

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Criminal Appeal S- No. 2909-SB of 2010 (O&M)

Date of decision : September 09, 2015

Shyam Sunder and another Appellants

Versus

State of HaryanaRespondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Sandeep Verma, Advocate for
Mr. Sukhdeep Parmar, Advocate
for appellant No. 1.

Mr. Surender Deswal, Advocate
for appellant No. 2.

Mr. Vivek Saini, AAG, Haryana

LISA GILL, J.

Present appeal has been filed by the appellants Shyam Sunder son of Raj Bansi and Kamaldev Parsad son of Parsuram Parsad challenging the judgment and order dated 07.08.2010 and 09.08.2010 whereby the appellants have been convicted and sentenced to undergo rigorous imprisonment for ten years besides pay a fine of ₹20,000/- and to further undergo rigorous imprisonment for two and a half years in default of payment of fine for the offence punishable under Section 376 (2)(g) IPC and also sentenced to

undergo rigorous imprisonment for two years besides pay a fine of ₹2000/- and to further undergo rigorous imprisonment for six months in default of payment of fine for the offence punishable under Section 506 IPC.

Prosecution was set in motion on the statement of the prosecutrix Ex. PA recorded on 14.11.2009. Prosecutrix revealed that she was a permanent resident of Bihar living on rent near Radha Krishan Mandir, Kapashera. She was engaged in the work of thread cutting at plot No. 383 Udyog Vihar, Phase 2. When she got free from work at night on 14.11.2009, she went to meet her friend Radhika in Chhipi Colony, Salarpur Khera. However, on reaching there she came to know that her friend had vacated the house. On the way back, she met acquaintance Jaseem PW2 who also hailed from District Atta Bihar. He offered to escort her till the main road as it was late at night. When she and Jaseem reached near the Shakti Timber Store, Sector 21 at about 9.40 p.m., three persons were standing outside the store. They accosted them, two of them caught hold of Jaseem who managed to escape from their custody whereas one person whose name later was revealed as Surinder @ Nitin forcibly took her inside the room. When she tried to raise a hue and cry, he hit on her left foot and waist. He threatened to kill her if she raised any noise. He committed carnal intercourse and thereafter the other accused whose names were later revealed to be Shyam Kumar and Kamal Dev who were first standing guard at the gate raped her one by one. All of them used condom while raping her and thereafter all three fled from the spot. She being scared and it being very late at

night, she went to her rented accommodation at Kapashera and came to lodge the report on the next day. On the basis of this statement, FIR Ex. PA/2 was registered.

Statement Ex. PA was recorded by PW7 ASI Dhanesh Kumar. On visiting the spot, rough site plan Ex. PD was prepared. Broken pieces of bangles were recovered from the spot and taken in possession vide memo Ex. PE. Spot was photographed. Prosecutrix was medically examined at General Hospital, Gurgaon. Prosecutrix was examined by PW11 Dr. Sushila Yadav, Medical Officer, General Hospital, Gurgaon. Copy of the medico legal report Ex. PQ/1 was received. Forensic Science Laboratory report Ex. PR was received. Dr. Sushila Yadav opined that possibility of sexual assault on the person of the prosecutrix could not be ruled out. It is also recorded by the doctor that husband of the prosecutrix was revealed to have been absconding for about nine years. Both the appellants were arrested from Gundahera on 15.11.2009. Surinder accused was not arrested by the police.

On completion of the investigation, challan was presented under Section 173 Cr.P.C. Charge was framed against both the accused on 08.02.2010.

Prosecution examined as many as 12 witnesses to prove its case against the accused. Both the accused while denying incriminating material put to them pleaded innocence and false implication in their statements under Section 313 Cr.P.C.

Learned trial Court on appreciation of the evidence on record and taking into consideration the entire facts and

circumstances of the case concluded that prosecution had proved its case beyond reasonable doubt qua both the accused. Thereby, they were convicted and sentenced as detailed above. Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellants vehemently argue that evidence on record does not prove the commission of offence as charged against the appellants. It is submitted that there is no injury on the person of the prosecutrix. It is highly improbable that in case of rape and sexual assault by three persons she would not have received any injury. Furthermore, no semen was detected as per FSL report Ex. PR. There was no test identification parade wherein the appellants were identified. Therefore, their identity is also not established. The place of alleged occurrence is a busy place, it is highly improbable that such an act could have been carried out over there. Furthermore, broken bangles are alleged to have been recovered from the place of occurrence whereas there is no averment regarding use of force. Therefore, falsity of the case is apparent.

Learned counsel for the appellants further urge that PW2 Jaseem has not supported the prosecution version and has been declared hostile. Therefore, conviction of the accused is not sustainable. Much stress has been laid on Exs. DA and DB to state that testimony of prosecutrix is not trustworthy. She has given contrary and vacillating versions. It is submitted that there is inexplicable delay in lodging of the FIR. It is improbable that the prosecutrix would not have straightway gone to lodge the report but

proceeded to her home. In view of above, it is prayed that conviction and sentence imposed upon the appellants is unsustainable and the impugned judgment and order be set aside.

Learned counsel for the State on the contrary submits that there is overwhelming and sufficient evidence on record to prove the complicity of the appellants. Evidence on record clearly proves the commission of offence as alleged. It is, therefore, prayed that the impugned judgment and order be upheld.

I have heard learned counsel for the appellants and gone through the record with their assistance.

A perusal of the evidence reveals that the prosecutrix has given a clear, cogent and consistent version of the events as they unfolded. Alleged occurrence took place at about 9.40 p.m. on 14.11.2009. FIR was lodged on the next day at 1.15 p.m. It is an admitted fact that the prosecutrix was living on her own and doing labour work to earn her living. She was a resident of Bihar who had come away from her native place to earn her living. Her husband was missing since nine years. It is a futile effort on the part of the defence to try and dent her testimony by reference to Ex. DA. Ex. DA dated 19.11.2009 is a purported application by the prosecutrix for recording of her statement under Section 164 Cr.P.C. wherein it is mentioned that there were two persons who accosted and raped her. Ex. DB is an affidavit to this effect. Name of Surinder @ Nittu has been wrongly mentioned in the FIR. She came to know about the same on receiving the copy of FIR. No such application was admittedly moved by the prosecuting agency. Defence cannot derive

any benefit from the admission of the prosecutrix in respect to her signatures on the said documents for the simple reason that she has consistently stuck to her initial and original version as in Ex. PA, in her testimony before the Court. When confronted with Exs. DA and DB she has categorically stated that she did not know about the contents of the said documents. She explains that she had signed documents for recording her statement under Section 164 Cr.P.C. She has categorically denied that Surinder did not commit rape upon her. Thus, in these circumstances where the prosecutrix is an illiterate labourer no benefit can be derived by the defence from Ex. DA and Ex. DB which in any case had never been moved/filed by the prosecution.

In respect to the witness Jaseem, doubtlessly he has been declared hostile but this witness has nevertheless admitted that he met the prosecutrix on 14.11.2009. He had proceeded to drop her on the main road and while returning two boys had met him. Therefore, PW2 Jaseem being declared hostile cannot detract from the prosecution version. Neither does it affect the credibility and trustworthiness of the statement of the prosecutrix.

It has been held by the Hon'ble Supreme Court on various occasions and reiterated in **Deepak versus State of Haryana (2015) 4 SCC 762** that the accused can be convicted on the sole testimony of the prosecutrix herself if it is found to be truthful and trustworthy. It is only the presence of compelling reasons on record that corroboration should be insisted upon. In the present case, it is clear that the prosecutrix was employed at Udyog Vihar and when she was

relieved from her duty at 8.00 p.m. she had proceeded to the house of Radhika. She was returning back to her house on learning that Radhika had shifted from there. Testimony of the prosecutrix does not become suspect on the ground that in case Radhika was her friend she would necessarily have informed the prosecutrix of having shifted from there. Equally unjustified are the aspersions sought to be cast on the prosecutrix's character at the time of arguments. Simply because prosecutrix is a part of the large migrant labour force, living alone does not give the defence any right to raise such like aspersions and that too without any such evidence on record or even a suggestion to the prosecutrix to this effect. There is sufficient evidence, pointing to the culpability of the appellants.

Similarly, alleged delay is not fatal to the prosecution case. Conduct of the prosecutrix is normal and probable in the given facts and circumstances. Having undergone a traumatic experience at around mid night, she cannot be faulted for going back to her rented premises instead of the police station in the dead of night. There is no reason whatsoever for the prosecutrix to falsely implicate the accused. They were not known to her prior in time. She had no axe to grind against him. They were duly identified in the Court, therefore, not holding a test identification parade is not fatal to the prosecution version.

Another argument vehemently urged by the defence was that absence of semen effectively negates the allegations of the prosecutrix. This contention is fallacious and untenable in the wake of the specific testimony of the prosecutrix that condoms were used.

Absence of injuries on the person of the prosecutrix is duly explained by her. It is not difficult to imagine that being threatened by the accused and having seen three of them she may not have offered much resistance. She has also explained that there was a bed having mattress and bed sheet. There is no evidence on record to show that the area in question was a busy thoroughfare. No such suggestion has been put to the prosecutrix.

Keeping in view the evidence on record and the entire facts and circumstances there is no doubt that the prosecution has proved its case beyond reasonable doubt against both the appellants.

Learned counsel for the appellants are unable to point out any ground whatsoever for setting aside the conviction of the appellants.

At this stage, learned counsel for the appellants submit that the appellants are also poor people having dependent families. They are the sole bread earners. They are not previous convicts. They have been in custody since 15.11.2009. It is, thus, prayed that the sentence imposed upon them be reduced so that already undergone.

Learned counsel for the State verifies that both the appellants are not involved in any other case. They have undergone actual sentence of 5 years, 8 months and 21 days as on 06.08.2015.

Having heard learned counsel, it is considered just and expedient to reduce the sentence of 10 years imposed upon the appellants for the offence punishable under Section 376 (2) (g) IPC

to that of eight (8) years. Sentence imposed upon them under Section 506 IPC shall remain the same. Both sentences to run concurrently. Amount of fine imposed under both Sections shall remain same as well as the period of imprisonment in default of payment of fine.

With the aforesaid modification in the sentence, this appeal is disposed of.

September 09, 2015
rts

(Lisa Gill)
Judge