, she was habitual for intercourse.

The medical examination of Naresh Kumar (respondent No.1) was also conducted. The report is on the file but has not been exhibited to prove the same. After examining him, it was opined that there was nothing present which suggested that this person was not able to do sexual intercourse.

Recovery memo of the parcel in respect of the accused Naresh Kumar (respondent No.1) was prepared by Lady ASI

Sharada. The same is also not exhibited on record. It is, however, mentioned that in the presence of the witness namely EHC Krishan Kumar, after the medical examination was conducted by the doctor of CHC Nissing, EHC Krishan Kumar produced a parcel containing the underwear of accused Naresh Kumar duly sealed with the seal of 'AW' with seven seals of the doctor; (2) a parcel of pubic hair duly sealed with the seal of 'AW' having three seals of the doctor. (3) a parcel of GLAMLE swab duly sealed with the seal of 'AW' sealed with two seals of the doctor. (4) an envelope of D/FSL Madhuban duly sealed with seal of 'AW' having five seals of the doctor, which were taken in possession by the police in pursuance of memo. EHC Krishan Kumar signed on the memo.

Site plan of the place where the incident of rape it is said had occurred was prepared by Lady ASI Sharada Rani. Mark 'A' in the site plan was depicted as the place where it was stated that the complainant had been raped. The same has not been exhibited on record.

After completion of investigation in the case, police report ('challan') was filed in the Court of learned Judicial Magistrate Ist Class, Karnal on 03.03.2014. The learned Magistrate in his order dated 15.03.2014 inter alia observed that the accused (respondent No.1) had also been booked for the alleged commission of offence punishable under Section 376 (2) (n) IPC, which was exclusively triable by the Court of Session. Accordingly, the case was committed to the Court of Session at Karnal. The accused was directed to be produced before the learned Sessions Judge, Karnal on 22.03.2014.

The learned Additional Sessions Judge to whom the case was assigned framed charges against respondent No.1 on 26.03.2014 for the offences punishable under Sections 420, 376 (2) (n), 323 and 506 IPC. It was alleged that respondent No.1 since January, 2013 to January, 2014 in the area of Nissing, District Karnal, dishonestly induced the prosecutrix by making false representation that the marriage between her and her husband had been dissolved and he further falsely promised to marry her and on this pretext, he committed sexual intercourse with her and sexually exploited her and that he thereby defrauded the prosecutrix and committed an offence punishable under Section 420 IPC. Secondly, he being a police official during the aforesaid period in the area of Nissing, Police Station Nissing committed repeated rape upon the prosecutrix without her consent and against her will and thereby committed an offence punishable under Section 376 (2) (n) IPC. Thirdly, during the aforesaid period and place, he committed criminal intimidation by threatening the prosecutrix to cause alarm to her life and thereby committed an offence punishable under Section 506 IPC. Fourthly, on 28.01.2014 in the area of village Takhana, District Karnal, he physically assaulted the prosecutrix and caused simple hurt to her and he thereby committed an offence punishable under Section 323 IPC. Respondent No.1 was directed that he be tried by the Court on the said charges. The charges was read over to respondent No.1 in simple Hindi and he pleaded not guilty and claimed trial.

During trial the prosecutrix was examined as PW-1 and in her examination in chief, she stated that she did not know Naresh

Kumar (respondent No.1) present in the Court. She further stated that he never dishonestly induced her by making a false representation that the marriage between her and her husband had been dissolved and he never falsely promised to marry her nor he sexually exploited her nor committed rape upon her nor he ever threatened to kill her nor he physically assaulted her nor caused injuries to her.

At the said stage, the learned Public Prosecutor made a request that the witness was suppressing the truth and hence she be declared hostile and he may be permitted to cross examine the witness. He was heard and his prayer was allowed.

The prosecutrix was cross examined by the learned public prosecutor at considerable length. In cross examination, she stated that she had heard the contents of the complaint (Ex.P1) word by word. It bears her signatures. She voluntarily stated that she did not know the contents of Ex.P1 and it was not got typed by her and rather, it was got typed by some police official. She did not mention in the complaint that she had moved an application against her husband in January, 2013 at Police Station Nissing and that the accused Naresh Kumar present in the Court was posted at that time at Police Station or that the accused had told her that it had become difficult for her to live with her husband and the accused asked her to sign some blank papers in order to get divorce from her husband. She was confronted with portion 'A' to 'A1' of the complaint Ex.P1 wherein it was so mentioned. She stated that she did not mention in the complaint that she started living separately from her husband in Nissing for some days. She denied that the accused used to visit

her. She further denied that he started showing sympathy to her or told her that he had got the marriage between her and her husband dissolved. She also denied that he desired to marry her stating that he was still unmarried. She denied that she came under his influence or that he exploited her sexually by taking her in confidence and by taking undue advantage of her illiteracy and helplessness. She also denied that thereafter, the accused was transferred from Police Station Nissing to Police Post Nilokheri or that she started living with the accused in village Takhana which was at a distance of 3 kilometers from Police Post Nilokheri. She also denied that she had been asking the accused to perform marriage with her but he had been prolonging the matter on one pretext or the other. She further denied that the accused took her to near a 'Gaushala' of village Takhana on 28.01.2014 and he came there along with a lady and after getting down from a vehicle gave a beating to her and told her that the said woman was his wife; therefore, he would not perform marriage with her. She also denied that they would kill her in case she narrated the incident to anybody else. She was confronted with the portion 'B' to 'B1' of the complaint Ex.P1 wherein it was so mentioned. It is further stated that she heard the contents of her statement Ex.P2, it bears her signatures. She stated that she did not make such a statement to the police. The statement (Ex.P2), is a statement that she made before DSP Indri before the registration of the FIR and in which she supported the contents of her complaint (Ex.P1).

She further during her deposition voluntarily stated that her signatures were obtained by the police on blank papers. She

had heard the contents of her statements Ex.P3 and Ex.P4 which bear her signatures. It is stated that she did not make such statements to the police. It may be noticed that the statement Ex.P3 is to the effect that she had made a complaint for registration of a case against ASI Naresh Kumar; however, at that time she was not feeling well and she was not in a position to give a statement. Therefore, she be given two days time. The statement Ex.P4 is also of the prosecutrix in which she states that she had been divorced from her husband in a 'panchyati' manner. Thereafter she along with her son started residing with her parents at village Nissing. For residing there, she had taken up a separate room. She had gone to Police Station Nissing regarding the report lodged against her husband. There she met ASI Naresh Kumar. She got acquainted with him and he started visiting her house. He also started saying about marrying her. Naresh got transferred to Nilokheri and he took them to Takhana. There he used to visit them at times. Naresh called her once outside village Takhana at the 'Gaushala'. There was one lady with him. He said that she was his wife. Therefore, he could not marry her. He was then not ready to keep her with him.

It is further stated by the prosecutrix that she did not state before the police that divorce between her and her husband had taken place in a 'panchayat'. It is also denied that thereafter she came to her parental home in village Nissing where she took a separate room on rent. She denied that she went to Police Station Nissing to make a complaint against her husband where the accused met her at the Police Station. She further denied that thereafter they became acquainted with each other or that he used

to visit her house. She denied that he had proposed to marry her. She also denied that he was thereafter transferred from Police Station Nissing to Nilokheri and he took her and her son to village Takhana where also he used to come to her residence. She again denied that he called her near the 'Gaushala' of village Takhana where he came along with a woman and told her that she was his wife. She denied that he had refused to marry her or that he was ready to keep her with him. She was confronted with portion 'A' to 'A1' of her complaint Ex.P4 wherein it was so recorded.

She had seen the MLR which bears her signatures at points 'A' and 'B'. A sealed parcel containing the statement under Section 164 Cr.P.C. was opened at the request of the learned Public Prosecutor. The prosecutrix stated that she had seen her statement Ex.P5 under Section 164 Cr.P.C., which bears her signatures. She voluntarily stated that she made the said statement under pressure of the police and her relatives. It is stated as wrong to suggest that she voluntarily gave the complaint Ex.P1 to the police against the accused. It is further stated as wrong to suggest that she had compromised the matter with the accused out of Court or for that reason she had resiled from her complaint Ex.P1 and previous statements made to the police. She also denied that for the said reason she was deposing falsely. It was stated as wrong to suggest that she had voluntarily made her statement under Section 164 Cr.P.C. before the learned Magistrate without any pressure from any corner.

In cross examination by the counsel for the accused (respondent No.1), she stated that she had made her statement in

Court without any pressure or coercion from any quarter. It was voluntary and true statement.

The learned public prosecutor, as already noticed, tendered in evidence the FSL report EX.P6. He then stated that the prosecutrix, who was the star witness in the case had totally resiled and had not supported the prosecution case. Therefore, in view of the statement, he closed the prosecution evidence as the case would not be improved by examining the remaining witnesses, who were official witnesses.

The learned Additional Sessions Judge then observed that since there was no incriminating evidence against the accused so recording of his statement under Section 313 Cr.P.C. was dispensed with. In view of the fact that there was no evidence against respondent No.1, the respondent No.1 was acquitted.

In the facts and circumstances of the case, it is noticed that there is no evidence whatsoever on record to connect respondent No.1 with the alleged crime. The prosecutrix has now stated that she had resiled from her statements before the police because she and her child were under threat of being killed by respondent No.1. However, though the prosecutrix had earlier lodged reports against respondent No.1 and had pursued the same but there is no report lodged by her making a mention of the threats said to have been held out by respondent No.1 to her. Therefore, it would be difficult to accept her shifting stand from that of completely resiling from her statements made before the police and the learned Magistrate during the trial of the case to now again stating that she was under pressure. Besides, there is no medical

evidence on record to support the allegation of rape. Dr. Shewata Monga, who examined her did not find any fresh external mark of injury on her person. It was mentioned that no vaginal swab was taken.

A perusal of the chemical examiner's report (Ex.P6) shows that it relates to the laboratory examination of exhibits relating to Naresh Kumar (respondent No.1). The articles which were sent for FSL examination are three sealed cloth parcels containing exhibit-1, exhibit-2 and exhibit-3 all stated to be of Naresh Kumar. Exhibit-1 is mentioned as one dirty maroon underwear; Exhibit-2 is mentioned as few dark brown strands of hair kept in an airtight glass vial described as pubic hair and Exhibit-3 is mentioned as two damp cotton wool swabs without sticks kept in an airtight glass vial described as glans swab. The laboratory examination of the same is as follows:-

"1. Human semen was detected on exhibit-3 (Glans swab). However, semen could not be detected on rest of the exhibits mentioned above.

2. Hair in exhibit-2 (pubic hair) were human in origin."

The above report does not in any manner help the prosecution case. There is no evidence or material on record, which may in any manner support the prosecution case so as to hold respondent No.1 guilty of the charges for which he was tried. The learned Additional Sessions Judge, Karnal has in the circumstances, rightly acquitted respondent No.1 and no ground is made out for interfering with the order that has been passed.

Accordingly the appeal of the prosecutrix being devoid of merit is dismissed. Since the appeal has been dismissed on merit, the question regarding delay in filing the appeal is only academic and the application seeking condonation of delay in filing the appeal is also dismissed.

(S.S. SARON)
JUDGE

(RAMENDRA JAIN)
JUDGE

28.04.2015
A.Kaundal