

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Crl. Appeal No. D-850-DB of 2014 (O&M)

Date of decision: 18.08.2015.

M

..... Appellant.

Versus

State of Haryana and another

..... Respondents.

Coram: Hon'ble Mr. Justice S.S. Saron
Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Munish Kumar Garg, Advocate, for the appellant.

S.S. Saron, J.

This appeal has been filed by the prosecutrix against the judgment dated 12.03.2014 passed by the learned Sessions Judge, Jind whereby Sant Raj (respondent No.2) has been acquitted of the charges that were framed for the commission of offences punishable under Sections 452 and 376 of the Indian Penal Code ('IPC' - for short).

Along with the appeal, a criminal miscellaneous application has been filed seeking condonation of 10 days' delay in filing the appeal.

We have heard learned counsel for the appellant and with his assistance perused the records of the learned trial Court, which were requisitioned.

FIR (Ex.PO) in the case has been registered on 17.04.2013 on the statement (Ex.PA) of the prosecutrix (PW-1) aged 29/30 years. According to the prosecutrix, she was a household lady and was married with Bijender (PW-3) about 10-11 years earlier to her making the statement,

which she made on 16.04.2013. She had four children, i.e. two sons and two daughters. The husband of the prosecutrix (Bijender) had gone out for his personal work. She after giving meal to her children in the evening had closed the doors and gone to sleep in the 'chaubara' (a room on the top of the house with all sides open). Their neighbour, Sant Raj (respondent No.2), who was constructing his house, at about 9:00/9:30 p.m. came and knocked at their gate. He stated that a telephone call was received from Bijender. The prosecutrix got up on this and alone came downstairs. She opened the gate. At that moment, Sant Raj (respondent No.2) caught her hair and came in. He pulled her inside the house. The prosecutrix was made to fall on a cot and he squeezed her face; besides, against her will by opening the string of her 'salwar' committed a wrong act against her wishes. The prosecutrix raised an alarm and on this Sant Raj (respondent No.2) left her and ran away. Then she got up and tied her 'salwar' string and went to her mother-in-law Rukman (PW-2). She woke her up and also woke up her husband's brother's wife ('jethani'), namely, Nanhi and informed them of what all had happened with her. Then she along with her mother-in-law (PW-2) and husband's brother's wife were going to the police station that ASI Ramesh Kumar, Police Station Alewa (PW-16) met them at the bus stand and he recorded her statement. The prosecutrix heard and understood her statement and accepted it as correct. Then she thumb marked her statement which was attested by ASI Ramesh Kumar and Smt. Jyoti Mann, Advocate on 16.04.2013 at 11:50 p.m.

Police proceedings (Ex.PA/1) were thereafter recorded by ASI Ramesh Kumar (PW-16). It was recorded by ASI Ramesh Kumar (PW-16)

that he and Constable Suresh Kumar were patrolling in the area. They had reached the bus stand where the prosecutrix met them with her mother-in-law Rukman (PW-2) and her husband's brother's wife ('jethani') Nanhi. Lady Advocate Jyoti Mann was contacted and she was requested to reach the spot. She reached the spot and in her presence, the prosecutrix got her statement recorded. She accepted her statement and put her right thumb impression beneath it, which was attested by ASI Ramesh Kumar (PW-16) and Advocate Jyoti Mann. From the statement of the complainant, offences under Sections 376 and 452 IPC were found to be made out. Constable Suresh Kumar was sent with the writing to the police station for registration of a case. Its number was asked to be informed; besides, special reports through a constable were asked to be sent to the Senior Officers. The scene of crime team was asked to be sent at the place of occurrence. ASI Ramesh Kumar (PW-16) for the medical examination of the prosecutrix, by arranging a vehicle was proceeding to Jind along with her mother-in-law and husband's brother's wife ('jethani') as also lady Constable Reena (PW7). The SHO was also asked to be informed. The proceedings were recorded at the bus stand by ASI Ramesh Kumar (PW-16) at 11:50 p.m.

At the police station, FIR No.56 dated 17.04.2013 (Ex.PO) was registered under Sections 376 and 452 IPC vide DD No.2 dated 17.04.2013 at 12:05 a.m. by SI Ram Karan (PW-14). Special reports were sent to the Senior Officers and also to the Illaqa Magistrate through H.C. Sohan Lal (PW-12). Copy of the police file and the original writing were sent to the Investigating Officer at the spot through the constable who had brought the writing.

The special report was received by the learned Judicial Magistrate 1st Class, Jind on 17.04.2013 at 1:30 a.m.

The prosecutrix was taken by ASI Ramesh Kumar (PW-16) to General Hospital, Jind. An application (Ex.PE) was submitted for her medico-legal examination. Dr. Geeta Rani, Medical Officer, General Hospital, Jind (PW-5) conducted medico-legal examination of the prosecutrix aged 26 years. She prepared report (Ex.PD). According to which, on internal examination, no abrasion or bruises were seen over the vulva. The hymen was atrophied, ruptured at the 4-5 o'clock position. The hymen admitted two fingers easily without pain. The vaginal mucosa was intact and nothing abnormal was detected in the uterus. It is also mentioned that opinion about recent intercourse would be given after chemical analysis report. After her examination, the doctor handed over to ASI Ramesh Kumar a sealed parcel containing 'salwar' (Ex.P1), a vial containing vaginal swab (Ex.P3) and another vial containing pubic hair (Ex.P4) of the prosecutrix along with a sealed envelope. These were taken in possession vide recovery memo (Ex.PH), which was duly attested by lady Constable Reena (PW-7).

The investigating officer then reached the place of occurrence. Photographs Ex.PT, Ex.PT/1 to Ex.PT/4 were taken. The statements of the witnesses were recorded. The investigation was then handed over to SI/SHO Subhash Chander (PW-15).

SI/SHO Subhash Chander (PW-15) on 17.04.2013 visited the place of occurrence and prepared rough site plan Ex.PR. He also collected the plastic string (Ex.P2) of the cot which was taken in possession vide

recovery memo Ex.PB. It was converted into a sealed parcel and sealed with seal of 'RK' and was duly attested by ASI Ramesh Kumar (PW-16) and Bijender (PW-3), the husband of the prosecutrix. The statements of the witnesses were recorded. The team of scene of crime was at the spot.

Lady ASI Rampati (PW-13) had also reached the spot. She (PW-13) inquired the facts from the prosecutrix by preparing a question answer report (Ex.PP) which was handed over to the investigating officer. The question answer report (Ex.PP) *inter alia* mentions that the prosecutrix was asked as to for how many days did she know Sant Raj (respondent No.2) and what dealing did she and her husband (Bijender) have with him. The prosecutrix replied that Sant Raj (respondent No.2) used to come to her husband off and on. She also stated that there was a dispute regarding a plot which they purchased from Sant Raj and raised construction on it. Thereafter, there remained a dispute between them and they sold the house back to him.

Sant Raj (respondent No.2) was arrested from his village Alewa at about 6:30 p.m. By filing an application Ex.PM, he was got medico-legally examined from General Hospital, Jind. After his medico-legal examination, the doctor handed over sealed parcels containing underwear (Ex.P6), a vial containing pubic hair (Ex.P7) and another vial containing swab (Ex.P8) of the accused to SI/SHO Subhash Chander (PW-15). These were taken in possession vide recovery memo Ex.PS which was duly attested by ASI Ramesh Kumar (PW-16). On return to the police station, the case property was deposited with the MHC with seals intact and the accused was put behind the bar.

Dharmender Siwach, In-charge, Mobile Forensic Science Unit, Jind (PW-6) visited the place of occurrence on 17.04.2013 and he prepared his report Ex.PG under his signatures. According to the said report Ex.PG relating to the place of occurrence, the observations noted were that the alleged house had an iron gate; in the alleged room, where rape took place, there were two cots, a table and two chair and the alleged room was well settled. No type of struggle marks were observed in the alleged room. The investigating officer was advised to photograph the spot properly and thoroughly; besides, he was advised to cut the ropes of the alleged cot for biological examination, pack them and send it to the FSL, Madhuban properly for further examination and report.

Dilbag Singh, Head Constable No.851/Draftsman, S.P. Office, Jind (PW-11) visited the place of occurrence on 28.04.2012 (sic. 28.04.2013) and prepared scaled site plan Ex.PN on the demarcation of the prosecutrix. Inspector/SHO Surender Pal (PW-4) was posted at SHO Police Station, Alewa on 29.05.2013. On that day, after completing the investigation in the case, he prepared the final report under Section 173 of the Code of Criminal Procedure ('Cr.P.C.' - for short). The report was filed in the Court of the learned Judicial Magistrate 1st Class, Jind on 30.05.2013.

The learned Magistrate found that the allegation against Sant Raj (respondent No.2) related to commission of an offence under Section 376 IPC, which was exclusively triable by the Court of Session. Accordingly, vide order dated 31.05.2013, the case was committed to the Court of learned Sessions Judge, Jind. The accused was asked to be produced before the Court of Session on 04.06.2013.

The learned Sessions Judge, Jind on 04.06.2013 on perusing the report under Section 173 Cr.P.C. and the documents attached with it found that a *prima facie* case for the offences under Sections 452 and 376 IPC to be made out. Accordingly, charges were framed against Sant Raj (respondent No.2) on the allegation that he on 16.04.2013 at about 9:00/9:30 p.m. in the area of village Alewa falling within the jurisdiction of Police Station Alewa, District Jind committed house trespass by entering into the house of the prosecutrix which was used as a place of human dwelling and he made preparation to commit rape on the prosecutrix and thereby committed an offence punishable under Section 452 IPC. Besides, on the aforesaid date, time and place, he committed rape on the prosecutrix and thereby committed an offence punishable under Section 376 IPC. The contents of the charge-sheet were read over and explained to the accused Sant Raj (respondent No.2) in simple Hindi. He heard and understood the contents of the charge. He pleaded not guilty and claimed trial.

The prosecution, in order to establish its case, examined as many as 16 witnesses i.e. the prosecutrix (PW-1); Rukman, mother-in-law of the prosecutrix (PW-2); Bijender, husband of the prosecutrix (PW-3); Inspector/SHO Surender Pal, prepared report under Section 173 Cr.P.C. (PW-4); Dr. Geeta Rani (PW-5), medically examined the prosecutrix; Dharmender Siwach (PW-6), prepared the scene of crime report (Ex.PG); Lady Constable Reena (PW-7), along with ASI Ramesh Kumar (PW-16) and the prosecutrix (PW-1) had gone to General Hospital, Jind; Constable Kamaljeet (PW-8) tendered in evidence his affidavit Ex.PI stating that ASI Ramesh Kumar (PW-16) on 17.04.2013 had deposited the case property

with him as he was working as MHC and the case property was then given to Constable Sombir on 18.04.2013 for its examination by FSL, Madhuban who submitted receipt after deposit of case property; Constable Sombir Singh (PW-9), who tendered in evidence his affidavit Ex.PJ regarding deposit of case property with FSL, Madhuban; Dr. Sunil Chataule (PW-10), medico-legally examined the accused Sant Raj (respondent No.2); Constable Dilbag Singh (PW-11), prepared the scaled site plan Ex.PN on the demarcation of the prosecutrix; Head Constable Sohan Lal (PW-12), delivered special report, i.e. copy of FIR, to the learned Illaqa Magistrate; SI Rampati (PW-13), who prepared questionnaire report (Ex.PP) and also recorded statement Ex.PQ of the prosecutrix; Sub-Inspector Ram Karan (PW-14), who received the statement (Ex.PA) of the prosecutrix and recorded formal FIR (Ex.PO) after making his endorsement Ex.PO/1; Sub-Inspector Subhash Chander (PW-15), conducted part of the investigation and ASI Ramesh Kumar (PW-16), who also conducted part of the investigation. Besides, documents including FSL report Ex.PF and Ex.PF/1 were tendered in evidence. According to the FSL report semen could not be detected on any of the exhibits mentioned therein.

The statement of Sant Raj (respondent No.2) in terms of Section 313 Cr.P.C. was recorded. The evidence appearing against him was put to him. In his defence, he stated that he was innocent and had been falsely implicated in the case as the prosecutrix wanted to grab money.

In defence, Ram Mehar (DW-1), Ram Kumar (DW-2) and ASI Om Parkash, Police Station, Alewa (DW-3) were examined. Ram Mehar (DW-1) stated that he took the police officials from his house on 16.04.2013

at about 10:00 p.m. and informed them about the residence of the accused. They apprehended him and took him to Police Station, Alewa where the prosecutrix along with her mother-in-law was present. The prosecutrix levelled allegations against the accused. There were four-five neighbours of the accused present there. It is stated that in fact there was a property dispute between the accused and the prosecutrix and even on their raising objections the accused was let off (sic - was not let off) by the police and arrested there. Ram Kumar (DW-2) stated that on 16.04.2013 the accused was very much present with him till 9.30 p.m. Thereafter he straight away went to his house where he was apprehended by the police. Then he was called by the officials to the Police Station Alewa. He narrated the same story to the police to the effect that no incident had taken place.

ASI Om Parkash, Police Station Alewa (DW-3) brought the original complaint register of S.P. Office, Jind. As per entry No.3606P dated 26.09.2013 an application dated 26.09.2013 (photocopy Ex.D4) was received in S.P. Office, Jind which was marked to him. Another application (photocopy Ex.D5) was received in S.P. Office, Jind vide entry No.3391P dated 07.09.2013 which was marked to him. He was to investigate the case but the complainant and the accused mentioned in the applications despite several telephonic messages and personal visits did not come to him. As per his personal knowledge and investigation, the house, which was sold by Bijender (PW-3), husband of the prosecutrix, to Sant Raj (respondent No.2), was in possession of Bijender and he used to live in it.

Sant Raj (respondent No.2) also produced documents in his evidence i.e. photocopy of the affidavit of the prosecutrix Ex.D1 in which it

is mentioned that her husband Bijender had a 8 marla house in village Alewa, which was sold to Sant Raj (respondent No.2) for a consideration of Rs.6.00 lacs. The sale consideration amount was received in the presence of the witnesses. The house it is stated in the affidavit had been sold of their own free will. A photocopy of a pro-note and receipt Ex.D2 executed by Bijender for an amount of Rs.6.00 lacs in favour of Sant Raj (respondent No.2) undertaking to pay the said amount to Sant Raj (respondent No.2) on interest of 2.5 per cent per month for the period from 01.12.2012 to 07.07.2013. Statement Ex.D3 of Bijender recorded by SHO Police Station Alewa on 17.04.2013 regarding taking of the plastic strings of the cot where rape had been committed on the prosecutrix. An application dated 08.09.2013 (Ex.D5) submitted by Sant Raj (respondent No.2) to the Superintendent of Police, District Jind for protecting his life and liberty. The SHO, Police Station Alewa was asked to verify the facts, take necessary legal action and report. The application of Sant Raj (respondent No.2) was against the prosecutrix stating that initially she had made false allegations and got a police case registered against him. He had then come out on bail. Then at his back she had entered his house and stolen his costly items which included LCD, a TV, a laptop, one cylinder-stove, five-six quintals of iron rods ('saria'), twenty bags of cement etc. She was then holding out threats that she would tear her clothes and embarrass him and would again get him stuck with the police, besides, she would get her bail even cancelled. She had called there her husband Bijender, his brother Pawan, Kala son of Hawa Singh and other anti-social elements. They all were armed and started holding out threats to their life and they went after them. Sant Raj

(respondent No. 2) and others went away from there and saved their life. It is further stated that the prosecutrix was still sitting at his house. In this regard, he had made a complaint at Police Station Alewa. A day earlier, i.e. on 07.09.2013, the panchayat of village Alewa from his side had gone to Police Station Alewa. The SHO of the Police Station could not be met and the panchayat waited there for the whole day. Since necessary action had not been taken, therefore, the applicant-Sant Raj (respondent No.2) was approaching the S.P. for shelter and necessary action was asked to be taken and their life and liberty was also asked to be protected and before that she be made to leave his house. Another application dated 26.09.2013 (Ex.D4) submitted by Sant Raj (respondent No.2) to the Superintendent of Police, Jind regarding taking legal action against the prosecutrix, Bijender, Kala, Pawan son of Hawa Singh, residents of Alewa and other unknown anti-social elements and for protecting their life and liberty from them and also for getting his house vacated was tendered in evidence.

The learned Sessions Judge, Jind, after considering the evidence and material on record, has acquitted Sant Raj (respondent No.2) and aggrieved against the same, the prosecutrix has filed the present appeal.

Learned counsel for the appellant has contended that case against Sant Raj (respondent No.2) is clearly made out inasmuch as he had committed rape on the prosecutrix. This it is submitted has been clearly stated by the prosecutrix and there is no reason whatsoever to discard her sworn testimony which is cogent and convincing. Besides, Dr. Geeta Rani, Medical Officer (PW-5), who medico-legally examined the prosecutrix, has after perusing the FSL reports (Ex.PF and Ex.PF/1) was of the opinion that

possibility of sexual intercourse with the prosecutrix could not be ruled out. This, it is submitted, goes to show that rape had been committed on the prosecutrix.

As has already been noticed, the prosecution case is that the husband of the prosecutrix on 16.04.2013 had gone out for some personal work. The prosecutrix after giving meal to her children in the evening and closing the doors of the 'chaubara' had gone to sleep. The time would be about 9:00/9:30 p.m. when her neighbour Sant Raj (respondent No.2), who was constructing his house, came and knocked at the gate of their house and said that Bijender had been calling on the phone. The prosecutrix got up on this and she alone came down stairs. At that very time, Sant Raj (respondent No.2) came inside and caught her from her hair. He pulled her inside and threw her on a cot. Then he squeezed her face and against her will opened the string of her 'salwar' and against her wishes committed rape on her. She raised an alarm on which Sant Raj (respondent No.2) fled away. Then she tied her 'salwar' string and went to her mother-in-law. She informed her mother- in-law Rukman (PW-2) and her husband's brother's wife ('jethani') Nanhi about what all had happened with her. Then the prosecutrix along with her mother-in-law and husband's brother's wife were going to the police station to report the matter that ASI Ramesh Kumar (PW-16) met them at the bus stand 'chowk' and he recorded her statement.

The prosecutrix while appearing in Court as PW-1 deposed that she was called by Sant Raj (respondent No.2), who stated that he received a telephone from her husband. She went downstairs to hear the telephone. The accused (respondent No.2) then entered her house and laid her down on a

cot and had sexual intercourse with her without her consent. Then she went to her mother-in-law and narrated the entire incident. In the meantime, her sister-in-law ('jethani') came and she also narrated the entire incident to her. Then they proceeded to the police station and they met the police at the bus stand of village Alewa where her statement (Ex.PA) was recorded. Then she was taken to General Hospital, Jind, where her medical examination was conducted. She identified the 'salwar' (Ex.P1), which was taken by the doctor at the time of her medical examination.

In cross-examination, it is *inter alia* stated by her that before the present occurrence, her husband had never called her from his mobile on the mobile of any other person. It is also stated by her that she had seen the mobile with her husband since the day of her marriage. Her mother-in-law as well as sister-in-law were also having mobile phones but she could not tell since how long. She could not say whether her mother-in-law and her sister-in-law were having mobile phones on the day of the occurrence. It is stated as incorrect to suggest that at about 9:30 p.m., Ram Kumar (DW-2) along with his other family members and neighbours Shamsher and Ram Mehar (DW-1) were sitting in the street. The prosecutrix stated that she had in her statement to the police stated that her husband had gone to her parental house. She was confronted with her statement Ex.PA wherein it was not so recorded. She also stated that she had got recorded in her statement that the accused had called her in a loud voice. She was confronted with her statement Ex.PA where it is not so recorded. It is also stated that the accused never dragged her from her hair but he pushed her and put her on the cot. She also stated that she did not state before the

police that the accused had caught her from her hair and dragged her in the hall of her house. She was confronted with her statement Ex.PA where it is so recorded. She stated that she did not sustain any injury in the incident though she was forcibly thrown on the cot. She could not say for how much time the accused remained in her house as she had become semi-conscious. She tried to catch hold of the accused but he ran away. She immediately cried but none came to her rescue and she rushed to her mother-in-law. The string of her 'salwar', it is stated, was opened by the accused (respondent No.2). Her mother-in-law was sleeping when she reached there. Her father-in-law was also present there. After about 10-15 minutes of her reaching at her mother-in-law's place, they left for the police station. The houses of her mother-in-law and sister-in-law were situated at a distance of 2-3 houses from her house. Her mother-in-law and she herself had gone to the house of her sister-in-law ('jethani'). She again stated that her sister-in-law ('jethani') had come to the 'chowk' (crossing) of their street. It is stated that it took about half/one hour from the accused (respondent No.2) entering their house and their reaching the police station. It is also stated that none of their male family members accompanied them to the police station. She again said that one Kundan, who was her brother-in-law ('devar') in relations, went with them. She could not say after about how much time her husband had reached at the police station. She initially stated that she could not say whether the accused Sant Raj (respondent No.2) was called by the police and then again on asking stated that accused Sant Raj was also called and his statement was recorded and he was arrested then and there. She could not say whether Ram Kumar (DW-2) told the police that the accused was in

his company from 8:00 p.m. to 10:00 p.m. They remained at the police station for 10-15 minutes and thereafter she was taken to the hospital for her medico-legal examination. She stated that neither her bangles were broken nor any other material was scattered in the room. She further stated that except for the present case she had no other case. She could not say as to how many cases under Section 420 IPC were pending against her husband, mother-in-law and sister-in-law ('jethani'). She stated that she was having no financial dispute with the accused. On the asking of the lady police official, she had told the lady police official that there was some money dispute between them and accused Sant Raj (respondent No.2). She never told the lady police official that after construction of the house, there was some dispute with Sant Raj (respondent No.2). She could not say whether her husband had borrowed any amount from accused Sant Raj. It is stated as correct that she had given an affidavit (true copy Ex.D1) that they sold the house to Sant Raj and she was happy with the said deal. She had seen the original affidavit. It is stated as incorrect to suggest that her husband (Bijender) had borrowed a sum of Rs.6.00 lacs from accused Sant Raj. She could not say whether her husband had given a pro-note in token of receipt of Rs.6.00 lacs. It is stated as incorrect to suggest that in order to grab the money borrowed by her husband from the accused, she had levelled false allegation against the accused and that no such incident had taken place.

Rukman (PW-2), who is the mother-in-law of the prosecutrix (PW-1), stated that she had three sons and four daughters. Bijender (PW-3), it is stated, was the youngest and was married to the prosecutrix. He along with his family was residing separately. It is stated that on the 16th of 2/3/4

(i.e. February, March, April) of 2013, her daughter-in-law (prosecutrix) came weeping to her at about 9/9:30 p.m. She stated that accused Sant Raj (respondent No.2) had sexual intercourse with her forcibly. Thereafter, she and her daughter-in-law (prosecutrix) went to the police station for lodging a complaint. On the way, the police met them at the bus stand. Her statement and that of her daughter-in-law (prosecutrix) were recorded by the police. In cross-examination, she (PW-2) stated that her house was third from the house of her son. Her husband was also present when her daughter-in-law (prosecutrix) came. He was an asthmatic patient, usually remained at home and was unable to walk. They remained with the police about one hour. Other villagers had also come to the police station but she could not tell their names. No case was pending against her and she had never got herself bailed out in any case. She could not say as to how many cases were pending against her son Bijender. She could not say whether any criminal case under Section 420 IPC was pending against her son, daughter-in-law (prosecutrix), as also the mother-in-law and father-in-law of her son Bijender. It is stated that there was no dispute between her son (Bijender) and accused (respondent No.2) regarding money. She could not say whether her son Bijender had borrowed any amount from accused Sant Raj (respondent No.2). It is stated as incorrect to suggest that the villagers had informed the police that no such occurrence had taken place. The accused Sant Raj (respondent No.2), it is stated, was arrested then and there. Ram Kumar (DW-2) had also come to the police station. She could not say whether Ram Kumar (DW-2) had informed the police that the accused Sant Raj (respondent No.2) was in his company from 08:00 p.m. to 10:00 p.m.

She had not seen any injury mark on the person of her daughter-in-law (prosecutrix). Her son Bijender (PW-3) had come to the police station just after five minutes of their reaching there. It is stated that it was wrong to suggest that she was deposing falsely being the mother-in-law of the prosecutrix and that the accused (respondent No.2) had been falsely implicated in this case.

Bijender (PW-3) stated that about 2-3 months earlier, he had gone to Safidon in his relations. There he received a telephone call from his cousin Sukhwinder, who informed him that Sant Raj (respondent No.2) had sexual intercourse with his wife without her consent. Thereafter, he came back and met the police party, his wife and mother at the bus stand 'chowk'. After completing the writing formalities at the bus stand 'chowk', they were taken by the police for medico-legal examination of his wife to Civil Hospital, Jind. On the next day, the police came to their house and collected the plastic string of the cot and after converting into a sealed parcel took the same in its possession vide recovery memo Ex.PB. A sealed parcel bearing FSL seals was opened and string pieces were taken out from it. Bijender (PW-3) identified the string pieces (Ex.P2). In cross-examination, it is *inter alia* stated that he had told the police that his cousin brother had given him a telephone call. He also told the police that he accompanied his wife and mother to the Civil Hospital, Jind and back to their home. They reached home at about 12:30 a.m. They started from the hospital at 12:00. Bijender (PW-3) was confronted with his statement Ex.D3 made before the police wherein it is not so recorded. It is also stated that his youngest son was with his wife when he reached the bus stand 'chowk'. It is stated that his wife or

any of his children did not sustain any injury. It is stated that generally there are some movements of the villagers in the street around 9:00/9:30 p.m. All the occupants of the colony had gathered there and he was told by many of them that accused (respondent No.2) had committed rape with his wife. It is stated that 10-12 persons including his family members were present in the police station. None except his family members stated about the rape with his wife. It is stated that he (PW-3) had not taken any loan from accused Sant Raj (respondent No.2) but he had sold his house to him. He (PW-3) identified his thumb impressions and signatures on the receipt (photocopy Ex.D2). The original was seen and returned. It is stated that he was facing trial in three criminal cases for cheating etc. but those were false. One criminal case was pending against his brother and his brother's wife ('bhabhi'). In one of the cases, his mother-in-law and brother-in-law were also co-accused with him. There was no case pending against his wife at Kaithal bearing FIR No.1 dated 01.01.2013. There was no dispute with the accused (respondent No.2). It is stated that he (PW-3) along with his family and in-laws were doing the business of playing fraud, cheating and extorting money from the public or that the accused (respondent No.2) had been falsely implicated only to grab the money already borrowed by him from the accused (respondent No.2) or that he was deposing falsely being husband of the prosecutrix.

The evidence regarding medical examination of the prosecutrix has been brought on record in the deposition of Dr. Geeta Rani, Medical Officer, General Hospital, Jind (PW-5). She tendered in evidence her affidavit Ex.PC, besides, she brought the original MLR of the prosecutrix,

copy of which was Ex.PD. In her affidavit, she deposed that the prosecutrix was medico-legally examined by her on 17.04.2013 with alleged history of sexual assault at village Alewa, District Jind with the following injuries:

“(i) Internal examination:

- a) No abrasion or bruises seen over the vulva. Hymen atrophied, ruptured at 4 & 5 O'clock position. Hymen admit two finger easily without pain.
- b) Vaginal mucosa intact.
- c) Uterus - NAD.”

Dr. Geeta Rani (PW-5) handed over to the police three sealed parcels containing 'salwar' (Ex.P1), a vial (Ex.P3) containing vaginal swab and another vial (Ex.P4) containing pubic hair of the prosecutrix along with a copy of the MLR and sample seal. The 'salwar' (Ex.P1), the vials (Ex.P3 and Ex.P4) containing vaginal swab and public hair were the same, which were handed over by her to the police. Dr. Geeta Rani (PW-5) had seen the FSL reports Ex.PF and Ex.PF/1. She opined that possibility of sexual intercourse with the prosecutrix could not be ruled out. In cross-examination, she stated as correct that if a person catches hold of a woman from her hair and drags her on uneven surface, then there would be scratches on her body and some of her hair would be in the hands of that person, besides, some hair could fall at the spot. The possibility of rope marks with redness could be caused when the prosecutrix was put on a cot for committing rape. Same was her reply regarding scratches during struggle by the prosecutrix in the process of intercourse. It is stated that if during the

course of intercourse both the parties were fully satisfied and discharged, then there would be semen on the vagina, hair, organs and clothes worn at that time. It is stated as correct that in case of little penetration, there would be smegma on the vaginal portion and organ. During the course of medico-legal examination of the prosecutrix, smegma was totally absent on her private parts. There was no scratch on the clothes of the prosecutrix. It is stated as incorrect to suggest that she had given wrong opinion about the possibility of rape with the prosecutrix or that she was deposing falsely.

Dr. Sunil Chataule, Medical Officer, General Hospital, Jind (PW-10), tendered in evidence his affidavit Ex.PK. The original MLR of Sant Raj (respondent No.2) was brought and its copy Ex.PL was tendered in evidence. On police request (Ex.PM), the medico-legal examination of Sant Raj (respondent No.2) was conducted. He was brought by ASI Ramesh Kumar with alleged history of rape. Sant Raj was conscious, oriented and all vitals sign were stable, there was no symptom/complain. On examination, it was observed as follows:-

- “1. All secondary sexual character are well developed.
2. Penis normal, no injury mark seen.
3. Glans penis normal, no smegma seen.
4. Both testis normal present in scrotum.
5. Frenulum intact.
6. No injury mark seen on body and genital area.
7. Pubic hair present not matted.”

It was concluded that there was nothing to suggest that the person examined could not perform sexual intercourse. Three parcels

bearing the seals of FSL were opened and an underwear (Ex.P6), a vial containing pubic hair (Ex.P7) and another vial containing swabs (Ex.P8) were taken out and these were identified to be the same which were handed over to the police. In cross-examination, it was stated as correct that during intercourse if force was used by the prosecutrix to escape from the grip of the accused, then there would be external injuries on her body and the accused, besides, there must be redness on the organ of the accused. The redness on the organ of the accused was stated to be absent.

The FSL report (Ex.PF) mentions that laboratory examinations were carried out to detect the presence of semen on the exhibits relating to the prosecutrix, i.e. Exhibit 1 - few small strands of hair kept in a glass vial described as public hair; Exhibit 2 - two cotton wool swabs on sticks kept in a glass vial described as vaginal swab; Exhibit 3 - one dirty green coloured 'salwar' and Exhibit 4 - number of pieces of plastic ropes tied in sequences. For the detection of semen, chemical tests and microscopy was performed and based on these examinations, the results obtained were that: 'Semen could not be detected on any of the exhibits mentioned.'

As per FSL report (Ex.PF/1), laboratory examinations were carried out to detect the presence of semen on the exhibits relating to Sant Raj (respondent No.2), i.e. Exhibit 1 - bunch of strands of hair kept in a glass vial described as public hair; Exhibit 2 - one cotton wool swab on stick described as glans penis swab and Exhibit 3 - one dirty synthetic black coloured underwear. For the detection of semen, chemical tests and microscopy was performed and based on these examinations, the results obtained were that: 'Semen could not be detected on any of the exhibits.'

The evidence that has been noticed above would show that from the mere bald assertion of the prosecutrix (PW-1), it cannot be said that rape had been committed upon her by Sant Raj (respondent No.2). It is to be noticed that prosecutrix has given her age as 26 years in the MLR (Ex.PD) before Dr. Geeta Rani (PW-5). During her examination in Court as PW-1, she states her age as 30 years. Therefore, the prosecutrix was mature enough and it cannot be said that she was incapable of defending herself from her assailant Sant Raj (respondent No.2). The circumstances of the case are such that no case of rape is made out. It is to be noticed that there had been a dispute regarding sale of house. The prosecutrix had deposed an affidavit Ex.D1 on 29.11.2012, which is much earlier to the incident that had occurred on 16.04.2013. In the said affidavit, she stated that her husband Bijender (PW-3) had sold one house in village Alewa at the main bus stand to Sant Raj (respondent No.2) for Rs.6.00 lacs and the entire amount had been received in the presence of witnesses. It is mentioned that Sant Raj (respondent No.2) would be owner of the house from 29.11.2012 onwards and they would have no concern with it. The house had been sold with their consent, without any kind of objection then or in future. The said house measured 250 sq. yards which was in agricultural land in Khewat No.583, Khata No.854 and 855 measuring 8 marlas 3 sarsais, i.e. 250 sq. yards. The boundaries of the plot are mentioned. A pro-note and a receipt dated 01.12.2012 for an amount of Rs.6.00 lacs were executed on a single page Ex.D2 by Bijender (PW-3) in favour of Sant Raj (respondent No.2). The prosecutrix, in her cross-examination, stated as incorrect to suggest that her husband (Bijender) had borrowed a sum of Rs.6.00 lacs from Sant Raj

(respondent No.2). Besides, she could not say whether her husband (Bijender) had given a pronote in token of receipt of Rs.6.00 lacs. It is stated as incorrect to suggest that in order to grab the money that had been borrowed by her husband (Bijender) from the accused (Sant Raj) she had levelled false allegations against the accused (Sant Raj) and that no such incident had taken place.

ASI Rampati (PW-13) was called by SI/SHO Subhash Chander (PW-15) for investigation of the case. She enquired the facts from the prosecutrix and prepared questionnaire report (Ex.PP) and also recorded her statement Ex.PQ. In cross-examination, she (PW-13) states that two cots were lying in the room and except the cots there was nothing in the room. It is also stated that there was no struggle mark in the room. In the questionnaire report (Ex.PP), which was prepared by her (PW-13), the prosecutrix has *inter alia* stated that she had completely discharged. On the question, whether she screamed, she replied that her voice was gagged by pressing her mouth. On the question, whether she suffered any injury on her face, she replied that she suffered no injury on her face. On the question, whether her bangles were broken or there was any mark on her chest and below it, she replied that there was none and she had taken medicines because of illness due to which she was quite senseless. The prosecutrix was asked whether she had any injury or mark on any other part of her entire body. She replied, 'none' and that there was no injury or mark on any part of her body. She was also questioned, whether there was any struggle and she replied that she was taken a back at once. She was also questioned, as to for how many days did she know the accused (respondent No.2) and as to what

were her dealings with him. She replied that his name was Sant Raj and he used to come to her husband off and on. Her husband had taken a plot from the brother of Sant Raj for which he had given money. Thereafter, they had constructed a house on the plot. After the house had been constructed by them, a dispute continued to remain with Sant Raj. Then they sold that house back to him. At that time, he was raising construction on that house, which was incomplete. The construction was going on. Her husband had gone away at 3-4 p.m. on 16.04.2013. The prosecutrix in her statement Ex.PQ stated that she did not want to give any other statement in Court. During her evidence in Court only, would she state the entire circumstances. Besides, she did not want to go anywhere to get her statement recorded. It is stated that she would state whatever she had to before the Court only at the time of her deposition.

Sant Raj (respondent No.2), in his defence, as already noticed, examined ASI Om Parkash, Police Station Alewa (DW-3), who stated that as per his personal knowledge and investigation, the house which was sold to Sant Raj (respondent No.2) by Bijender (PW-3) was in possession of Bijender (PW-3) and he used to live in it. There is no cross-examination by the learned Public Prosecutor on the issue of Bijender (PW-3) living in the house which he had sold to Sant Raj (respondent No.2). It is well known that a party is to put to its opponent's witness so much of its case as it concerns that particular witness who is under examination. If no such questions are put, the Court is to presume that the witness's account has been accepted. Therefore, failure to cross-examine ASI Om Parkash (DW-3) on the point whether after sale of house by Bijender (PW-3) to Sant Raj

(respondent No.2), Bijender (PW-3) still continued to reside is to be taken as accepted. Besides, the sale of house by Bijender (PW-3) to Sant Raj (respondent No.2) is accepted in the affidavit Ex.D1 of the prosecutrix which was put to her in her cross-examination and is exhibited as Ex.D1 on her statement. Therefore, the possibility of making a false case due to the dispute relating to the house cannot be ruled out.

It may also be noticed that there was no injury of any kind on the person of the prosecutrix according to her medical examination. Dr. Geeta Rani (PW-5) who conducted the medical examination *inter alia* stated that she had seen the FSL reports (Ex.PF and Ex.PF/1). She opined that possibility of sexual intercourse with the prosecutrix could not be ruled out. The exhibits which were examined by the FSL in its report (Ex.PF) in respect of the prosecutrix were, Exhibit 1 - few small strands of hair kept in a glass vial described as public hair; Exhibit 2 - two cotton wool swabs on sticks kept in a glass vial described as vaginal swab; Exhibit 3 - one dirty green coloured 'salwar' and Exhibit 4 - number of pieces of plastic ropes tides in sequences. The exhibits that were examined in the report (Ex.PF/1) in respect of Sant Raj (respondent No.2), were Exhibit 1 - bunch of strands of hair kept in a glass vial described as public hair; Exhibit 2 - one cotton wool swab on stick described as glans penis swab and Exhibit 3 - one dirty synthetic black coloured underwear. Both the FSL reports (Ex.PF and Ex.PF/1) mention that semen could not be detected on the exhibits in respect of which laboratory examinations were carried out by performing chemical tests and microscopy. Therefore, it is difficult to understand as to how the FSL reports (Ex.PF and Ex.PF/1) would help the case of the

prosecution to establish rape having been committed by Sant Raj (respondent No.2) on the prosecutrix.

Dharmender Siwach, In-charge Mobile Forensic Science Unit, Jind (PW-6) submitted his crime scene visit report (Ex.PG) in which he has mentioned that the alleged room where rape took place there were two cots, a table and two chairs. It is further mentioned that the alleged room was well settled and there were no type (sic - kind) of struggle marks observed. The investigating officer was advised to cut the ropes of the alleged cot where rape had taken place for biological examination. The pieces of plastic strings (Ex.P2) were indeed cut and sent to the FSL by SI/SHO Subhash Chander (PW-15). However, as per FSL report (Ex.PF), no human semen was detected on Exhibit 4 which contained number of pieces of plastic ropes tied in sequence.

There are other discrepancies in the prosecution case as well inasmuch as the prosecutrix (PW-1) states that her husband had gone to her parental house during the time when the incident took place. However, she did not say so in her statement Ex.PA recorded by ASI Ramesh Kumar (PW-16). Besides, the prosecutrix states that she along with her mother-in-law Rukman (PW-2) and her sister-in-law ('jethani'), namely, Nanhi had gone to the police station. In cross-examination, she states that one Kundan, who was her brother-in-law ('devar') in relations, went with them. However, no statement of said Kundan was recorded by the police and neither was he made a witness in the case. It may also be noticed that Bijender (PW-3) states that when he got information from Sukhwinder, his cousin, of rape being committed on his wife by Sant Raj (respondent No.2), he came back

and met the police party, his wife (prosecutrix) and his mother at the bus stand 'chowk'. He also states that his youngest son was with his wife at the bus stand 'chowk'. After completing the writing formalities at the bus stand 'chowk', they were taken by the police to the Civil Hospital, Jind for medico-legal examination of his wife (prosecutrix). However, it is to be noticed that the presence of Bijender (PW-3) is not mentioned or recorded in the writing Ex.PA recorded by ASI Ramesh Kumar (PW-16), which was attested by Smt. Jyoti Mann, Advocate and ASI Ramesh Kumar (PW-16). The writing was sent to the police station through Constable Suresh Kumar, on the basis of which FIR (Ex.PO) was registered by SI Ram Karan (PW-14). Besides, the prosecution does not mention that the youngest son of Bijender and his wife (prosecutrix) was with them at the bus stand 'chowk'.

The learned trial Court has acquitted Sant Raj (respondent No.2). It was observed that it could be conclusively said that the statement of the sole witness, i.e. the prosecutrix, was wholly unreliable. Improvements were made by her in the version from what was narrated in her statement Ex.PA. The prosecutrix, in her statement Ex.PA made before the police, stated that she was caught hold of by Sant Raj (respondent No. 2) from her hair and she was dragged to the cot where she was made to lie down, her mouth was gagged and after opening the string of her 'salwar', sexual intercourse was committed against her wishes. However, while appearing in Court as PW1 she did not mention the fact that she was caught hold of from her hair and dragged, besides, forced to lie on the cot by gagging her mouth. Her assertion only was that the accused (respondent

No.2) entered her house, laid her down on a cot and had sexual intercourse with her without her consent. Thereafter, she narrated the incident to her mother-in-law Rukman (PW-2) and her sister-in-law ('jethani'). It was noticed that the said improvement though on the face of it was not of much significance but it gained importance in view of the fact that as per copy of MLR (Ex.PD), there was no mark of any injury on any part of her body. The said improvement, it was observed, was nothing but an after thought to cover the fact that there was no injury on any part of her body. It was observed that had she been caught by her hair or dragged on the cemented floor and forced to lie on a cot, she in all likelihood would have sustained some minor injuries or contusions. The prosecutrix, in her cross-examination, admitted that she did not sustain any injury during the entire episode. It was further observed that as per report (Ex.PG) prepared by Dharmender Siwach, In-charge of Mobile Forensic Science Unit, Jind (PW6), there was no mark of any struggle in the room where the incident had occurred. Indeed, in the report (Ex.PG) it was mentioned that there was no mark of struggle in the alleged room and the same was well settled. Besides, the prosecutrix in the questionnaire (Ex.PP) to the question as to whether there was any struggle, she replied that she was taken a back at once. The learned Sessions Judge also ruled out the possibility of rape being committed as no semen was detected on any of the clothes worn by the prosecutrix and there was no semen on any of the articles sent for chemical examination.

A mention has also been made by the learned trial Court to the deposition of Dr. Geeta Rani (PW-5), who during the course of her cross-

examination, stated that if during the course of intercourse both the parties were fully satisfied and discharged, then there would be semen on the vagina, hair, organs and clothes worn at that time. It was noticed that it was not the prosecution case that the prosecutrix had changed her clothes during that period or that the accused (respondent No.2) had washed his clothes including his underwear. The prosecutrix along with her family members had gone to the police immediately after the incident. It was observed that there was no occasion for her to change the clothes or remove the semen. The contention of learned defence counsel that the smegma was not present, it was observed, did carry conviction with the Court. Dr. Geeta Rani (PW-5) stated that in case of some penetration, there would be smegma present on the vaginal portion. During the course of medical examination of the prosecutrix, smegma was totally absent.

It was also noticed that according to the prosecution case, the prosecutrix had raised a hue and cry and tried to chase Sant Raj (respondent No.2) but he ran away. It was held to be unbelievable as children of the prosecutrix were sleeping on the first floor of the house and had she cried, there was every occasion for the children to wake up and come to the rescue of their mother. It was also held that the house of the prosecutrix was surrounded by other houses and had she raised a hue and cry, some of the neighbours would have come at the place of incident. It was also held that it was unbelievable that no one came to her rescue on hearing her cries. According to the version of the defence, the parties were having some dispute with regard to the house and husband of the prosecutrix had borrowed a sum of Rs.6.00 lacs, executed a pro-note and receipt Ex.D2 and

in order to avoid that payment, a false case was thrust upon Sant Raj (respondent No.2). It was noticed that a dispute was indeed going on between the parties. This was in evidence from perusal of the document Ex.D4, as also the pro-note and receipt Ex.D2 executed by husband of the prosecutrix in favour of Sant Raj (respondent No.2). Besides, it had come in the statement of ASI Om Parkash (DW-3) that a complaint was filed by Sant Raj (respondent No.2) against the prosecutrix, her husband and brothers-in-law Kala and Pawan regarding some dispute between them. From the chain of events, it was noticed that some serious dispute was going on between the parties and it appeared plausible and believable that the prosecutrix took recourse to the filing of the present case which was based on untrue facts.

Another significant circumstance that was noticed was that accused Sant Raj (respondent No.2) in the initial stage was arrested under Section 41 Cr.P.C. and not for committing an offence under Section 376 IPC. It was noticed that from the statement Ex.PA made by the prosecutrix, a cognizable and non-bailable offence was made out. Therefore, there should not have been any hitch on the part of the police to arrest the accused (respondent No.2) for the aforesaid offence. The arrest of the accused under Section 41 Cr.P.C. itself, it was observed, created a doubt about the commission of rape. It appeared that from the medico-legal report (Ex.PD) prepared by Dr. Geeta Rani (PW-5), it could not be made out whether any offence of sexual assault was made out or not. It was for the said reason that the accused (respondent No.2) was arrested under Section 41 Cr.P.C. and not for committing offences under Sections 452 and 376 IPC.

The findings and conclusion reached at by the learned trial Court are just and reasonable. The learned counsel for the appellant despite raising manifold arguments has not been able to, in any manner, dislodge the conclusion reached at by the learned trial Court. It would not be out of place to mention that the learned trial Court has taken a reasonable and in any case a possible view and merely because another view may be possible would be no ground to interfere with the well reasoned judgment.

The appeal of the appellant has been considered on merits, therefore, the question of 10 days' delay in filing the appeal is only academic.

In the circumstances, there is no merit in the appeal and in the application seeking condonation of delay and the same are accordingly dismissed.

(S.S. Saron)
Judge

(Rekha Mittal)
Judge

18.08.2015

PARAMJIT/A.Kaundal