

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

CRM-A-556-MA-2014 (O&M)

Date of decision :February 10, 2015

State of Haryana

.....Applicant

Versus

Raj Kumar & another

.....Respondents

**CORAM : HON'BLE MR.JUSTICE S.S. SARON
HON'BLE MR.JUSTICE GURMIT RAM**

1. To be referred to the Reporters or not? Yes / No
2. Whether the judgment should be reported in the Digest? Yes / No

Present : Mr. Baljinder Singh, DAG, Haryana.

Mr. Kunal Dawar, Advocate,
for the respondents.

GURMIT RAM, J.

1. This criminal miscellaneous application has been filed by the State of Haryana under Section 378(3) (as amended upto date) of the Criminal Procedure Code ("Cr.P.C." in short) for the grant of leave to appeal against the judgment dated 21.09.2013 passed by the learned Additional Sessions Judge, Palwal vide which respondents-Raj Kumar and another have been acquitted of the charges under Sections 363, 366, 376 (2)(g) and 506 read with Section 34 of the Indian Penal Code ("IPC" in short).

2. The case of prosecution in nut-shell is that on 07.01.2012

prosecutrix-Kavita Chauhan presented an application Ex.PB before In-charge Police Post, Bus Stand, Palwal. The subject of this application was to the effect that prosecutrix has been studying in 10th Class at Saint C.R. Senior Secondary School, Palwal. On 26.12.2011 she was going to the school from her house. At about 8:00 a.m., there came two boys namely Dalip and Rahul residents of Kithwari Chowk, Palwal along with one Raj Kumar resident of Sihol in a Maruti Van. On the asking of said Raj Kumar, Rahul and Dalip put her in the vehicle forcibly. Rahul inserted cloth in her mouth. Raj Kumar alighted from the vehicle and directed his remaining two accomplices-Rahul and Dalip to take her away, whereupon said Rahul and Dalip took her out of Palwal on Aligarh Road upto a considerable distance. Then they took her into the field of sugarcane and committed rape upon her turn by turn twice each and kept her captive there for about four hours. Then they dropped her at Kithwari Chowk and threatened her to kill while leaving her there in case she dared to tell about the incident to anybody. Thereafter she came to her house and narrated the entire incident while weeping to her mother Prem Wati. Till date her family members did not initiate any action against the aforesaid culprits out of shame. Now said Rahul and Dalip had intercepted her on the way for kidnapping her again and hence the instant application had been filed. On the basis of this application, the FIR Ex.PB/2 was registered. Prosecutrix was got medically examined from Civil Hospital, Palwal. Site plans of the place from where the prosecutrix was kidnapped forcibly and of the spot where she was allegedly raped were prepared. Accused were apprehended. Statements of witnesses were recorded. On the completion of investigation, challan in this case was presented in the Court of learned Illaqa Magistrate, who after

making compliance of provision of Section 207 Cr.P.C. committed this case to the Court of learned Additional Sessions Judge, Palwal for the trial.

3. Accused were charge-sheeted for the offences punishable under Sections 363, 366, 376(2)(g) and 506 read with Section 34 IPC, which was denied by them and they claimed trial.

4. The prosecution in order to establish its case before the learned trial Court examined as many as nine prosecution witnesses.

5. Then accused were duly examined as provided under the provisions of Section 313 of the Cr.P.C. during which the entire incriminating evidence as brought on the record by the prosecution was put to them. They denied the same entirely and pleaded their innocence as well as their false implication in this case.

6. The learned trial Court after hearing the learned counsel for both the parties and going through the record as well, acquitted the accused of the aforesaid charges vide the impugned judgment, on the basis of benefit of doubt.

7. The Applicant being aggrieved from this judgment of learned trial Court has come up in the instant application. Record of the learned trial Court was also requisitioned.

8. We have heard learned counsel for the applicant and have also scrutinized the record as well.

9. Learned counsel for the applicant has contended that the impugned judgment is based on mere surmises and conjectures. It is also against the law and facts on the file and as such, the same is liable to be set aside. Then it is also his contention that prosecutrix as PW-3 had narrated the entire story of prosecution as stated by her before the Police vide her

application Ex.PB. Her father Mahender Singh, who appeared as PW-1 also fully supported the prosecution version. The learned trial Court misconstrued the testimony of both these material witnesses of the prosecution while recording the impugned judgment. Then he has also referred to the statement of PW-2 Dr. Kalpana Kumari who had medically examined prosecutrix after the alleged occurrence and had given her opinion thereafter that possibility of sexual intercourse cannot be ruled out. Her affidavit as a part of her statement was brought on the record as Ex.PW2/A. Then it is also contended by the learned Counsel for applicant that date of birth of prosecutrix as recorded in her birth certificate Ex.PE is 11.05.1997 and as such, she was a minor even below the age of 16 years on the date of alleged occurrence. But the learned trial Court committed a grave error in ignoring this certificate. Then he has also referred to the provisions of Section 114-A of the Indian Evidence Act, 1872. Lastly he has prayed that this appeal is likely to be accepted and as such, special leave to appeal be granted to file the instant appeal to bring the culprits to the book.

10. During the cross-examination of PW-1 Mahender Singh, father of the prosecutrix, complaint Ex.DA dated 02.01.2012 and complaint Ex.DB dated 06.01.2012 had come on the record. It is admitted by this witness that both the said complaints were filed by him against the accused. Even the factum of filing of these complaints by Mahender Singh (PW-1) is also admitted by the prosecutrix in her cross-examination as PW-3. As per the record complaint Ex.DA was filed for taking action against Dalip and Rahul for teasing the girls while going to school and vice versa and also for passing lewd remarks against them. Complaint Ex.DB had been filed against aforesaid Rahul and Dalip and one brother-in-law (*Jija*) of said

Dalip. The subject of this complaint was to take action against these persons for teasing, kidnapping and threatening to kill the daughters of the complainant. Both these complaints are subsequent to the date of alleged occurrence and in both of them the factum of rape allegedly committed on the prosecutrix by the present respondents (then accused) is not mentioned. Then it has also come in the application Ex.PB of the prosecutrix that she told her mother about the entire incident on reaching her house after the alleged occurrence on 26.12.2011. So non-mentioning of the fact of rape in both these complaints allegedly committed on the part of the accused creates some suspicion about the correctness of the prosecution story.

11. Then in this case the alleged occurrence was dated 26.12.2011 and the application Ex.PB to register the case in this regard was presented before the Police on 07.01.2012. So this unexplained delay of 13 days in lodging the FIR further tells something about the false implication of the accused in this case coupled with the fact that commission of offence of rape was not mentioned in the aforementioned applications Ex.DA and Ex.DB both dated 02.01.2012 and 06.01.2012 respectively. So far as the medical evidence as had come on the record in the statement of PW-2 Dr.Kalpana Kumari is concerned, it also tells about the character of the prosecutrix to be of dubious nature. In her affidavit Ex.PW2/A, it has been recorded as under :

Labia Majora & labia minora :- No external mark of injury.

No swelling no redness.

P/V:- Two finger inserted without pain, no bleeding no stain present.

Then it has also come in her cross-examination that possibility

of prosecutrix being habituated to sexual intercourse cannot be ruled out.

12. Regarding age of the prosecutrix, certificate Ex.PE was brought on the file by the prosecution in the statement of PW-7 Manoj Kumar issued from the office of Municipal Council, Palwal. From its perusal, it is revealed that entry with regard to date of birth of the prosecutrix was recorded in the office of Municipal Council on 13.03.2012, i.e. after the alleged occurrence, which is dated 26.12.2011. Then it is also the case of the prosecution that prosecutrix was student of 10th class at the time of alleged occurrence, but no record with regard to her admission and withdrawal of school concerned has been produced in order to corroborate the fact that entry made in birth certificate Ex.PE with regard to her date of birth is correct one. Then PW-2 Dr. Kalpana Kumari had also referred the case of the prosecutrix to dental Surgeon and Orthopedics for determination of her age. The prosecution did not bring on record any evidence to show as to whether she was ever produced before any dental Surgeon as well as Orthopedician for determining her age and if so, what were reports of her said tests.

13. So far as the presumption as provided under the provisions of Section 114-A of the Indian Evidence Act, as pointed out by the learned counsel for the applicant is concerned, there is no dispute qua this. But before drawing such a presumption, the prosecution has to prove its case beyond the doubt that rape upon the prosecutrix was committed by the accused and accused only and none else. This fact in the present case, prosecution has failed to establish for the reason that the alleged occurrence took place on 26.12.2011 and she was subjected to her medical examination on 07.01.2012. Then as abovesaid it has also come in the cross-examination

of PW-2 Dr. Kalpana Kumari that the prosecutrix being habituated, to sexual intercourse cannot be ruled out. So in between the period of 26.12.2011 to 07.01.2012, she might have physical relations with somebody else other than the alleged accused. So in this situation, the aforesaid provisions of Section 114-A of the Indian Evidence Act also do not help the applicant for any purpose.

14. Then it is the case of the prosecution that prosecutrix was allegedly raped by the accused persons in the sugarcane field. It came in the cross-examination of PW-3 prosecutrix that sugar-cane crop was of the height of 7/8 feet. Moreover, in the month of December of each year sugarcane crop becomes fully grown up and matured. So if any act like rape is committed forcibly in such like crop, then certainly some type of abrasions / bruises are to be caused on the persons involved due to hard dry and green leaves of sugarcane.

In the case in hand no such abrasion / bruises were detected on the person of prosecutrix, when she was allegedly medically examined by Doctor PW-2 Kalpna Kumari on 07.01.2012.

Here we deem it necessary to discuss the case law as delivered by the Hon'ble Apex Court in Rajesh Patel vs. State of Jharkhand, AIR 2013 (SC) 1497. In this case also, there was delay of 11 days in lodging the FIR. The basic principle laid down in it is that the *“Testimony of witness must be natural and believable and therefore should inspire confidence for acceptance of same for sustaining conviction and sentence.”*

In the case in hand as above discussed, the statements of witnesses examined by prosecution do not appear to be natural or believable. These also do not inspire any confidence for accepting the

version of prosecution as alleged.

15. In the light of the above discussion, no ground for grant of special leave to appeal in this case is made out and this criminal miscellaneous application stands dismissed and disposed of accordingly.

16. Since the main criminal miscellaneous application has been dismissed, so any other criminal miscellaneous application, which is pending, also stands disposed of accordingly having been become infructuous.

February 10, 2015

Gaurav Sorot

(S.S. SARON)
JUDGE

(GURMIT RAM)
JUDGE