

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
CRA-S-4205-SB of 2013(O&M)
Date of Decision:22.12.2017

Vicky
..... Appellant
Versus
State of Haryana
..... Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.K.S.Dhillon, Advocate
for the appellant.
Mr. Ramesh Kumar, AAG, Haryana.

LISA GILL, J (Oral).

Appellant has been convicted for the offences punishable under Sections 363, 366-A, 376 of the Indian Penal Code, 1860 (for short-'IPC') by the learned Additional Sessions Judge, Rewari, vide impugned judgment dated 30.08.2013 and by a separate order of sentence dated i.e. 31.10.2013 the appellant has been sentenced as under:-

Offence u/s	Sentence
363 IPC	Rigorous imprisonment for three years; besides pay a fine of ₹2000/- and in default thereof to further undergo RI for two months
366-A IPC	Rigorous imprisonment for five years; besides pay a fine of ₹3000/- and in default thereof to further undergo RI for three months
376 IPC	Rigorous imprisonment for seven years; besides pay a fine of ₹5000/- and in default thereof to further undergo RI for four months

Aggrieved therefrom, the present appeal has been filed by the appellant.

Brief facts necessary for the adjudication of this case are that the above said FIR (Ex.PH) was registered on the statement of PW-2-Bhim Singh-complainant (Ex.PD). Information was received by the police

authorities through the control room on 12.01.2013 that a girl had been kidnapped. On receipt of this information, ASI Shri Bhagwan along with constable Jogender and LHC Kusum Lata reached Rajiv Nagar. Complainant-Bhim Singh met them there and recorded his statement to the effect that his brother had four children, one of them was a daughter aged about 16-17 years. He stated that she was of slightly weak mind and was undergoing treatment. The complainant informed that the victim was sitting near the Shani Temple in the locality on 12.01.2013 at about 6.00.p.m. Other children of the locality were playing there as well. The complainant's sister-in-law (Bhabi) informed him that the victim who was sitting near the Shani temple had gone missing. They started searching for the victim. Children present at the spot informed that the appellant, who was residing with the daughter of his maternal aunt (Mausi) had taken away the victim. The complainant along with one Sunny son of Rajiv tailor and Vicky son of Chaillu Ram went in search of the victim in a vehicle. They found the appellant alongwith the victim near a roadside vendor near 'Pilot Chowk'. The appellant was forcing the victim to eat eggs taken from the said roadside vendor. The victim was crying and the appellant was beating her. When they inquired from the prosecutrix as to why she was crying, she revealed that the appellant was taking her forcibly.

The complainant stated that the appellant taking advantage of the victim's simplicity forcibly kidnapped his niece with an intention to commit wrong act. FIR under Section 363, 366-A IPC was accordingly registered against the appellant.

Rough site plan Ex.PQ was prepared by the Investigating Officer-Shri Bhagwan (PW-11). The victim was medico legally examined by Dr. Shivangi Prashar (PW-1). Medico Legal Report is on record as

Ex.PB. F.S.L. report is on record as Ex.PX.

Statement of the victim under Section 164 Cr.P.C., Ex.PD was recorded on 16.02.2013 before the learned Additional Chief Judicial Magistrate, Rewari. The victim stated that the appellant used to reside near their house. He forcibly took her along with him to a street vendor (Rehri). The victim started crying but the appellant slapped her. It is further stated that she was rescued thereafter from the appellant. Final report under Section 173 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') was presented on completion of the investigation on 19.02.2013. Report of the F.S.L. dated 14.02.2013 (Ex.PX) was received. As per the said report, human semen was detected on exhibit-1 i.e. a dirty brown coloured 'Salwar' stated to be belonging to the victim. Consequent to receipt of the F.S.L. report, the appellant was proceeded against for the offence punishable under Section 376 IPC.

It is to be noted that charge against the appellant was initially framed under Section 363, 366-A IPC on 02.04.2013. After receipt of the F.S.L. report, Ex.PX it was opined by the learned trial Court that an offence punishable under Section 376 IPC is also made out against the appellant. Accordingly, amended charge was framed against the appellant on 23.05.2013 under Sections 363, 366-A and 376 IPC. The appellant pleaded not guilty and claimed trial.

The prosecution examined as many as fourteen witnesses to prove its case against the appellant. The accused in his statement under Section 313 Cr.P.C., denied all the incriminating evidence put to him while claiming innocence and false implication. No evidence in defence was however, led.

Learned trial Court on considering the facts and circumstances

of the case as well as the evidence on record concluded that the prosecution successfully proved its case beyond reasonable doubt. Consequently, the appellant was convicted for the offences punishable under Sections 363, 366-A, 376 IPC and sentenced as detailed above.

Aggrieved therefrom, the present appeal has been filed.

Learned counsel for the appellant vehemently argues that the conviction of the appellant for the offences punishable under Section 363, 366-A, 376 IPC is not made out on the basis of the evidence on record. It is submitted that no allegations of rape were raised at the outset or at any stage thereafter till the receipt of the F.S.L. report. As per the M.L.R. Ex.PB, no injury was detected on the person of the victim. In-fact, the medical evidence rules out the probability of sexual assault. Moreover, the link evidence in this case is missing, which proves that detection of human semen on the brown 'Salwar' may not necessarily be linked to the victim. Moreover, it is vehemently argued that the ocular version in itself falsifies the hypothesis of commission of rape upon the victim. The time-line, which is given by the witnesses clearly proves that commission of such offence was not possible within the said time frame. It is further urged that there is no medical evidence on record to reveal that the victim was mentally weak /retarded. The vaginal swabs of the prosecutrix taken at the time of medical examination were not sent for examination for reasons best known to the prosecution.

Furthermore, it is argued that non-examination of the father of the victim as well as the independent witness-Vicky are fatal to the prosecution version as PW-3-Sita, mother of the victim stated that it is the victim's father who had brought back the girl home. It is thus, submitted that discrepant ocular version, non raising of the allegations of rape at the outset,

coupled with the medical evidence on record does not prove the guilt of the appellant beyond the shadow of reasonable doubt. The appellant, it is submitted, has been in custody for 4 years, 9 months and 28 days as on 10.11.2017 as per the custody certificate dated 11.11.2017. It is thus prayed that this appeal be allowed and the appellant be acquitted of the charges against him.

Learned counsel for the State while refuting the said arguments submits that the prosecution has proved its case against the appellant beyond all reasonable doubt. Thus, it is submitted that there is no ground for setting aside the well reasoned and logical judgment of conviction dated 30.08.2013 and order of sentence dated 31.08.2013, which is based on a sound appreciation of the evidence on record. Therefore, the said judgment and order be upheld.

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

It is not in dispute that the FIR in question was registered on the statement of the uncle of the victim to the effect that his brother has four children and amongst them his brother's daughter aged 16-17 years had a simple mind since childhood and was undergoing treatment. He stated that the victim was sitting near the Shani Temple of the locality at about 6.00 p.m on 12.01.2013 as it was Saturday. It is to be noted that Saturday is a day on which the deity is specially worshipped. Children of the locality were also playing there. The complainant was informed by PW-3-Sita (complainant's sister-in-law) that the victim had gone missing. They searched for the victim. They were informed by the children playing nearby, that the victim was taken away by the appellant. The complainant alongwith Sunny and Vicky went in search of the victim and found her in the company

of the appellant near an egg vendor in the vicinity of Pilot Chowk. The appellant was forcing her to eat eggs. The victim was crying and the appellant was beating her. The victim revealed that she was taken away forcibly by the appellant.

PW-2-Bhim Singh (complainant) while deposing before the learned trial Court stated that when he reached his residence at about 5.45 p.m, on 12.01.2013 his brother's wife told him that the appellant had taken away the victim. When they went in search of the victim, they saw the appellant feeding eggs to the prosecutrix, who was crying. He further stated that they caught hold of both the victim as well as the appellant on which persons standing nearby asked as to why they had caught hold of both the victim and the appellant. The complainant disclosed to these persons that the appellant had brought the victim forcibly by inducing her. The victim was brought back home by the complainant and the appellant stated to be taken to the police station. It is admitted by the complainant that he alongwith the victim's father and Vicky went in search for the girl. She was found at about 6/6.30 p.m. He further admitted that 4-5 persons were standing near the said egg stall. The appellant, it is submitted was known to them since the past 10-15 years. It is stated that the appellant was under the influence of an intoxicant at that time. The complainant in his cross-examination has categorically denied the suggestion that the victim was taken away by the appellant for an illegal act.

When PW-2, the complainant was recalled for cross-examination after amendment of the charge he stated that he never inquired about the offence from the victim. It is stated that the victim was found within one hour of her being missing. The appellant is stated to have taken the victim from Krishna Nagar Mohalla to Pilot Chowk on foot. It is further

stated that it takes about one hour to go from the place of occurrence to Pilot Chowk.

PW-3, the mother of the victim stated that her daughter was sitting near the Shani Temple at about 6.00 p.m. on 12.01.2013 which was a Saturday. PW-3 stated that the victim was seen sitting at about 4.00 p.m. by her. She was informed about the appellant taking away her daughter at about 6.00 p.m by the children present near the Shani Temple. She stated that wrong act had been committed by the appellant with her daughter. This, it is stated was revealed to her by the victim. PW-3-Sita specifically stated that the victim was brought home by her husband at about 7.00 p.m. One Shalu son of Raju had come to her house and informed that the victim had been taken away by the appellant to an unknown place.

The prosecution in its wisdom gave up the witnesses Vicky and the father of the prosecutrix, as being unnecessary. PW-7-Rakesh Kumar, Computer Clerk Office of M.C. Rewari, has proved the birth certificate (Ex.PK) of the victim, wherein her date of birth is reflected as 07.02.1995.

The victim-PW-10 in her statement under Section 164 Cr.P.C had stated that the appellant who used to reside near their house had taken her away forcibly from the vicinity of the Shani temple to a street vendor. It is further stated that she started crying and the appellant slapped her. She was thereafter rescued. However, in her testimony before the learned trial Court, the victim stated that she was present near the temple in the locality when the appellant had taken her away. He gave her two eggs to eat from the stall but she threw the eggs and in retaliation the appellant slapped her. The victim for the first time before the learned trial Court stated that the appellant took her away in a bus and wrong act was committed.

PW-11-SI Shri Bhagwan deposed that he was posted at Police

Station Model Town, Rewari on 12.01.2013. They received information of one girl being kidnapped by someone. They reached Rajiv Nagar, Rewari, where statement of the complainant (Ex.PD) was recorded. FIR Ex.PH was registered on the basis of this statement. The victim was recovered from her residence vide recovery memo Ex.PF. Medical examination of the victim was conducted. A packet containing the 'Salwar' of the victim duly sealed were taken in custody vide recovery memo Ex.PR. PW-11 stated that the distance of Pilot Chowk, Rewari from the spot where they reached in Rajiv Nagar is about half kilometer. Shani temple is near the house of the victim. It was revealed to PW-11 by the complainant that the victim had been recovered by him from near Pilot Chowk. PW-11 stated that he did not talk to the victim at that time. It is further stated by PW-11 that the victim was missing from about 7/7.30.p.m and recovered at about 8.p.m. The distance between the victim's house and the house of the appellant's brother-in-law (where the appellant is stated to be living) is mentioned to be 200 yards.

It is not in dispute that initially FIR against the appellant was registered under Section 363, 366-A IPC. No allegations of sexual assault were raised against the appellant at any stage. It is after the receipt of the report of Chemical Examiner, Ex.PX, that offence punishable under Section 376 IPC was added. There is no explanation for non examination of the father of the victim or Vicky, the independent witness, who admittedly accompanied the complainant while searching for the victim. Neither the egg vendor nor any of the persons statedly present near the egg vendor were examined. Similarly, none present in the vicinity of the Shani Temple at the time when the appellant is alleged to have taken the victim away has been examined or even cited as a witness. PW-3, mother of the victim stated that one Shalu son of Rajiv had come to their house and informed about the

victim being taken away by the appellant. It is pertinent to note that said Shalu was never examined nor cited as a witness.

At this stage, it is relevant to refer to the medical evidence on record. As per PW-1-Dr. Shivangi Prashar, who examined the victim on 12.01.2013, no injury was found present on the person of the victim. In MLR (Ex.PX), duly proved by PW-1, it is stated as under:-

“L.E: Pubic & Axillary hair present, breast adolescent type. No injury seen over body. No sign of resistance present on body & external genitals & anal region and on medial aspect of thighs. Hymen intact. A brick colour (Kathai) pajami signed by me, is sent for chemical analysis.”

While rendering her opinion in the said MLR, it is mentioned as under:-

“No probability of sexual intercourse assault, however final opinion will be given after receiving FSL Report.”

As per the FSL Report, human semen was detected on the 'Salwar' of the victim. Curiously, there is no report regarding the swabs which PW-1-Dr. Shivangi Prashar, deposed were handed over to the police authorities.

A palpable doubt is cast on the prosecution version in view of the evidence as above. First and foremost, it is not in dispute that at the outset no allegations attracting the rigours of Section 376 IPC were raised. In-fact, no such allegation was raised by the complainant or the victim. As per the Chemical Examiner Report Ex.PX, semen was detected on the 'Salwar' purportedly worn by the victim. Thereafter, charge against the appellant was amended and Section 376 IPC added. It is to be noted that as per the prosecution case, the victim had already been taken home by the complainant/ father of the victim after she was recovered from near the egg

vendor. PW-11, SI Shri Bhagwan, has specifically stated that the victim was present at her residence when the police reached on information received. She was taken from her residence for medical examination. PW-2, the complainant stated that the appellant was under intoxication. The medical evidence on record does not indicate the same. The M.L.R of the appellant is on record as Ex.PN. Further doubt is cast on the prosecution version when the street vendor/ egg vendor or any of the other persons standing nearby or the persons present near the temple were not examined by the prosecution. There is nothing on record to conclusively show that the victim was taken away forcibly or subjected to rape. There is nothing on record to indicate that the prosecutrix was not completely normal or that she was of simple or weak mind as projected by the complainant. Though, it is stated by PW-2 that the victim was under treatment, no such evidence has been brought on record. There are no details of the treatment she was purportedly receiving or of the hospital/doctor from where she was receiving the treatment. The victim in her statement under Section 164 Cr.P.C., never raised any allegations attracting the rigours of Section 376 IPC against the appellant. In her statement before the learned trial Court, there is a bald statement which reads as under:-

“Stated that when I was present in the temple in my locality, Vicky took me away from there. He gave me two eggs at a Rehri to eat. I threw the eggs and he gave me slaps. He took me away in a bus and accused Vicky did wrong act with me. I identify the accused present in the Court. My statement which I given in the Court is Ex.PO.”

The victim for the first time before the learned trial Court states that she was taken away in a bus by the appellant and a wrong act was committed. To rely solely on the statement of the victim in the factual matrix of this case is unsafe and unjustified. The Chemical Examiner report Ex.PX

reflecting the presence of semen on the salwar purportedly worn by the prosecutrix at the time of incident (the victim was admittedly taken home after being recovered from near the egg vendor and was taken for medical examination from her residence) does not conclusively link the appellant with the commission of the crime.

The distance between the place of occurrence and the temple from where the victim is stated to have been forcibly taken away does not in any manner permit of a hypothesis pointing to the guilt of the appellant. A wholesome and thorough scrutiny of the evidence on record, facts and circumstances of the case do not conclusively point to the guilt of the appellant. Keeping in view the facts and circumstances as noted above, the prosecution has failed to prove its case beyond reasonable doubt against the appellant. Reasonable doubt is cast on the version put-forth by the prosecution, the benefit of which necessarily has to accrue to the appellant.

In my considered opinion, the appellant is entitled to the benefit of doubt. The learned trial Court has indeed erred in convicting the appellant for the offences punishable under Sections 363, 366-A, 376 IPC and sentencing him thereunder on the basis of the evidence on record.

Consequently, this appeal is allowed. The impugned judgment of conviction dated 30.08.2013 and order of sentence dated 31.08.2013, passed by the learned Additional Sessions Judge, Rewari, are set aside. The appellant is acquitted of the charges framed against him. The appellant is in custody. He be released forthwith, if, not required in any other case.

22.12.2017
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.