

Crl. Appeal No. S-846-SB of 2009

(1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. Crl. Appeal No. S-846-SB of 2009

DharambirAppellant

Versus

State of HaryanaRespondent

2. Crl. Appeal No. S-2599-SB of 2012

Rai SinghAppellant

Versus

Karambir @ Bhira and othersRespondents

DATE OF DECISION:5.12.2017

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Sanjeev Sharma, Legal Aid counsel
for appellant-Dharambir in CRA-S No.S-846-SB of 2009.

Mr. Rakesh Gupta, Advocate
for appellant in CRA-S-2599-SB of 2012.

Mr. SS Mann, Sr. DAG, Haryana.

DAYA CHAUDHARY, J.

This judgment of mine shall dispose of two Criminal Appeals bearing Nos. CRA-S No. 846-SB of 2009 and CRA-S No. 2599-SB of 2012.

Crl. Appeal No. S-846-SB of 2009 has been filed by accused-appellant-Dharambir to challenge judgment of conviction and order of sentence dated 16/19.1.2009 passed by Additional Sessions Judge-cum-

Presiding Officer, Special Court under the Scheduled Castes and Scheduled

Tribes (Prevention of Atrocities) Act, 1989, Kurukshetra (hereinafter referred to as 'the Act'), vide which, he was convicted and sentenced for the commission of offences punishable as under:-

Sr. No.	Offence	Sentence
1	Under Section 376 IPC	Convict shall undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹5000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of three months.
2	Under Section 452 IPC	Convict shall undergo rigorous imprisonment for a period of three years and to pay a fine of ₹2000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one year.
3	Under Section 3 (2) (v) of SC/ST Act	Convict shall undergo rigorous imprisonment for a period of three years and to pay a fine of ₹2,000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one month.

However, he was acquitted for the offences punishable under Sections 323,506 read with Section 34 IPC and Section 3 (1) (xi) of the Act. All the substantives sentences were ordered to run concurrently and the period of sentence undergone during investigation and trial of the case was ordered to be set off against the sentence awarded.

Crl. Appeal No. S-2599 of 2012 has been filed by complainant- Rai Singh against acquittal of Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi under Sections 323,506,452 read with Section 34 IPC and Section 3 (1)(xi) of the Act.

Briefly, the facts of the case as mentioned in the present appeal are that FIR No. 152 dated 27.4.2007 under Sections 376, 323,452,506 read

Station Pehowa on the basis of statement made by complainant-Rai Singh stating therein that on 27.4.2007 his daughter, name not mentioned, (hereinafter called 'the prosecutrix') aged about 15 years was all alone in the house. Accused-Dharambir came in the house and by forcibly taking the prosecutrix inside the room committed rape upon her against her wishes. The prosecutrix raised hue and cry and after hearing her voice, her cousin, namely, Jasmer Singh came inside the house and caught hold of accused-Dharambir. Meanwhile, other persons, namely, Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi reached there and accused-Dharambir managed his escape but while going accused-Dharambir aimed brick blow upon Jasmer Singh and caused injury upon upper portion of left eye of the prosecutrix. Parents of the prosecutrix came subsequently in the afternoon and she was taken to hospital for medical examination and thereafter the matter was reported to the police.

The investigation was initiated by the police after conducting medical examination of the prosecutrix and accused was arrested. On completion of investigation, challan was presented before the Court. Copies of the challan and other documents were supplied to the accused by Sub Divisional Judicial Magistrate, Pehowa at the time of commitment proceedings as required under Section 208 Cr.P.C.

Charges were framed against accused-Dharambir under Sections 376,452 IPC and Section 3 (2) (v) of the Act and all the accused were chargesheeted for the commission of offences under sections 323,506,452 read with Section 34 IPC and Section 3 (1) (xi) of the Act, to which, they pleaded not guilty and claimed for trial.

To prove its case, prosecution examined as many as fifteen

witnesses in all and thereafter prosecution evidence was closed on 8.11.2008.

Statements of all the accused were recorded under Section 313 Cr.P.C, wherein, they pleaded false implication and denied the allegations and claimed trial. Accused produced documentary evidence in defence evidence and thereafter defence evidence was closed on 12.1.2009.

On appreciation of evidence, accused-appellant-Dhambir was found to be involved in the case and he was convicted and sentenced as mentioned above. Accused-Kambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi were acquitted of the charges framed against them.

The aforesaid judgment of conviction and order of sentence is subject matter of challenge in the appeal filed by accused-Dhambir. However, complainant-Rai Singh has also challenged the acquittal of aforementioned accused under Sections 323,506,452 read with Section 34 IPC and Section 3 (1)(xi) of the Act.

Appeal filed by accused-Dhambir was admitted on 31.3.2009 and recovery of fine was also stayed. During pendency of the appeal, the sentence imposed upon appellant-Dhambir was suspended and he was ordered to be released on bail on 9.8.2011.

Learned legal aid counsel appearing for the accused-appellant-Dhambir submits that the appellant has falsely been implicated in the case, whereas, no offence is made out against him. There are material discrepancies and contradictions in the statements of the witnesses and as such their testimony cannot be relied upon. Learned counsel further contends that there is not only major improvement in the statements of the witnesses while deposing before the trial Court but additions and alterations

are also there, which makes the prosecution case doubtful. As per statement of prosecutrix (PW-10), her statement was recorded by SI Dharambir (PW-1), whereas, said witness has stated during cross-examination that he had not recorded any statement of the prosecutrix after the alleged occurrence. There was an inordinate and unexplained delay in lodging the FIR and nothing has been explained as to how delay had occurred. The alleged incident had occurred at 10.00 am and the FIR was registered at 10.30 pm and as such there is an unexplained delay of more than 12 hours in lodging of the FIR. As per statement of Dr. Uma Khurania (PW-12), she medico legally examined the prosecutrix on 27.4.2007 at about 11.00 pm, whereas, as per prosecution version, the prosecutrix was taken to hospital at 3.00 pm by her parents. Dr. Uma Khurania (PW-12) also stated in her statement that there was no mark of injury on the private parts and thigh of the prosecutrix. Hymen was found to be torn and no fresh bleeding was present. In her statement, she has not given any clear cut opinion regarding the possibility of rape with the prosecutrix but has only stated that the possibility of sexual intercourse could not be ruled out. Learned counsel also submits that as per report of the Forensic Science Laboratory, no semen was detected on the clothes and pubic hair of the prosecutrix. Similarly, Dr. Manjinder Bhatti (PW-4) who conducted the medico legal examination of the appellant has categorically stated that no smegma was present. It is also the argument of learned counsel for the appellant that the aforementioned discrepancies which are material have not been taken into consideration by the trial Court while convicting the appellant.

Learned counsel for the respondent-state submits that the

prosecution has fully proved its case beyond reasonable doubt on the basis of statements of prosecutrix and eye witness Jasmer Singh (PW-11). Only minor contradictions and discrepancies are there, which are immaterial and may occur with the long lapse of time. Prosecutrix was admittedly minor at the time of occurrence and her age has been proved on the basis of school certificate, which has been proved on record as Ex. PG. The factum of rape has also been proved from the statement of Dr. Uma Khurania (PW-12), who medico legally examined the prosecutrix and found three injuries on the person of the prosecutrix. As per FSL report, blood was found on the pubic hair of the prosecutrix, which shows that she had suffered injuries. Learned counsel also submits that offence under Section 376 IPC has been proved on the basis of statements of the witnesses including the statement of the prosecutrix as well as doctor, who medico legally examined her. There was no reason to falsely implicate the accused-appellant as there was no enmity between the family of the prosecutrix and the accused.

Learned counsel for the complainant-appellant submits that accused-respondents, namely, Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi have wrongly been acquitted by the trial Court. The findings recorded by the trial Court are contrary to the facts as it has been proved on record that the aforesaid accused entered into the house of the prosecutrix when she was all alone. Said incident was witnessed by cousin of the prosecutrix, namely, Jasmer Singh. The trial Court while acquitting the aforesaid accused has not relied upon the statement of Jasmer Singh by stating that no offence has been made out under Sections 323, 452 and 506 read with Section 34 IPC and Section 3 (1) (xi) of the Act. The incident had occurred inside the house and accused-appellant, namely, Dharambir was

convicted for offence punishable under Section 452 IPC, whereas, accused-respondents were acquitted of the charges framed against them. Statements of prosecutrix (PW-10) and eye witness Jasmer Singh (PW-11) finds corroboration with the factum of rape upon the prosecutrix and no adverse finding was recorded by the trial Court qua the statement given by the prosecutrix and eye witness. The acquittal of other accused is patently wrong. It is also the argument of learned counsel that accused-respondents have been acquitted for offence punishable under Sections 3 (1) (xi) of the Act only on the ground that basic ingredients of the offence are missing, no offence was committed at a public place and also that accused persons were not aware about the caste of the victim before commission of the offence, whereas, Jasmer Singh (PW-11) has specifically stated in his statement that the offence was committed in the courtyard of the house of the prosecutrix, which was a public view and they used derogatory language against him as well as the prosecutrix about caste. Learned counsel also submits that admittedly accused-Dharambir and respondents were the resident of the same village and were known to each other. Sultan Singh (PW-13), who was an independent witness had appeared and stated that the respondents had abused the prosecutrix and her cousin Jasmer Singh by Caste. The statements of aforesaid witnesses clearly proves that the offence was committed at a public place, which falls within the definition of Section 3 (1) (xi) of the Act.

The case was heard at length on 25.11.2017 and judgment was kept reserved. Written arguments on behalf of the respondents in Crl. Appeal No.S-2599-SB of 2012 were submitted by Mr. Bhag Singh, Advocate before pronouncement of the judgment, which have been

considered.

Learned counsel for respondents No.1 to 4 has submitted in his written submissions that no offence under Sections 323/452/506/34 IPC and under Section 3 (1) (xi) of the Act is made out against the respondents. The prosecutrix (PW-10) in her statement Ex. PA has nowhere stated that any injury was given to her or her cousin-Jasmer Singh (PW-11) by the respondents. Even it was not stated by her in her statement that there was any intention on the part of the respondents to cause injury or put fear to the complainant or to the witnesses. There is no allegation of humiliation to the prosecutrix or to the eye witness-Jasmer Singh. The prosecutrix while appearing before the Court had improved her statement. The respondents have falsely been implicated being family member of Dharambir, who is the main accused as there was enmity between the family of the prosecutrix and the respondents. It has also been submitted that Ram Kumar, uncle of PW-10 and PW-11 had caused injuries to Mangal, on which, FIR No. 229 dated 1.9.2000 was registered under Sections 323,325 and 506 IPC at Police Station Pehowa and in that case respondent No.3 was witness. In that case, Ram Kumar-uncle of prosecutrix (PW-10) and Jasmer Singh (PW-11) was convicted and sentenced to undergo two years RI vide judgment dated 2.9.2005, therefore, it has been proved that the respondents have falsely been implicated in this case to take revenge. In the end, it has also been submitted that by taking into consideration the evidence available on record and proper appreciation thereof, the respondents have rightly been acquitted by the trial Court and no interference is required by this Court in appeal against acquittal.

Heard the arguments advanced by learned counsel for the

parties and have also gone through the relevant record of the trial Court including the statements of the witnesses.

Facts relating to lodging of FIR, presentation of challan, framing of charges and thereafter conviction of accused-Dharambir and acquittal of accused-respondents, namely, Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi are not disputed. The prosecutrix was examined by Medical Officer, namely, Dr. Uma Khurania, PGIMS, Rohtak and her statement was recorded before the trial Court on 8.10.2008. On examination, Dr. Uma Khurania (PW-12) found following injuries on the person of the prosecutrix:-

1. A lacerated wound 1 c.m. X 0.5 c.m. on lateral aspect and above left side eye brow region. Clotted blood was present at the site of wound. Nature of injury simple. Duration of injury within 12 hours. Type of weapon was blunt.
2. A bruise reddish blue in colour 4 c.m. X 4 c.m. at left shoulder joint. Type of injury simple. Duration of injury within 12 hours. Type of weapon was blunt.
3. A bruise reddish in colour 4 c.m. 3 c.m. right shoulder joint. Type of weapon was blunt.

She also stated that there was no history of previous medical termination of pregnancy. Secondary sexual characters were well developed. Breasts were well developed. Axillary and pubic hair were present. As per vaginal examination, on inspection, there was no mark of injury on thigh or external genital area. Hymen was torn, tags of torn hymen were present. No fresh bleeding was present at hymen. Patient experienced pain during vaginal examination and vagina admitted two

fingers. Dr. Uma Khurania (PW-12) after going through the FSL report Ex. PJ also stated that the possibility of sexual intercourse could not be ruled out.

A perusal of statements of prosecutrix (PW-10), Jasmer Singh (PW-11), who is an eye witness of the incident as well as statement of Doctor (PW-12), who medico legally examined the prosecutrix clearly shows that rape was committed upon the prosecutrix and same was witnessed by Jasmer Singh. The age of the prosecutrix has been proved on record on the basis of school leaving certificate. No evidence was brought on record by the defence to prove the age of the prosecutrix otherwise. The consent of the prosecutrix was not relevant as she was minor at the time of commission of the offence. The delay in lodging the FIR is not relevant as at the time of commission of the offence, parents of the prosecutrix were not at home and she was all alone in the house. The incident was witnessed by Jasmer Singh (PW-11), who is cousin of the prosecutrix. Even an altercation had taken place between the accused-party and eye witness, which has also been proved on record not only from the statement of the Doctor, who medico legally examined Jasmer Singh but from the statement of the prosecutrix itself. After conducting medical examination of the prosecutrix, the FIR was lodged with the police.

Keeping in view the nature of offence, age of the prosecutrix as well as non-availability of her parents at the time of commission of offence, I am of the view that the delay has properly been explained. Moreover, in reporting such type of matters to the police when prestige of the family and future prospects of the minor girl are involved, it takes time to decide whether the matter should be reported to the police or not. There are certain

minor discrepancies and contradictions in the statements of the witnesses, which are not relevant and immaterial and the same are to be ignored. It has also not been proved on record that the accused-appellant-Dharambir was falsely implicated in this case with certain motive. There was no litigation pending between the family members of the prosecutrix and accused appellant.

Keeping in view the evidence available on record including the statements of the Doctor, prosecutrix and eye witness, I find no reason to interfere with the findings recorded by the trial Court. Accordingly, CRA-S No. 846-SB of 2009 filed by accused-appellant, namely, Dharambir is hereby dismissed. **Since the appellant is on bail as his sentence was suspended by this Court during pendency of the appeal, he be taken in custody forthwith to undergo remaining part of the sentence.**

Crl. Appeal No. S-2599-SB of 2012 has been filed against judgment of acquittal of accused-respondents, namely, Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi on the ground that contradictory finding has been recorded by the trial Court, whereas, it has been proved on record that accused persons were present at the time of incident, which had occurred inside the house of the prosecutrix. The injury has been proved on record still the accused have been acquitted of the charges framed against them.

The findings recorded by the trial Court while acquitting the accused-respondents are reproduced as under:-

As regard to the offences alleged against the accused Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi under Sections 323,506,452 read with Section 34 IPC and Section 3

(1) (xi) of the Act for which they are facing the trial, the prosecution case is not proved on the file. To prove the offences under Section 3 (1) (xi) of the Act, prosecution was required to prove the basic ingredients that offence was committed at a public place and within the public view and victim of the case belongs to scheduled caste or scheduled tribe community and that fact must be within the knowledge of accused persons derogatory words against the victim of the case with the intention to defame and insult such a person. But these basic ingredients are missing if the statement of prosecutrix Ex. PA and subsequent statement of Meena Kumari in the Court as PW10 and statement of Jasmer PW11 are taken into consideration.

As regard to the remaining offences under Section 323,506,452 read with Section 34 IPC are concerned, the same are also not proved against accused-Dharambir, Karambir @ Bhira, Ramesh @ Mesha, Rama and Smt. Bhulli Devi. As per statement Ex. PA there are no allegations of insult or humiliation of Meeni Kumari by the accused persons. Similar matter had gone before the Hon'ble Supreme Court in case **Husna and others Vs. State of Punjab** 1996 Supreme Court Cases(Crl.) 421, wherein, accused persons were impleaded on the basis of supplementary statement of the first informant recorded during investigation and Hon'ble Supreme Court laid down the law that such supplementary statement was hit by Section 162 Cr.P.C. and the same cannot be treated to be part of

FIR. The allegations against accused persons Karambir and others as well as accused-Dharambir for the offences under Sections 323,506,452 read with Section 34 IPC and Section 3 (1) (xi) of the Act are not proved. There are no allegations against accused Karambir @ Bhira, Ramesh @ Mesha, Rama for the offence under Section 376 IPC or Section 3 (2) (v) of the Act against accused Karambir @ Bhira, Ramesh @ Mesha and Rama and Smt. Bhulli Devi.

Accused-respondents were arrayed as accused on the basis of supplementary statement. However, as per provisions of Section 162 Cr.P.C., the supplementary statement cannot be treated to be the part of the FIR. The allegations against the accused-respondents under Section 376 IPC and Section 3 (2) (v) of the Act were not proved on record.

The law with regard to interference in judgment of acquittal is well settled to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate Court can interfere with the judgment of acquittal. The appellate Court while hearing such matter should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

If the judgment of acquittal is unreasonable and the relevant and convincing material has been eliminated in the process in an unjustifiable manner, only then the judgment of acquittal should be interfered with. This view has been taken by Hon'ble the Supreme Court in

Joseph Vs. State of Kerala, 2003 (3) RCR (Crl.) 7; Devatha Venkataswamy Vs. Public Prosecutor, High Court of A.P., 2003 (10) SCC Criminal 76; State of U.P. Vs. Babu, 2003 (4) RCR (Crl.) 673 and Suchand Pal Vs. Phani Pal, 2004 (1) RCR (Crl.) 221.

In Arulvelu and another Vs. State represented by the Public Prosecutor and another 2009 (4) RCR (Criminal) 638, the Supreme Court has laid down the following guidelines for appellate Court in dealing with cases where trial Court had acquitted the accused:-

- “1. The accused is presumed to be innocent until proved guilty. The accused possessed this presumption when he was before the trial Court. The trial Court's acquittal bolsters the presumption that he is innocent.
2. The power of reviewing evidence is wide and the appellate Court can re-appreciate the entire evidence on record. It can review the trial Court's conclusion with respect to both facts and law, but the Appellate Court must given due weight and consideration to the decision of the trial Court.
3. The appellate Court should also keep in mind that the trial Court had the distinct advantage of watching the demeanor of the witnesses. The trial Court is in a better position to evaluate the credibility of the witnesses.
4. The appellate Court may only overrule or otherwise disturb the trial Court's acquittal if it has very substantial and reasons” for doing so.
5. If two reasonable or possible views can be reached-one that leads to acquittal, the other to conviction – the High

Courts/appellate courts must rule in favour of the accused.

6. An order of acquittal should not be lightly interfered with even if Court believes that there is some evidence pointing out the finger towards the accused.

7. The trial Court judgment cannot be set aside because the appellate Court's view is more probable. The appellate Court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial Court is either perverse or wholly unsustainable in law.”

Hon'ble the Apex Court in **Tota Singh Vs. State of Punjab 1987 (2) RCR (Crl). 35** has observed that if two views are possible on appraisal of evidence adduced in the case and the trial Court has taken a view which is a plausible one, the appellate Court should refrain from interfering with an order of acquittal.

In the appeal against acquittal, the basic ingredients of the offence under the Act have not been proved as the offence was not committed in the public view and it has not been proved on record that the accused persons used derogatory words against the victim with intention to defame and insult her. It has also not been proved on record that the respondents were present at the time of commission of rape. Nothing has been said by the prosecutrix against the respondents in her initial statement. Supplementary statement made by the prosecutrix is hit by provisions of Section 162 Cr.P.C. and same cannot be treated to be the part of the FIR as has been held by Hon'ble the Apex Court in the case of **Husna and others Vs. State of Punjab and others** 1996 Supreme Court Cases (Criminal) 421.

In view of what has been discussed above, I am of the view that the judgment of the trial Court in acquitting accused-respondents is reasonable and plausible one and the same does not require any interference by this Court. There is no merit in the arguments advanced by learned counsel for the complainant-appellant and Crl. Appeal No. S-2599-SB of 2012 filed by complainant-appellant-Rai Singh is also dismissed.

Accordingly the judgment of conviction and order of sentence dated 16/19.1.2009 of trial Court qua to accused-Dharambir is upheld and Crl. Appeal No. S-846-SB of 2009 is dismissed. Crl. Appeal No. S-2599-SB of 2012 filed by the complainant against acquittal is also dismissed.

5.12.2017
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes