

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl. Appeal No. S-744-SB of 2003

Date of decision : 11.05.2015

Darbara Singh

..... Petitioner

versus

State of Haryana

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of the 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 ?

**Present: Mr. G.S. Gandhi, Advocate
for the appellant**

Mr. S.S. Pannu, DAG Haryana

ANITA CHAUDHRY, J.

This appeal is directed against the judgment dated 28.03.2003/29.03.2003 passed by the Additional Sessions Judge, Kurukshetra who held the appellant guilty under Section 376/323 IPC in FIR No. 84 dated 10.03.1998.

The appellant was sentenced to undergo rigorous imprisonment for 7 years alongwith fine of ₹ 2000/- and in default of payment of fine to further undergo six months under Section 376 IPC. The appellant was also sentenced to undergo rigorous imprisonment for six months alongwith fine of ₹ 500/- under Section 323 IPC. In default of payment of fine he was to further undergo rigorous imprisonment for one month. Both the sentences were directed to run concurrently.

The facts and circumstances giving rise to the case are

that on 10.03.1998 when the police party was present at T Point near Grain Market Ismailabad the prosecutrix (name withheld) approached them along with her co-villagers and got her statement recorded. She disclosed that she and Jeeto wife of Inder were going to bring fodder for the cattle at 10 a.m. when accused Darbara Singh, of the same village, came on a tractor and started following them. When the prosecutrix reached near the fields of Satpal Chaudhary, Darbara Singh winked at the prosecutrix and gave her signal thereby asking her to come on the side. The prosecutrix shot back that he was like her father. Darbara Singh then caught hold of her hands and bit her cheek and started molesting her. Jeeto intervened and rescued the prosecutrix. The allegations are that Darbara Singh by then had broken the string of her salwar. The cries had attracted several persons who arrived on the scene and the accused fled on his tractor.

On the basis of this statement, the police registered a case under Section 323/354 IPC. The victim was medically examined at Ismailabad. She made a supplementary statement later in the day stating that out of shame she could not disclose the true incident and infact Darbara Singh had dragged her inside the standing crops and had broken the string of her salwar and thereafter tried to rape her when she was rescued by Jeeto. On the basis of supplementary statement, Section 376/511 IPC was added. The accused was arrested and his medical was got done. On 18.03.1998, the prosecutrix was produced before the Magistrate who recorded the statement of the victim under Section 164 Cr.P.C. where

she stated that she had been raped by the accused when she was taken inside the fields. The prosecutrix was got medically examined and the swabs were taken which were sent to the FSL. On completion of investigation, challan was presented under Section 376, 323 IPC.

Charge was framed under Section 376, 323 IPC. The accused pleaded not guilty.

To support its case the prosecution examined Dr. Anupam Singh as PW-1, Dr. Narinder Pal Singh as PW-2, Dr. Yogesh Kumar as PW-3 besides the police officials, Patwari and finally the prosecutrix and her husband and lastly the investigating officer.

The prosecution had given up Dharmpal, Jeeto and Shispal as having been won over by the accused.

In the statement under Section 313 Cr.P.C., the accused raised the plea of false implication but led no evidence in defence.

On appraisal of the evidence, the trial Court accepted the statement of the prosecutrix. The trial ended in conviction of the appellant.

I have heard both the sides and with their able assistance gone through the record.

Learned counsel appearing for the appellant submitted that the statement made by the prosecutrix could not be relied upon as there were material contradictions in her depositions and she had made improvements on large number of issues and facts and embellishment and improvements are to such a large magnitude that her statement becomes unreliable. It was urged that within a week,

the prosecutrix had changed her statement improving upon her earlier statement. It was urged that probability of such incident happening in the presence of another woman is not believable at all and there was no injury on the back and no injury on the accused. It was urged that Jeeto was the main witness and could have supported the prosecutrix but was given up. It was urged that the FSL report does not help the prosecutrix as she was a married lady and semen was found on the swabs which were bound to be there as she was living with her husband but if the blood group had matched then the case would have been different. It was urged that the prosecutrix in her statement had stated that she had met the police in the grain market but in her statement she had stated that she had gone home and had narrated the incident to her mother-in-law and had then gone to the police station whereas the Investigating Officer had stated that they met the prosecutrix in the Mandi. It was urged that the allegations of rape only came a week after the incident and that too after consultations with the lawyer. It was urged that the road on which the prosecutrix was going with Jeeto is frequented and a busy road and such incident could not have occurred during day time.

Continuing with the arguments, the counsel submitted that the statement of a prosecutrix can be accepted and conviction can be recorded on the solitary statement of the prosecutrix but when the story put forward by the prosecutrix is found to be improbable then the Court must look for corroboration and it was for the prosecution to make out a case beyond reasonable doubt. Reliance

was placed upon ***Narender Kumar vs. state (NCT of Delhi) AIR 2012 Supreme Court 2281, Jai Krishna Mandal and another vs. State of Jharrkhand, (2010) 14 Supreme Court Cases 534, Bibhishan vs. State of Maharashtra, 2007(4) RCR(Criminal) 469, Kishan vs. State of Haryana, 2009(3) RCR(Criminal) 480, Suresh N. Bhusare and others vs. State of Maharashtra, AIR 1998 Supreme Court 3131, Amar Bahadur Singh vs. State of U.P., 2011 AIR (SC) (Cri) 775, Sh. Raghunath vs. State, 1991(2) RCR (Criminal) 18, Pratap Misra and others vs. State of Orissa, AIR 1977 Supreme Court 1307, Dharma vs. State of Haryana, 1987(2) RCR(Criminal) 247, Rahim Beg vs. State of U.P., AIR 1973 Supreme Court 343 and Chander vs. State of Haryana, 2010(4) RCR (Criminal) 210.***

Per contra the submission on behalf of the State was that the accused was the Ex-Sarpanch and was in a position to influence and it was only on account of protests by the villagers and road jams that the prosecutrix was produced before the Magistrate for her statement under Section 164 Cr.P.C. and that is the true version. It was urged that the trial Court had examined all the pleas and had rejected the same and the statement of the prosecutrix was found to be true and convincing.

Responding the argument, counsel for the appellant had urged that there is no evidence of hue and cry or public rage or protests by the villagers and the prosecutrix was accompanied by the Sarpanch when she had approached the police.

The law is well settled that the court can safely act upon

the solitary statement of the prosecutrix provided the court finds it to be trustworthy, but at the same time, it cannot be mechanically applied to every case of sexual assault.

The veracity of the story projected by the prosecution qua allegations of rape must, thus, be examined.

The prosecutrix is a married lady who had left home and was going with another women of the same village to collect fodder for the cattle at 10.00 a.m. when the accused came from behind on his tractor. When he got closer, the accused stopped his tractor and winked at the prosecutrix and came down from the Tractor and caught hold of her and bit her cheek and put his hands on her chest. Jeeto intervened but Darbara Singh managed to break the string of her salwar. The prosecutrix raised noise and attracted the people on which the accused left her and went on his tractor. The prosecutrix narrated this incident to police and her statement was record at 2.00 p.m. on the same day. The FIR was registered 15 minutes later under Section 354, 323 IPC. The complainant again approached the police and her supplementary statement was recorded the same day wherein she had disclosed that she was dragged 4-5 feet inside the field and the accused threw her down and sat on her and broke the string of her salwar and Jeeto intervened and rescued her. A week later, the police moved an application and produced the prosecutrix before the Magistrate where her statement under Section 164 Cr.P.C. was recorded and the prosecutrix for the first time disclosed about rape.

The prosecutrix was sent for her medical examination on

21.03.1998. Dr. Anupam Singh, Medical Officer LNJP Hospital, Kurukshetra proved Medical Ex. PA. He had stated that there was no mark of injury on any part of the body. He stated that patient did not disclose the name of the assailant. Dr. Yogesh Kumar PW-3 had examined the prosecutrix on 10.03.1998 and had noted that the right sleeve of the shirt was torn and there was a rounded bruise which was purplish blue in colour measuring 2 cm x 2 cm on the right cheek about 1 ½ c.m. below the eye. The same Doctor had examined the prosecutrix again on 21.03.1998 and noticed that there was old scar on the right cheek below the eye. He had further disclosed that no allegations of rape had been made to him when she was first time examined the prosecutrix. She had stated that when the injury is fresh the bruise is red in colour which changes colour after about 12 hours.

The star witness of the prosecution was the prosecutrix herself. She explained that she had narrated the whole incident to the Station House Officer but the officer omitted mentioning rape and thereafter she approached the DSP and had made a statement and thereafter they came to the village and on the 12th day when no action was taken, the roads were blocked and they forced the police to get the statement recorded before the Court and it was thereafter her medical was done. In the cross-examination she stated Jeeto did not accompany her to the field but came subsequently. The witness was confronted with her earlier statement Ex. PH where it was found to be recorded.

The prosecutrix insisted that the accused had come from

the side of the village but in the first statement it was mentioned that Darbara Singh came on Tractor from the opposite side. The prosecutrix has stated that she had received scratch marks on her private parts and on her back as a result of resistance. She also stated that she had made a statement before the Magistrate and she had consulted her lawyer and thereafter had made a statement.

Dayala Ram husband of the prosecutrix stated that the incident was narrated to him by his brother and when he returned home his wife narrated the sequence and he alongwith his wife went to the Sarpanch of the village and then came to the police station where the statement of his wife was recorded.

The incident took place at about 10.00 a.m. on 10.03.1998. The prosecutrix accompanied by the Sarpanch Kamlesh and the official reached the hospital at 3.00 p.m.

The following injury was noticed:-

“Rounded bruise purplish blue in colour 2 cm x 2 cm on the right cheek about 1 ½ cm from the lateral centhur of the eye.

No other injury present.”

Perusal of the MLR shows that the lady Sarpanch had accompanied the prosecutrix to the hospital. The police had gone alongwith her. At that point of time, the prosecutrix had not made allegations of rape. It appears that the supplementary statement was recorded some time later where the prosecutrix had alleged that Darbara Singh had dragged her 4-5 feet inside the field and broke the string of her Salwar, bit her on the cheek and then attempted rape but Jeeto came to rescue her.

It is apt to mention here that the medical evidence produced on record belies the version of rape. The swabs were taken after a week of the incident. The prosecutrix is a married lady and was living with her husband, therefore, semen was bound to be there. But the question is where there is evidence that it was of the accused. The prosecutrix was living with her husband. She could have had sexual intercourse with her husband during that interval.

In the case of ***Munna Vs. State of Madhya Pradesh, 2014(10) SCC 254***, the Hon'ble Apex Court held as under:-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecution in view of the statutory presumption under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

Hon'ble Supreme Court in ***Raju and others Vs. State of Madhya Pradesh, (2008) 15 SCC 133*** has held that the accused must be protected against the possibility of false implication. It has been further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can

never be presumed that her statement should without exception be taken as the gospel truth. It was held:

"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A

and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

In *Tameezuddin alias Tammu Vs. State (NCT of Delhi)*, (2009) 15 SCC 566 it has been held that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. It had been held as follows:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of

the opinion that story is indeed improbable.

In ***Narender Kumar Vs. State (NCT of Delhi), (2012) 7 SCC 171***, the Hon'ble Apex Court had held that minor or insignificant inconsistencies, discrepancies or contradictions in the statement of prosecutrix are inconsequential. However, if the statement of prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon. It has further been held that onus of proof is on the prosecution to establish each ingredient of offence beyond reasonable doubt on basis of cogent evidence and material on record. The sole testimony of prosecutrix can be relied for the purpose of conviction without any corroboration if the same inspires confidence, but if court finds it difficult to accept version of prosecutrix on its face value, it may look for corroboration by other evidence, direct or circumstantial. The Court must appreciate evidence in its totality with utmost sensitivity. It was held:

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor

contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr., AIR 2003 SC 818; and Vishnu v. State of Maharashtra, AIR 2006 SC 508)

The basic principle is when allegations of rape are made ordinarily, the evidence of prosecutrix should be believed and should be evaluated at par with that of an injured person but when the statement appears to be not convincing and creates doubts about its veracity the Courts should have to look for corroboration from some source.

The most important witness for the prosecution was Jeeto who is a witness to the occurrence but was not examined. She was given up as having been won over by the accused. The medical examination was got done a week later. The complainant was living with her husband in the period interregnum. The statement of the prosecutrix regarding rape can not be accepted as there were no

injuries on her back or on the private parts. There were absolutely no resistance on the part of the prosecutrix and the statement of the complainant is not enough. The complainant had changed her statement thrice and it is difficult to accept her testimony. The statement of the complainant can not be taken as the gospel truth.

The prosecutrix was accompanied by another lady of the village. The incident had taken place during day time. The prosecutrix was a married lady. She could certainly put up the stiffest resistance to prevent the accused from sexually assaulting him. She would have sustained injuries but we find that there were no injury on the back, legs or private parts. The FIR was registered after about four hours but the allegations of rape were not made then. The Sarpanch of the village had accompanied the prosecutrix. She had full moral support from her family and elders of the village. All these factors cumulatively indicate that the incident did not occur in the manner which the prosecutrix had presented to the Magistrate a week later in her statement recorded under Section 164 Cr.P.C. In view of this it is held that the judgment of conviction under Section 376 IPC is not based on correct appreciation of evidence or law. The trial Court failed to take into consideration the aforesaid infirmities and lacunas in the prosecution case and, therefore, the order of conviction and sentence under Section 376 IPC warrants interference and is set aside. However, we find that there was injury on the face of the prosecutrix. It appears that some altercation did take place that morning. The complainant had stated that the accused had bit her on the cheek but the MLR does not refer the

same as bite marks. It was a bruise purplish in colour, therefore, the conviction recorded under Section 323 IPC is affirmed.

The custody certificate shows that petitioner has already undergone incarceration of 1 year and 3 months. The sentence already undergone would suffice. The judgment is modified to the extent above. Resultantly, the appeal is partly allowed.

May 11, 2015

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**(ANITA CHAUDHRY)
JUDGE**