

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

**Date of decision: September 05, 2018
CRA-D-326-DB of 2013 (O&M)**

Deepak

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-422-DB of 2013 (O&M)

Mangal Singh

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE B.S. WALIA**

Present: Mr. M.S. Rai, Advocate
for the appellant (in CRA-D-326-DB of 2013).

Mr. Saurabh Arora, Advocate
for the appellant (in CRA-D-422-DB of 2013).

Ms. Tanisha Peshawaria, DAG Haryana.

A.B. CHAUDHARI, J

By this common order, above said both the appeals are being
disposed of.

2. Being aggrieved by judgment/order dated 18.02.2013/
19.02.2013 passed by the learned Additional Sessions Judge, Fatehabad,
in Sessions Case No.34 of 2012/2013, by which the appellants, namely
Deepak and Mangal Singh were convicted for commission of offence
punishable under Sections 363, 366 and 376(2)(g) of Indian Penal Code,

1860 (for short 'IPC') and were sentenced to undergo Rigorous Imprisonment for life (for offence under Section 376 IPC), with fine in the sum of ₹10,000/-; in default of payment of fine, to further undergo rigorous Imprisonment for six months; sentenced to undergo Rigorous Imprisonment for seven years (for offence under Section 366 IPC), with fine in the sum of ₹5,000/-; in default of payment of fine, to further undergo rigorous Imprisonment for three months; and sentenced to undergo Rigorous Imprisonment for three years (for offence under Section 363 IPC), with fine in the sum of ₹5,000/-; in default of payment of fine, to further undergo rigorous Imprisonment for three months, the present appeals have been filed by the appellants in this Court.

FACTS

3. Briefly stated, the prosecution case is that the complainant-Guddi wife of Balwant Singh, lodged a written complaint (Exhibit P6) to the police stating therein that her maternal grand-daughter, prosecutrix whose birth date is 01.03.2001 was enticed away on 02.09.2012 (Sunday) at about 1:00 P.M. by the appellants and her whereabouts were not disclosed by them. She, therefore, sought help of police for her recovery. The police registered FIR under Sections 363, 366-A read with Section 34 IPC. During investigation, on 06.09.2012, the complainant-Guddi and her nephew produced the prosecutrix before the police and thereafter, she was medico-legally examined and handed over back to the complainant-Guddi. Thereafter, on 07.09.2012, statement of the prosecutrix under Section 164 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') was recorded

before the Chief Judicial Magistrate, Fatehabad. She stated that she studied upto 5th class. On 02.09.2012, her two neighbourers, Krishan and Deepak along with third boy Mangal jumped the wall and entered the house when she was alone in the house. She tried to raise noise but her mouth was gagged and she was threatened that she would be killed. They gave her something to eat and performed bad act with her. They took her to *dera* of *baba* on motorcycle where she regained her consciousness on next date. *Baba* in the *dera* asked her about her address and thereafter, *baba* dropped her on her house. On her statement, offence of gang rape under Section 376(2)(g) IPC was added to FIR. Accused Deepak and Mangal were arrested on 08.09.2012. The police made investigation and thereafter, filed charge-sheet against the present appellants while the third accused Krishan was tried before the juvenile Court.

4. The learned trial Court heard the evidence of the witnesses produced by the prosecution before it and thereafter, convicted the appellants as stated above. Hence, these appeals.

ARGUMENTS

5. In support of the appeal, learned counsel for the appellants, in both these appeals, vehemently argued that the trial Court wrongly convicted the appellants for offences in question when there was, as a matter of fact, no evidence of rape much less gang-rape, as per prosecution story. According to him, careful perusal of evidence of Dr. Renu Bala-PW5 will clearly show that there is not even remote sign of

rape. It is highly impossible and improbable that three persons committed rape on small girl of 11 and a half years and still there is no single visible or invisible injury to the private part of the prosecutrix. Even the story of gang-rape has not been proved by the prosecution in any manner whatsoever. According to the learned counsel for the appellants, there is no whatsoever evidence against the appellants and they were required to be acquitted since the prosecution case was false and baseless and without any evidence. Learned counsel for the appellants, therefore, prayed for acquittal of the appellants.

6. *Per contra*, learned State counsel submitted that a small girl of 11 and a half years was enticed and rather forcefully taken away by the appellants finding that there was no one in the house. The girl was administered some substance, as a result of which, she lost her sense of understanding. The trial Court has relied on the evidence, which was almost gone unchallenged and therefore, the trial Court rightly convicted the appellants. There was evidence of rape in the form of prosecutrix appearing as a witness and stating that rape was committed on her by all the accused persons. There is no reason why any other view could be taken. The prosecution proved its case beyond reasonable doubt and hence, the appeal should be dismissed.

CONSIDERATION

7. We have heard learned counsel for the rival parties. We have perused the entire evidence, so also the medical evidence carefully. At the outset, we find that the evidence of prosecutrix, who appeared as PW4

before the Court, regarding the appellants entering her house, administering her something and then taking her away from the house along with them, has gone almost unchallenged and there is no reason for this Court to disbelieve the said evidence. Instead of repeating the evidence, it would be appropriate to quote the following paragraphs from the judgment of the trial Court:-

“9. The prosecutrix appeared as (PW4). She stated that she was living at the house of her maternal grand mother Guddi Bai complainant, since her childhood as her mother had contracted Karewa marriage. She further stated that on the fateful day, i.e. on 2/9/2012, said Guddi Bai was away for labour work and she was alone at home. She further stated that at about 12 noon, when she was taking rest in her house, her neighbours Deepak and Mangal (present accused) and Krishan (juvenile) came after scaling (the wall) and they gagged her mouth and then, after administering some intoxicant committed rape on her. She further stated that then, accused Mangal took her to the dera of baba on a motorcycle in a semi-conscious condition and he left her outside the dera, where she fell unconscious. She further stated that the baba asked her address but she did not tell him her address out of fear and she revealed the same to him on the third day when he dropped her at her home. She further stated that on return home, she narrated the incident to her maternal grand mother and then, complaint to the police was made. She further stated that her statement under Section 164 Cr.P.C. Was recorded. In her cross examination, she stated that her house is surrounded by other houses. She further stated that outer wall of her house is 7/8 feet high and her house consists of two

rooms. She further stated that she was unconscious when she was sitting on the motorcycle while being taken away and she did not raise any alarm. She further stated that she had regained her consciousness on the next day and she did not tell anybody regarding rape on her due to fear. She further stated that she was kept at the dera by the wife of the baba who provided her food.”

8. We have checked the above evidence with the evidence of prosecutrix and we are sure that there is no perversity on the part of the trial Court in accepting her evidence in respect of her forceful kidnapping by the appellants. We therefore, confirm the finding of the trial Court that the prosecutrix was kidnapped by the appellants forcibly.

9. In so far as the age of the prosecutrix girl is concerned, the appellants have almost not disputed the same that she was a small and minor girl. We therefore, do not find it necessary to dwell upon the said aspect of the matter and hold that the girl was minor and kidnapped from the legitimate custody of her guardians. We, therefore, uphold the findings of the trial Court convicting the appellants for the offences punishable under Sections 363 and 366-A read with Section 34 IPC.

10. The next question is whether the offence of gang-rape under Section 376(2)(g) IPC has been proved by the prosecution or not. In this behalf, we have carefully seen the entire evidence and weighed the pros and cons of the matter. We are aware that the gang-rape with a small and minor girl is a serious matter and therefore, we have consciously and cautiously seen the entire evidence to find out whether there is evidence

on record of any rape much less gang-rape committed. Though, we find from the evidence of the prosecutrix that she claimed that rape was committed on her, we find that her evidence is required to be corroborated on medical evidence. PW5, Dr. Renu Bala examined her on 06.09.2012, i.e. almost immediately after her recovery. It would be necessary to quote her evidence in the form of affidavit, which reads thus:-

“2. According to victim was kidnapped by Mangal, Deepak, & Krishan. She has sexually assault by Mangal & Yakab 20 days back & 2 days back on 04/09/2012. Victim has not taken bath after the incident on 04/08/2012. Consent for examination. On examination Patient's general condition was conscious, oriented to time, place and person. CVS & RESP. -NAD, B.P-110/70 mm of Hg. Pulse -80/min, & Respiration Rate-20/min.

x x x x

P/V Examination:-

Hymen is not intact and admits only one finger. There is pain during manipulation. Vaginal smear taken & made 2 slides for examination of spermatozoa. No injury over labia majora and labia minora.”

11. It would be also appropriate to extract her cross-examination, which is reproduced as under:-

“..... Prosecutrix produced before me on 06.09.2012 at about 2:00 p.m. At the time of medico legal examination of prosecutrix stated before me regarding history of 20 days back prior to this occurrence from the date of examination. She was sexual assault by any person. It is correct that no external mark of injuries and no struggle mark was present on

the body of prosecutrix. It is correct that I mentioned in the MLR of the prosecutrix regarding age confirmation, prosecutrix must be examined by dental and radiologist. It is correct that no injury sustained on the private part of the prosecutrix. It is correct that if an unchasted girl is forcibly raped by any person then injury on the labia majora and labia minora can be happened but it is not a rule. It is correct that hymen can be torn by support activity and fall from height. There was no intoxication symptom at the time of examination of the prosecutrix.”

12. Learned State counsel vehemently argued that the vaginal swab that was sent for examination indicated that there was human semen and therefore, inference must be drawn that rape was committed. Upon careful perusal of the evidence of PW5-Dr. Renu Bala, we find that, though, three persons are said to have committed rape on the prosecutrix, as per her evidence, the medical report shows that the vagina admits only one finger and no injury over labia majora and labia minora. As to the hymen, it is stated that it is not intact, but then it is stated that hymen was ruptured and on the contrary, it is stated that vagina admits only one finger, and even for that there is pain. In the wake of the report that there was no injury over labia majora and labia minora, though, three persons are said to have committed rape on the prosecutrix, we have serious doubt about commission of rape even penetration. The cross-examination also shows that there was no external mark of injury on the body of the prosecutrix nor any injury even on private part of the prosecutrix. The doctor agreed that forceful rape on unchasted girl by three persons was

bound to result into injury on the labia majora and labia minora. Her explanation that it is not the rule, does not appeal to us, particularly in the light of report that even upon insertion of one finger, there was pain. We, therefore, find that there was neither any penetration nor rape committed by any of the persons on the prosecutrix. The finding about sperms vagina swab in the FSL report is also doubtful in the sense that rape is said to have been committed on 02.09.2012 and the swab is said to have been obtained on 06.09.2012. We do not think that necessarily finding of human semen can be linked to the alleged offence of rape, particularly because the prosecutrix did not allege commission of rape after 02.09.2012 after she was kidnapped from house. The only date and time of rape committed on her is said to be on 02.09.2012 in the afternoon. We, therefore, find that the benefit of doubt in respect of the charge regarding gang-rape will have to be given to the appellants. We, therefore set aside the findings as recorded by the trial Court for holding them guilty for the charge of gang-rape. In the result, we make the following order:-

ORDER

- (i) **CRA-D-326-DB of 2013** and **CRA-D-422-DB of 2013** filed by the appellants, namely Deepak and Mangal Singh, respectively, is partly allowed;
- (ii) Impugned judgment/order dated 18.02.2013/19.02.2013 of conviction/sentence, passed by the learned Additional Sessions Judge, Fatehabad, in Sessions Case No.34 of 2012/2013, for commission of offence punishable under

Section 376(2)(g) IPC, is set aside;

- (iii) Impugned judgment/order dated 18.02.2013/19.02.2013 of conviction/sentence, passed by the learned Additional Sessions Judge, Fatehabad, in Sessions Case No.34 of 2012/2013, for commission of offence punishable under Sections 363, 366 IPC, with fine, is maintained, with a further direction that sentences for these offences shall run consecutively.

(A.B. CHAUDHARI)
JUDGE

(B.S. WALIA)
JUDGE

September 05, 2018

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No