

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

CRA-S-2124-SB-2010 (O&M)

Date of Decision: 13.05.2015

Mahender Singh and anr.

.....Appellants

Versus

State of Haryana

.....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Bijender Dhankhar, Advocate
for the appellant No.1

Ms. Sharmila Sharma, Advocate
for appellant No.2.

Mr. Pardeep Prakash Chahar, DAG, Haryana.

- 1. *Whether Reporters of local papers may be allowed to see the judgment ?***
- 2. *To be referred to the Reporters or not ?***
- 3. *Whether the judgment should be reported in the Digest?***

RAJ MOHAN SINGH, J. (Oral)

1. This appeal is directed against the judgment of conviction dated 21.08.2010 and order of sentence dated 23.08.2010 passed by additional Sessions Judge, Palwal, whereby appellants were found guilty of commission of offences under Section 342/376 (2) (g) IPC and were sentenced to undergo rigorous imprisonment for one year along with fine of Rs.500/- each (3 months in default of payment of fine) and rigorous imprisonment for 10 years and fine of Rs.10,000/- (RI for 2 ½ years in the event of default of payment of fine) under

Section 376 (2) (g) IPC respectively. According to prosecution case prosecutrix Sham daughter of Dharam Singh Caste Carpainter got her statement recorded on 11.06.2008, the contents of which on being translated run an under:-

“ Statement of Sham daughter of Dharam Singh Caste Carpainter resident of Gali Chairman Arawali Singh Gill Chowk, Hodal District Faridabad.

It is stated that:-

Yesterday on 10.07.2008 at about 11/11.30 PM I went to field from my house in order to meet call of nature. When I passed through the front of Rawat Printing Press, then a young boy came out from the shop of the press and caught my hand and second boy gagged my mouth and both took me inside the printing press. One boy twisted by right hand and second boy put off my all the cloths and both committed rape upon me turn by turn. Thereafter, they made me to drink water, thereafter I could not remember. Both boys were named Mahender and Naresh. Thereafter, my mother and Mausī Bhagwati wife of Bachu Singh came searching me and found noise from the shop and got the shutter opened. Both the boys i.e Mahender resident of village Meesa and Naresh resident of Bedha Patti, Hodal ran away after opening the shutter. I along with my mother and Mausī was going to lodge complaint at Hassanpur Chowk and you met us. I have got my statement recorded, which heard to be correct.”

2. After registration of the case, the accused were arrested. Victim as well as the accused were medically examined.

Statement of witnesses were recorded under Section 161 Cr.P.C

and after completion of the investigation, challan was presented in Court. After framing of charges the case was put up for trial.

3. Before adverting to the merits of the case, it is necessary to have a glance over material evidence collected by the police during the course of investigation. In MLR, Ex.PF no external mark of injury was found on the person of the prosecutrix. Injury No.1 was advised for X-ray and for age of the prosecutrix. She was referred to B.K Hospital, Palwal. Vaginal swabs were taken by Doctor and accordingly sent to FSL. On being referred for age determination, the dental age of the prosecutrix was found to be approximately 16 years as per Report Ex. PK/1 submitted by Dental and Surgeon Government Hospital, Palwal.

4. According to School Leaving Certificate Ex. DY, the date of birth of the prosecutrix was found to be 08.02.1991. The prosecutrix was brought before Magistrate for recording her statement under Section 164 Cr.P.C on 23.07.2008 Ex. PH/1. The prosecutrix stated in her statement under Section 164 Cr.PC in the following manner:-

“ Statement of Sham Kumari daughter of Dharam Singh age 15 years.

It is stated that on 10.07.2008, at about 8.00 PM I was going to field in order to meet call of nature. In the field two boys at once came. One was fatty boy and another was slim. They caught me from back and

forcibly took me to a shop near the field. There they gagged my mouth with help of cloth strip and they gave me beatings. Fatty boy twisted my hand. Both forcibly got me naked. In the meanwhile one of them asked Mahender to make her to drink some water immediately. The second one replied that Naresh you make her to drink. Thereafter, one of them forcibly made me to drink water. There was some intoxicants in that water and after drinking the same I became unconscious. Thereafter, I could not know as to what had happened with me. I regained consciousness in late hours in hospital and my entire body was aching.

*Sham Kumari (Sd)
RO & AC (Magistrate)
23.07.2008*

“Magistrate made following memorandum Ex.PG/2 under the statement of prosecutrix”-

I have explained to Sham Kumari that she is not bound to make a confession and that if she does so in confession she may be used as evidence against her and I believe that this confession was voluntarily made. It was noted and was read over to her which was admitted to be correct. It contains full and true account of the statement made by her.

*(Magistrate)
23.07.2008”*

5. The vaginal swabs so taken by Doctor was subjected to

forensic analysis. As per FSL report, seven exhibits were tested in the laboratory, Ex.1 underwear, Ex.2 Vial containing Swabs on the stick, Ex.3 Vial containing swab of the prosecutrix, Ex.4 Vial containing swab of the prosecutrix, Ex.5 Vial containing swab of the prosecutrix, Ex.6 underwear of Mahender, Ex.7 underwear of Naresh. As per laboratory examination a human semen was detected in Ex.6 and Ex.7. However, no semen was detected on the rest of exhibits Ex.6 and Ex.7 are the underwears of Mahesh and Naresh. No semen was detected on the vial/swabs of the prosecutrix as well as on the underwear of the prosecutrix.

6. According to DNA report, since no semen could be detected on the exhibits belonging to the victim and no sample is available for comparison with the DNA profile of the accused, therefore, DNA report was made in negative on 09.02.2010.

7. The prosecution in its evidence examined mother of prosecutrix as PW1 who gave the following salient features of the prosecution case in her deposition:-

(a) On 11.07.2008 there was marriage of Rameshwar Singh son of Jaith of Pushpa. Many relatives had come to attend the marriage.

(b) Prosecutrix went to meet call of nature at 11/11.30 PM. When she did not return, the witness along with her sister

Bhagwati proceeded to search her.

(c) They heard some commotion from the room and they knocked the shutter. It was opened after a considerable time. On opening the shutter two accused namely Mahesh and Naresh (present in Court) ran away.

(d) Sham was lying unconscious. She was brought to home. She gained consciousness after sometime. On inquires she disclosed complicity of Mahender and Naresh in commission of offence under Section 376 IPC.

(e) Medical examination was conducted at about 3.00 PM. There were shops on north and south side of the shop in question. There was a complete market around the place of occurrence. Other shops were stated to be closed. The witness did not call her husband or anybody else due to honour of family. Witness did not know the accused earlier nor the victim have any acquaintance with the accused earlier. When witness entered the shop the victim was with the clothes.

(f) The witness and her sister had raised

alarm for about half an hour by knocking the shutter, but nobody from the neighbourhood came. There was no cot or bed in the shop. Clothes of daughter were not torn. She had injury on her right hand. The names of the accused were told to the witness by ASI Raghbir Singh when their statements were recorded. Prior to the occurrence the witness did not know the accused by their names. The accused were arrested in the absence of witness. Police did not take the witness in jail for identification of accused (stated that she had identified them in police station Hodal). She did not tell the police that the accused had made the victim to drink something.

8. Inspector Mahavir Singh was examined as PW-2 who prepared the special report of the case and handed over the same to the constable to deliver the same to Illaqa Magistrate. HC Hazir Khan was examined as PW-3 who was present at the time of patrolling with ASI Raghbir Singh at Hassanpur Chowk. The victim made statement to ASI Raghbir Singh. After conducting the proceedings IO handed over the writing to the witness for going to the police station for recording FIR. This witness was declared hostile.

9. PW-4 is constable Anoj Kumar draftsman. PW-5 is Dr. Usha Mathur who conducted the medical examination of the prosecutrix. According to Doctor victim was having swelling on right hand. No other external injury was found. No injury of external and internal genitalia was found. Vagina admitted two fingers with difficulty. The case was referred to BK Hospital for opinion regarding age. X-ray was advised for injury No.1. In the opinion of Doctor, possibility of sexual intercourse could not be ruled out. In cross-examination, the aforesaid witness had deposed that sex characteristics of the victim were fully developed. There was no mark of injury on the body of the victim except injury No.1 i.e swelling on hand. Victim did not give any history to the doctor regarding any sexual assault.

10. PW-6 is lady constable Kamlesh who took the prosecutrix for medical examination. The prosecutrix herself was examined as PW-7 and she alleged rape against the appellants. The prosecutrix has alleged in the statement that she gained consciousness, at house and she made the statement before the Magistrate voluntarily. After gaining consciousness, the victim narrated everything to her mother and mausi. PW-8 is Judicial Magistrate who recorded the statement under Section 164 Cr.P.C. PW-9 is Dr. Rameshwari, Medical Officer who examined the prosecutrix for the purpose of determination of her age. He gave opinion that as per dental age, patient was approximately

16 years. In cross-examination, Doctor admitted that dental test is not exact. Possibility cannot be ruled out that the victim could be 18 years of age.

11. Witness PW-10 is SI Jai Kishan who prepared the challan under Section 173 Cr.P.C. PW-11 is Rajender Singh who has proved his affidavit Ex.PN. P/W 12 is the Investigating Officer who was also cross-examined on broader features. Dr. S.C. Bhagat has been examined as PW-13 who got both the accused medically examined and found that they were capable of committing such an offence. The witness has admitted that such offence could have been confirmed by means of DNA which is exact science. Thereafter, the statement of accused were recorded under Section 313 Cr.P.C and they did not led any evidence in defence.

12. I have heard learned counsel for the parties and have also gone through record.

In the medico legal examination of the prosecutrix no mark of injury was found on her person except the swelling on the right hand which was stated to be on account of twisting of hand by one of the accused. The prosecutrix was produced before the Magistrate for recording her statement under Section 164 Cr.P.C. In her deposition before Magistrate, prosecutrix has stated that she was made to drink water before the commission of offence and thereafter she became unconscious. This part of prosecutrix story runs contrary to allegation in the FIR as well as allegations made in the Court.

13. Fact regarding commission of alleged offence hinges upon medical evidence. Medico legal report does not suggests any use of force as no mark of injury was found on the external and internal genitalia aspects of the prosecutrix except the swelling on the hand. The swabs taken by Doctor were subjected to FSL. In FSL report, nothing incriminating could be detected as nothing was found on Ex.2 to Ex.5 i.e swabs taken from prosecutrix. Only semen was detected on Ex.6 and Ex.7 i.e underwear of accused persons. The DNA report also suggested no incriminating evidence against the appellant for want of matching configuration. Due to non-availability of sample of the prosecutrix, comparison with DNA profile of the accused could not be done.

14. In view of medical examination and report of FSL coupled with the statement of Doctor PW-5 it cannot be conclusively held that victim was subjected to rape. But at the same time it cannot be lost sight of the fact that prosecutrix had swelling on the hand and she was kidnaped, made naked, wrongfully confined and criminal force was used by the accused in assaulting her with an intend to outrage her modesty.

15. Taking facts in consideration, this Court is of the opinion that allegations of rape are unfounded, but accused-appellants

are found to have committed offence in terms under Sections 342 and 354 IPC by keeping the victim in wrongful confinement and assaulting her by use of force to outrage her modesty. Therefore, the appellants are acquitted for the offences under Section 376 (2) (g) and at the same time have been convicted under Sections 342 and 354 IPC. Consequently, sentence under Section 342 IPC is ordered to be maintained. The accused/appellants have also been sentenced to undergo rigorous imprisonment for 5 years and to pay fine of Rs.10,000/- (each) under Section 354 IPC. Both the sentences shall run concurrently. With the aforesaid modification, the appeal is partly accepted.

16. As per custody certificate, the appellants have already undergone about 8 years of actual sentence.

17. The jail authorities are accordingly directed to calculate the period already undergone and necessary consequences to follow thereafter.

13.05.2015
prince

(RAJ MOHAN SINGH)
JUDGE