

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

Crl. Appeal No. 1115 SB of 2005 (O&M)
Date of decision: December 21, 2016

Shiv Kumar
State of Haryana

Versus

...Appellant
...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Ms. Anju Arora, Advocate
for the appellant.
Mr. Sanjay K. Saini, AAG, Haryana.

JAISHREE THAKUR, J.

The appellant/accused—Shiv Kumar has preferred the instant appeal against the judgment dated 11.5.2005 passed by the Special Judge, Jhajjar, vide which he was convicted for the offences under Sections 451, 506, 376 511 IPC and under Section 3 of the scheduled Castes and Schdeuled Tribes (Prevention of Atrocities) act, 1989 and was sentenced as under:-

Section	Sentence of imprisonment	Sentence of fine	In default
376 read with 511 IPC	Seven years	₹ 2,000/-	Two months
451 IPC	One year	₹ 500/-	Fifteen days
506 IPC	One year		
3 SC&ST Act	Six month	₹ 500/-	Fifteen days

The prosecution case, in brief, are that the present case was registered on the application (Ex. P2/C) given by the prosecutrix to SHO,

Police Station, Sasroli, Jhajjar, alleging that she is Harijan by caste. She has four sons. Her son has also constructed a new house in the outskirts of the village, but no one resides there and only cattle are tethered there. On 14.2.2003, at about 2 p.m., when she had gone to that house for seeing the cattle, she found the door opened. When she went inside, she found the accused present there. On her asking as to why he entered the house, he caught hold of her from the neck and thrown her on the ground. When she raised alarm, Zile Singh, her son and neighbour Satbir and Puran came at the spot. They saved her from the clutches of the accused. But the accused managed to escape from the spot. He had entered her house with an intention to commit theft. On which ruqua Ex. P.2 was recorded by HC Shamsher Singh regarding which Ex. P2/B endorsement was made on the ruqua and FIR under Sections 380/511 IPC was registered.

Later on, another application dated 19.2.2003 from the office of S.P. Jhajjar was received by the Investigating Officer, in that application the prosecutrix alleged that she is about 65 years of age and belonged Scheduled Caste category. She had gone to prepare cow dung cakes in the house constructed in the outskirts of the village. In the meantime, the accused came there and caught hold of her forcibly and dragged her inside the house. In that scuffle, he turned her neck, inflicted fist blows and her clothes were also torn. The accused put off his pant and tried to commit rape on her. On her raising alarm, the accused threatened to kill her. On hearing the noise, her son Zile Singh and one Puran and many people of the village also gathered there, but the accused managed to run away from the spot,

while leaving his pant and chappel there. When her son Zile Singh and Puran chased the accused upto his house, his father closed the door and started abusing them and declared that in case anyone tried to pen the door, he will inflict *danda* and *jelli* blows and asked them to run away from there. On further investigation of the matter, offences under Sections 376/511/323/506/451 IPC were also added. Investigation was conducted, site plan was prepared, scaled site plan was also prepared.

After completion of the investigation, challan was presented in the Court against the accused.

On appearance of the accused in the court, copies of all the documents sent alongwith the police report and relied upon by the prosecution were supplied to him, as per the mandatory requirements of Section 207 Cr.P.C.. From the perusal of those documents and after hearing PP for the State and the accused in person, the learned Sessions Judge found sufficient grounds for presuming that the accused committed offence punishable under Section 323, 451, 506, 376 read with Section 511 IPC. He was charged accordingly, to which he pleaded not guilty and claimed trial.

To bring home the guilt of the accused, the prosecution examined Constable Jai Chand (PW-1), who prepared the scaled site plan (Ex. P.1), HC Shamsheer Singh, (PW-2), who partly investigated the case Pato Devi (PW-3), Zile Singh son of the prosecutrix (PW-4) ASI Raj Singh (PW5), who partly investigated the matter.

After the close of the prosecution evidence, the accused was examined and his statement was recorded under Section 313 of the Cr.P.C.

All the incriminating circumstances appearing against him in the prosecution evidence were put to him in order to enable him to explain the same. He denied all those circumstances and pleaded his innocence and false implication. The appellant was also given opportunity to produce evidence in defence, but he did not avail this opportunity.

After going through the evidence, so produced and hearing PP for the State and the learned defence counsel for the accused, the trial court convicted and sentenced the accused, as aforesaid.

Ms. Anju Arora, Advocate, appearing on behalf of the appellant submits that the version put forth by the prosecutrix is contradictory. It is argued that the prosecutrix made two different versions, first on 14.2.2003 (Ex. P2) and another on 19.2.2003 which contradict each other. In fact, no injury is alleged to have been caused to the prosecutrix. Only MLR was tendered but the doctor, who conducted the MLR was not examined. It is further argued that the appellant has been falsely implicated as the appellant was not apprehended at the spot. The falsity of the prosecution is established from the fact that in the statement recorded at the first place the prosecutrix stated that the appellant had entered her house with an intention to commit theft, but in the second statement she stated that the appellant tried to commit rape on her. Therefore, the offences, as alleged by the prosecution, are not made out against the appellant. In support of her contention, learned counsel for the appellant relies on the judgments **Hukam Singh Vs. State of H.P. 2005 (1) CurLJ 333**, **Gopaldas Versus State of Rajasthan 2016 (2) Crl. L.R. 1009** and **Pappu Versus State of**

U.P. 2016 (7) ADJ 179.

Per contra, Mr. Sanjay K. Saini, AAG, Haryana, learned counsel appearing for the State submits that the testimony of the prosecutrix (PW3) stands corroborated by the other witnesses, who have fully supported the prosecution versions and as such the question of implicated the appellant falsely does not arise. The prosecution evidence cumulatively has established the guilt of the appellant.

I have heard learned counsel for the parties and with the their help have gone through the record.

In the court, the prosecution story was unfolded by Pato Devi, complainant (PW-3). She stated that two years ago, accused Shiv Kumar entered into her house with an intention to commit rape with her. He caught hold her by neck and threatened that If she makes a noise, he will kill her. He gagged her mouth also. When she raised alarm, Zile Singh and Puran came there. However, the accused managed to escape from the spot. She also stated that if her son and Puran had not reached there in time, the accused might have committed her murder also. Her son Zile Singh appeared as PW4 and categorically stated that when he entered the room, he found clothes of his mother torn. He stated that his mother was wearing salwar and kamij and string of the salwar was already broken. His mother was lying on the ground. The accused was wearing black pant and chappal which were lying on the spot, after the accused managed to escape from the place of occurrence. Recovery of chappal and pant (Ex. P7) goes to show that the accused was present at the place of occurrence. Nowhere any

suggestion was given to the witness that the pant and chappel do not belong to him. A woman of 65 years of age would never make such serious allegations of rape against any person unless such incident had actually taken place. No woman would like to tarnish her image at this stage of her life.

However a perusal of the record reveals that there is a direct contradiction between the statement that was recorded on 14.2.2003, when there is no mention of any attempt of rape being committed upon her, and on 19.2.2003 in subsequent statement wherein it is so mentioned. The MLR record does not show that there was there was actual penetration. Only abrasions were found on the body of the victim.

In the case of **Tarkeshwar Sahu v. State of Bihar, 2006 (4) R.C.R. (Criminal) 603**, Hon'ble the Supreme Court held that where there was no penetration, there could be no rape. The facts of the said case were that the accused of the said case had forcibly taken the prosecutrix, aged about 12 years, to a Gumti and asked her to lie down with intention to commit rape on her. The accused could not succeed as some persons came there on hearing the screams raised by the prosecutrix. The conviction of the accused for the offence punishable under Section 376 IPC was set aside and instead he was convicted for the offences punishable under Sections 366 and 354 IPC.

In the case of **Aman Kumar 2004 (1) R.C.R. (Criminal) 925**, Hon'ble the Supreme Court held that there was no evidence of penetration. The accused laid holding the prosecutrix, but there was no evidence that he

determined to have sexual intercourse at all events despite resistance. The conviction of the accused was converted to Section 354 IPC from Section 376 read with Section 511 IPC. The judgments referred to by the learned counsel for the appellant are not applicable to the facts of the present case.

Keeping in view the totality of the facts and circumstances of the case, where the MLR is not proved, there is no intercourse, this Court is of the firm view that no sexual intercourse had taken place on prosecutrix. The finding of pant and Chappal on the spot would not be an indication of the actual fact having occurred. However, there can be no manner of doubt that an attempt was made to outrage her modesty which is punishable under Section 354 IPC. Therefore, the conviction of the appellant for the offence punishable under Section 376, IPC, is set aside and he is acquitted of the said charge. However, from the deposition of the prosecutrix and other material available on record, it has fully been proved that the appellant had outraged the modesty of prosecutrix, therefore, the appellant is liable to be held guilty for the offence punishable under Section 354, IPC. It is settled law that if the accused is charged for a graver offence and from the material available on record, lesser offence is made out, then he can be held guilty for the lesser offence. Therefore, the appellant is held guilty for commission of the offence punishable under Section 354, IPC being a lesser offence. From the material available on record, it is very much proved that the appellant while outraging the modesty of prosecutrix also intimidated her. Therefore, his conviction under Section 506 IPC and Section 3 of the Scheduled Caste and Scheduled Tribe Act are also upheld.

Since the appellant has suffered incarceration of actual sentence of 2 years 8 months out of seven years under Section 376/511, therefore, his sentence for the offences now convicted is reduced to the period already undergone.

The order of fine imposed by the learned Trial Court for the offence punishable under Section 376, IPC, shall be termed as fine imposed under Section 354, IPC.

With the above modifications, the present appeal is partly allowed.

December 21, 2016
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No