

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

**Crl. Appeal No. S-1407-SB of 2003
Date of decision : 16.11.2016**

Hitender

... Appellant

versus

State of Haryana

... Respondent

and

Crl. Appeal No. S-1503-SB of 2003

Harpinder

... Appellant

versus

State of Haryana

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Mr. Gautam Dutt, Advocate and
Mr. J.C. Malik, Advocate
for appellant Hitender.**

**Mr. K.S. Dhaliwal, Advocate
for appellant Harpinder.**

**Mr. Apoorv Garg, DAG Haryana.

ANITA CHAUDHRY, J.

The aforesaid appeals lay challenge to the common judgment of conviction and sentence dated 14.07.2003 and 21.07.2003 respectively vide which the appellants have been held guilty under Sections 366-A IPC. They had been sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/- each under Section 366-A read with Section 120-B IPC. In default of fine they were required to undergo further rigorous imprisonment for six months. Appellant Hitender was also sentenced to

undergo rigorous imprisonment for ten years and fine of Rs.1000/- under Sections 376(2)(g) read with Section 120-B IPC. In default whereof, he was to undergo further rigorous imprisonment for six months. Both the sentences of appellant Hitender were ordered to run concurrently.

The prosecution case finds its origin in the statement, Ex.PA dated 26.01.2000 made by Ashok, wherein he informed that his younger sister, studying in BA Ist Year in Hindu Girls College had gone to the college on 25.01.2000, but had not returned. Her cycle was found parked in the college and on enquiry from her friends and other student, it came to the light that on 25.01.2000 Hitender son of Dhup Singh, Surender Dalal @ Kala son of Dilbagh Singh and Neelam daughter of Shyama Malik had come to the college in a Maruti Car No. DL4CH-1618 and had taken his sister along with them. They took her to Golden Hut and administered intoxicant in milk under a conspiracy.

On the basis thereof, FIR bearing No. 26 dated 26.01.2000 was registered under Sections 363 and 366 IPC at Police Station City Jind.

As per prosecution, PW Vikram Singh informed the police that on 25.01.2000 he and his friend Ashok Kumar had noticed that Neelam, Hitender and Surender had taken away the sister of the complainant from her college in car No. DL4CH-1618 and had gone towards Safidon road and later he learnt that she had been enticed by Hitender and Surender.

It was further the case of the prosecution that PW Pardeep @ Kala who has fields in front of Golden Hut saw Hitender and Surender along with Neelam and sister of the complainant alighting from car No. DL4CH-1618 and going inside the Golden Hut and they had left the place after about half an hour and went towards Jind in a three wheeler.

The prosecution case further is that the father of the complainant and his brother went to Hisar in search of the girl and they came to know about the admission of a girl and a boy in Civil Hospital, Hisar. On reaching there, the girl was identified by Randhir Singh. Her condition was serious and she was taken to Khetarpal Hospital where she died the same day. It was the case of the prosecution that during inquest proceedings, the father and uncle of the girl made statements to the effect that the girl was allured and forcibly taken from the college by Hitender, Surender and Neelam in a three wheeler and taken to Golden Hut and all the three took her to the house of a relative of Surender at village Pabra, from where she was taken to Hisar and Surender forcibly administered her celphos tablets and then also consumed it. They further got recorded that in the Khetarpal Hospital, the girl had disclosed about the rape by Hitender and Surender and thereafter she became unconscious. The girl died in the hospital. Surender did not survive and died on 27.1.2000.

Autopsy on the bodies were conducted. The cause of death was said to be consumption of Aluminium Phosphide. Statements of witnesses were recorded. Accused Hitender was arrested on 28.01.2000. On completion of investigation, challan was filed only against accused Hitender.

The trial Court framed the charges against the accused Hitender for the commission of offence under Sections 366 and 376 IPC.

Statement of Randhir Singh, father of the deceased was recorded as PW1 and an application under Section 319 Cr.P.C. was filed by the prosecution, which was allowed. Neelam and Harpinder were summoned as an additional accused.

The trial Court again framed the charges against the accused under Sections 120-B, 366 and 376(2)(g) IPC.

At the trial, the prosecution produced 21 witnesses.

PW1 Ashok Kumar is the complainant; PW2 Vikram Singh had seen the deceased going with the accused on 25.01.2000; PW3 Pardeep had seen the girl with the accused at Golden Hut restaurant; PW4 Const. Kuldeep Singh took the dead body to the Civil Hospital, Hisar for post-mortem. He deposited the apparels of the deceased with the MHC; PW5 HC Hans Raj deposed about the deposit of the parcels containing the clothes, viscera with him on 26.01.2000, which he handed over to SI Kanwar Singh on 27.01.2000; PW6 Const. Sanjay Kumar took the accused Hitender for medical examination on 28.01.2000; PW7 Const. Krishan Chander took the special report at 4:00 p.m. on 26.01.2000 and delivered it to the Illaqa Magistrate, Jind; PW8 Jasmer Singh uncle of the deceased before whom the deceased is stated to have made a oral dying declaration; PW9 ASI Ravinder Kumar had conducted the inquest proceedings regarding deceased Surender and handed the parcels containing viscera and apparels of Surender to SI Kanwar Singh; PW10 HC Vedpal was the MHC with whom the parcels were handed. He had sent them to the FSL through Const. Shishpal; PW11 Inspector Shishpal Singh had prepared the final report under Section 173 Cr.P.C.; PW12 Dr. N.K. Khetarpal deposed about admission of Surender and the deceased in his hospital on 26.01.2000 with the history of Celphos poisoning and that the girl died the same day while Surender died on 27.01.2000; PW13 Dr. Ajay Kumar Gupta conducted the post-mortem examination on the body of Surender; PW14 Dr. R.N. Bura medicolegally examined accused Hitender; PW15 Const. Dilbagh Singh had

prepared the scaled site plan of the place from where the girl was kidnapped; PW16 Const. Shishpal had deposited the parcels with the FSL on 06.03.2000; PW18 SI Harish Kumar had conducted the inquest proceedings; PW18 Dr. M.L. Kamra had conducted the postmortem examination; PW19 Randhir Singh is the father of the deceased; PW20 SI (Retd.) Raghunath Singh had recorded the formal FIR of the case and PW21 SI Kanwar Singh is the investigating officer of the case.

FSL Report, Ex.P19 was tendered in evidence.

After closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C. and they pleaded false implication. Accused Hitender took the stand that Surender and the deceased were having an affair and they wanted to marry but it was not acceptable to the parents of the deceased and both of them ran away from the house and hence they were being pursued and both of them consumed celphos and ended their lives. He stated that he was a friend of Surender and the father of the deceased had come to him to enquire and there was exchange of hot words between them and due to grudge, he had been falsely implicated in the case.

Accused Neelam also pleaded false implication and took the plea that she was in her college on the date of incident.

No evidence was led in defence.

The trial Court convicted and sentenced the appellants Hitender and Harpinder in the manner indicated above. Neelam was acquitted by the Court.

Dis-satisfied with the same, the instant appeals have been filed by the appellants.

I have heard learned counsel for the parties and with their able assistance gone through the record of the case very carefully.

The learned Counsel for the appellants have assailed the findings of the learned trial court, inter-alia, on the ground that the case of the prosecution was extremely weak.

Opening the arguments, it was urged that the deceased was missing on 25.01.2000 but the matter was not reported to the police. It was pointed out that the father of the deceased was a police officer, still no action was taken by them and even after they came to know that the deceased and Surender had consumed poison and were hospitalized, no complaint was given and the FIR had been registered after the death. According to learned counsel, both were having an affair and this alliance was not acceptable to the family and finding no other alternative, both committed suicide.

It was urged that the story of kidnapping and rape was concocted at the behest of the father of the deceased who was a police officer. PW2 Vikram Singh and PW3 Pardeep in their initial statements have not stated about kidnapping and made number of improvements while stepping into the witness-box and gave it a color of kidnapping and they were not reliable witnesses.

It was further urged that the other incriminating evidence brought against the appellants was the statement of PW8 Jasmer Singh and PW19 Randhir Singh before whom the deceased had allegedly suffered a dying declaration. According to learned counsel, the facts were manipulated and the medical evidence would reveal that the girl was unfit when she was admitted in the Civil Hospital and she was not in a position to make any

statement on the way to Khetarpal Hospital and the trial Court disbelieved the prosecution witnesses so far as involvement of Neelam was concerned and the appellants were also entitled to the same treatment.

It was further urged that mere presence of semen on the undergarments of deceased and appellant Hitender was not sufficient to rule the possibility of rape upon the deceased. According to learned counsel, DNA test was not carried out to connect them with the semen found on the vaginal swab to be that of Hitender. It was urged that the story of rape by Hitender seems to be highly improbable. The young couple were having an affair and wanted to marry and on refusal by the family and probably there was a hot pursuit and out of fear both of them even took the extreme step.

It was urged on behalf of the appellant Harpinder that he was not named by the complainant and the witnesses during investigation and for the first time he had been named by the complainant and other witnesses during their statements recorded in the Court and the appellant had been introduced as the driver of the car. He had further urged that the witnesses are discrepant so far as presence of appellant Harpinder was concerned. According to him, it was a result of exaggeration and there is no legal admissible evidence against the appellant Harpinder to connect him with the crime.

On the other hand, the learned State counsel supported the judgment of trial Court. According to him, the findings returned by the Court below were based on proper appreciation of evidence.

The story projected by the prosecution is that on 25.01.2000 the deceased was forcibly taken by the accused in a car firstly to restaurant Golden Hut where she was given milk containing some intoxicating

substance and she was then taken to Hisar where she was raped by Hitender and Surender and later Surender and the deceased consumed celphos and died.

Two set of witnesses were produced by the prosecution to prove the charges of kidnapping and rape. First set of witnesses consist of PW1 Ashok Kumar, the complainant, PW2 Vikram Singh who was present outside the college when the deceased was seen in the company of the accused, PW3 Pardeep also noticed the deceased along with accused in Golden Hut restaurant. The other set of evidence is that of PW8 Jasmer Singh and PW19 Randhir Singh, the uncle and father respectively of the deceased before whom she had disclosed about her rape by Hitender and Surender.

Firstly, it is desirable to consider the statements of PWs Ashok, Vikram and Pardeep.

PW1 Ashok Kumar complainant of the case deposed that on 25.01.2000 his sister had gone to college on a cycle, but did not return. Her cycle was found parked in the college premises and on enquiry they came to know that the deceased was summoned outside the college by Neelam and some girls had also told that accused Hitender, Surender and Harpinder had forcibly taken her in car No. DL4CH-1618 to Golden Hut restaurant. They also came to know that the deceased was made to drink milk mixed with some intoxicant under a conspiracy. He informed his father and gave statement Ex.P1 to the police on 26.01.2000, on the basis of which FIR was registered. He further deposed that before lodging the FIR, he came to know about the admission of his sister in the hospital through Hisar police and at that time she was shifted to Khetarpal Hospital.

PW2 Vikram Singh deposed that on 25.01.2000 at about 2:45 p.m. he was going towards the hospital and on the way he met Ashok. While they were conversing, they noticed a maruti car No. DL4CH-1618 came in front of the college gate. The vehicle was driven by Harpinder and Hitender, Surender and Neelam were sitting in the car. Hitender and Surender sent Neelam inside the college to bring the deceased out. When she came out, she was forced inside the car and taken by the accused towards Safidon side.

PW3 Pardeep deposed that he was present in restaurant Golden Hut and was taking tea at about 3:15 p.m. Hitender, Surender and Neelam brought the girl in the maruti car No. DL4CH-1618 driven by Harpinder. All of them alighted from the car and vehicle went towards the city.

It is clear that PW Ashok is not an eye-witnesses. He narrated to the police whatever information he had gathered from others. He failed to disclose from where he came to know about the alleged kidnapping. Though, he claimed that some girls had told him about it, but their names were not disclosed nor anyone of them was joined in the investigation. A perusal of statement Ex.P1, it can be seen that there is a reference that the deceased was taken away by Surender, Hitender and Neelam after she was allured. It was not the case that she had been forcibly taken by them. The FIR does not refer to the kidnapping. Not only this, PW21 SI Kanwar Singh, the investigating officer of the case admitted that the complainant met him at 2:30 or 3:00 p.m. and even then there was no mention about the death of the girl.

PW2 Vikram Singh made number of improvements while appearing in the witness box. He was an important witness, but the credibility of this witness is not free from doubt. In his statement,

Ex.PW2/A he nowhere states that the girl was forcibly taken by the accused. It was stated that the deceased was enticed by the accused, but in the Court he went on to say that the deceased was forcibly taken by the accused towards Safidon. An highly improbable version had been introduced by him. No explanation was put forth as to why he kept quiet when she was forcibly taken by the accused in his presence. He admitted that they did not raise any alarm after the occurrence nor lodged any report with the police nor reported the matter to the Principal of the college. He also failed to explain as to how the police came to know about his presence at the spot at the time of incident. Interestingly, he admitted that the deceased and her father were not known to him. Their names and addresses were mentioned by the police in his statement Ex.PW2/A. He stated that the police had left a message at his residence so he went to the police post where his statement was recorded. He admitted that the deceased did not seek help nor raised alarm. This fact belies the case of the prosecution that the deceased was kidnapped or enticed by the accused. This witness categorically admitted that the name of appellant Harpinder was not given by him in his statement to the police. He named Harpinder for the first time in the Court.

Adverting to the testimony of PW3 Pardeep, it can be seen that he introduced an altogether different version in his police statement Ex.PW3/A. He was confronted with his statement wherein he had stated that he was standing on the road on 25.01.2000 and noticed that two boys Hitender and Surender and Neelam along with the deceased alighted from a car and they went inside the restaurant and the vehicle had went towards Jind side and after remaining there for half an hour, all the four went away

in a three wheeler. In the Court he twisted the facts and claimed that he was sitting in the lawn of the restaurant and noticed that two glasses of milk were being taken inside the restaurant. Interestingly, he admitted that Surender, Hitender, Harpinder and Neelam were not known to him earlier. It cannot be believed that a person who did not know the accused previously could disclose their identity to the police. He claimed that he suspected some foul play, but he failed to report the matter to the police nor intervened. Why was he a mute spectator? He admitted that the police party was present half kilometer from his fields and near to the restaurant. He admitted that his father was Head Constable in the police and the father of the deceased was also a Police Inspector. He did not name Harpinder in his police statement and implicated him in his statement recorded in the Court and introduced him as the driver of the car. Another fact which belies his statement was the non-examination of Sunil Kumar. He was a waiter in Golden Hut restaurant. He was not examined by the prosecution and was given as won over by the accused. His statement which is part of the challan reveals that he had disclosed about visit of a girl and a boy to the restaurant and had ordered two glasses of milk and after consuming it, they had left. It appears that he was kept away from the witness-box only because he had not disclosed about the presence of any other person.

There is no explanation as to why the matter was not reported to the police on 25.01.2000. The complainant knew that his sister had been enticed by the accused. PW Ashok admitted that he did not try to contact Neelam to know her whereabouts. The father is in the police department, but still he did not take any steps. It appears that time was utilized for making up a story. An attempt had been made to hide factual aspect of the

matter and an attempt had been made to give it a shape of kidnapping. No evidence was led regarding the age of the victim. In the ocular account it had come on record that she was seventeen and a half years old and in the inquest proceedings, which was done in the presence of relatives of girl, her age was given as 18 years. The best possible evidence would have been the school record that was not produced by the prosecution. It is settled that where two views are possible, the view favouring the accused has to be accepted. The girl had left the college in broad day light, without there being any restraint or alarm and thus, completely rules out the allegation of kidnapping by the accused. The name of appellant Harpinder was mentioned by the witnesses for the first time in the Court, whereas earlier neither in the FIR nor in the inquest proceedings it was not the case that Harpinder was with the other accused. The witnesses are untrustworthy. No reliance can be placed on their statements so far as allegations of kidnapping under a conspiracy are concerned against the appellants Hitender and Harpinder.

The other set of witnesses viz., PW8 Jasmer Singh and PW19 Randhir Singh were produced by the prosecution to substantiate the allegations of rape by Surender and Hitender.

PW Jasmer Singh, uncle of the deceased deposed that on 25.01.2000 on coming to know that the deceased had not returned from the college, he along with his nephew Ashok went to the college and contacted the girls students including Neelam and came to know that his niece had been taken forcibly in car No. DL4CH-1618 towards Hisar side. He further deposed that on 26.01.2000 they reached Hisar and came to know that a young boy and girl had consumed poison and were admitted in Civil Hospital, Hisar. They reached there and considering the serious condition of

his niece, they took her to Khetarpal Hospital and on the way she disclosed to him as well as Randhir Singh that on the asking of Neelam she came out of the college and was taken to Golden Hut restaurant in a car by Hitender, Harpinder and Surender. Neelam made her drink milk containing some intoxicant and in a state of drowsiness she was taken to Pabra where during night Hitender and Harpinder and Surender committed rape with her. All the three took her to Hisar where she as well as Surender consumed poisonous tablets. He further deposed that she breathed her last at 2:15 p.m. in Khetarpal Hospital.

Randhir Singh, father of the deceased deposed that his daughter was 17-1/2 years old and a student of BA Ist Year. On 31.01.2000 she did not return from college. They searched for her and came to know that Surender and Neelam had kidnapped her in maruti car No. DL4CH-1618 and Harpinder was driving the vehicle and had taken to Golden Hut restaurant where milk mixed with calmpose was administered to her and she was taken to village Pabra in district Hisar in the same car by the accused. Next day, he along with his brother Jasmer had gone to Hisar in search of his daughter and at bus stand they came to know that a girl and a boy had been admitted in Civil Hospital. On reaching there he found his daughter in a critical condition and shifted her to Khetarpal Hospital. During the time he was shifting his daughter, she told him that Hitender, Surender and Neelam took her to Golden Hut where she was administered milk and she got nervous and was taken to village Pabra where Hitender and Surender raped her. He further deposed that she told him that on reaching Hisar, Surender converted some tablets into powder and administered her and he also consumed the same powder.

The trial Court placed implicit reliance on the version coming out from the mouth of these two witnesses which was purportedly disclosed to them by the deceased. When the testimony of these witnesses is read in juxtaposition with the statement of PW1 Ashok and the other evidence on record, it becomes crystal clear that the real genesis of the occurrence had not been given and a different story had been projected. It is apparent from the testimony of PW1 Ashok that before the FIR was lodged, he came to know that the girl had been hospitalized in Hisar. PW8 Jasmer Singh admitted that his brother Randhir Singh had a telephonic conversation with his son and he knew that she had been traced and she had consumed poison, but while lodging the FIR he deliberately concealed this fact in his statement Ex.P1. The deceased died at 1:52 p.m. on 26.01.2000 and the FIR was lodged at 3:10p.m. after the death of the girl and nothing was mentioned about consumption of poison by the girl or the rape, which was purportedly disclosed by the deceased. There is contradiction about the manner in which the occurrence had started. In the inquest proceedings, Ex.P5 her kidnapping had been shown in a three wheeler, but in the FIR it was shown that she was taken in a car and as noticed above the name of Harpinder was conspicuously missing in the FIR as well as inquest proceedings. PW Jasmer even went ahead and accused the appellant Harpinder of rape, besides Hitender and Surender. PWs Jasmer and Randhir during the inquest proceedings, Ex.P5 mentioned that the girl had disclosed to them about forcible administration of celphos. In the Court, PW Jasmer Singh had simply stated that the girl had told him that she and Surender took poisonous tablets, while PW Randhir Singh had stated before the Court that Surender had converted some tablets into powder and administered it to

her and Surender also consumed the same powder.

There are missing links in the chain of evidence. Both the witnesses are self-discrepant as to why they came to Hisar in search of the girl. According to PW Jasmer Singh, some information was given by Ram Kumar Kotwal, a relative of Surender that the girl could be traced in or around Hisar, whereas PW Randhir Singh admitted in the cross-examination that they went to Hisar in search of the girl on their own and nobody had informed them.

A contradictory version had been coming as to when the deceased had disclosed the incident to PWs Jasmer and Randhir Singh. In the inquest proceedings, both of them mentioned that in the Khetarpal Hospital, the girl had narrated the incident to them whereas in their statements before the Court both of them changed their earlier version and had stated that the girl disclosed to them when she was being shifted from General Hospital to Khetarpal Hospital and she became unconscious thereafter. They improved upon their statement as they were aware that PW12 Dr.N.K. Khetarpal had declared the girl and Surender unfit to make the statement. PW17 SI Harish Kumar had received intimation about the admission of the girl in the General Hospital, Hisar. The doctor who had attended the patient had sent the ruqa, he was not examined by the prosecution. In the ruqa, it was mentioned that the girl and Surender had been examined at 11:25 a.m. and was unfit. PWs Jasmer and Randhir improvised by saying that the girl was conscious when they reached the General Hospital but in the next breath they admitted that the condition of the girl was critical and considering her serious condition, she was shifted to Khetarpal Hospital. Had she been conscious, an attempt would have been

made to get her statement recorded. The police post is situated within the General Hospital, Hisar.

PW12 Dr.N.K. Khetarpal had stated that when the deceased was shifted to his hospital at 11:50 a.m. her blood pressure was unrecordable, pulse was 110 per minute, respiration was 30 per minute, weak and laboured; her heart was weak and irregular and her consciousness was cloudy. He explained in his cross-examination that by cloudy consciousness he meant that the patient was unfit to make a statement. On application, Ex.P14 he made his endorsement Ex.P15 that both were unfit to make the statement. He admitted that five tablets of celphos would not take more than 2-3 hours to make a person semi-conscious. All these facts make it amply clear that the girl was not in a position to make any statement.

The prosecution made a vain attempt to prove that the girl was raped by Hitender and Surender and had referred to the FSL report. But that fact in itself was not sufficient to connect it to appellant Hitender. No DNA test was carried to connect it with the accused. The ocular version coming on record is found to be unreliable and untrustworthy. In the inquest proceedings, Jasmer and Randhir Singh had stated that the girl was taken to a house of relative of Surender and in that view of the matter, the story of rape is improbable. The plea of the defence seems to be more probable. The girl was having an affair with Surender and both of them wanted to marry, but it was not acceptable to the family of the girl, ultimately both of them took the extreme step by ending their life and Hitender was named by the family being a close friend of Surender.

The evidence led by the prosecution suffers from serious infirmities and inconsistencies. The circumstances referred to above lend

support to the defence taken by the accused. Allegations of kidnapping and rape carry grave implications. Therefore, for convicting any person for the offence, the degree of proof has to be of a higher standard and not mere possibility. In a criminal case, the prosecution has to prove its case beyond reasonable doubt. In the instant case, the prosecution has failed to prove the case against the accused Hitender and Harpinder beyond shadow of reasonable doubt. The trial Court had erred in convicting and sentencing the appellants on the basis of untrustworthy and unreliable evidence. Accordingly, both the appeals are allowed. Judgment of conviction and sentence is set aside. Accused Hitender and Harpinder are acquitted of the charges.

November 16 ,2016

Jiten

**(ANITA CHAUDHRY)
JUDGE**

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No