

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

Crl. Appeal No.S-2380-SB of 2016(O&M)

Date of Decision: 17.11.2018

Bhupender

.. Appellant

Vs.

State of Haryana

.. Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Mr. Sukhmeet Singh, Advocate
for the appellant.**

Ms. Priyanka Sadar, AAG Haryana.

ANITA CHAUDHRY, J.

This appeal has been preferred against the judgment of conviction dated 06.04.2016 and order of sentence dated 08.04.2016 vide which the appellant has been held guilty under Sections 376(1) and 506 of Indian Penal Code (for short, IPC) and was sentenced for a period of 10 years and 01 year rigorous imprisonment respectively. Fine of Rs.25000/- was also imposed under Section 376(1) IPC. In default whereof further imprisonment for 2 years was awarded. Both the sentences were ordered to run concurrently.

The prosecution case finds its origin in the complaint (Ex.PW10/A) dated 28.10.2014 made by prosecutrix (PW10). It was mentioned that on 04.10.2014 her husband had gone to meet his relative in another village. She was in the house with her children. The accused, who

was brother-in-law of her brother, had come to their house and stayed there on the pretext of having urgent work with her husband. In the night, he committed rape with her and criminally intimidated her. It was also mentioned that on 26.10.2014 the accused again came to their house, but she did not open the gate and narrated the occurrence to her husband (PW11) and matter was reported to the police.

On the basis of complaint, FIR No. 569 dated 28.10.2014 was registered under Sections 376 and 506 IPC at Police Station Sadar, Palwal. Investigation was conducted by PW13 ASI Sat Pal. The prosecutrix was taken to hospital by PW1 Const. Anita for medical examination, which was conducted by PW8 Dr. Varuna Gaur. Her clothes were taken into possession. PW2 Anju Kumari and other police party took the prosecutrix for her statement under Section 164 Cr.P.C. Site plan was prepared by PW3 Ravinder Singh, Draftsman. The accused was arrested and was taken for medical examination by PW5 Cont. Krishan Kumar. The accused demarcated the place of occurrence. His MLR (Ex.PW11/A) was proved by PW12 Subhash Chand. The case properties were sent to FSL Madhuban by PW6 EASI Fateh Singh and PW9 Const. Virender Singh. PW7 SI Jai Ram partly investigated the case later. On completion of investigation, challan was filed by PW4 Insp. Jaibir Singh.

Charge under Sections 376(1) and 506 IPC was framed. The accused pleaded not guilty and 13 witnesses were examined at the trial.

In his statement under Section 313 Cr.P.C., the accused abjured the trial. He took the stand that the prosecutrix had an affair with him and whatever was done by him was with her consent and he was implicated in collusion with her husband.

No defence evidence was led.

The trial Court rejected the defence version and held the accused guilty and convicted him in the manner noted above. Dis-satisfied with the same, the instant appeal.

I have heard learned counsel for the parties and have gone through the record carefully.

Learned counsel for the appellant had submitted that the prosecutrix was major and was a consenting party and it is apparent from the fact that the occurrence took place on 04.10.2014 and she reported the matter to the police on 28.10.2014. During period interregnum no complaint was made. Admittedly, her children were in home at the time of occurrence, but no hue and cry was raised, there was no mark of injury and the solitary testimony of prosecutrix was not reliable and could not be relied upon and the Court below had erred in placing implicit reliance thereupon to record the conviction of the appellant.

Learned State counsel supported the judgment of conviction.

There is sole testimony of prosecutrix. The testimony of her husband was hearsay. The other witnesses were either formal or relating to the medical examination of prosecutrix and the accused or related to the investigation. No doubt, the conviction can be based on the solitary statement of the prosecutrix, but at the same time, it cannot be mechanically applied to every case of sexual assault. Hon'ble Supreme Court in **Raju and others Vs. State of Madhya Pradesh, (2008) 15 SCC 133** has held that the accused must be protected against the possibility of false implication. It has been further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness

whose presence at the spot is probable but it can never be presumed that her statement should without exception be taken as the gospel truth. In **Tameezuddin alias Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566** it has been held that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

In **Narender Kumar Vs. State (NCT of Delhi), (2012) 7 SCC 171**, Hon'ble Apex Court has held that if the statement of prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon. It has further been held that onus of proof is on the prosecution to establish each ingredient of offence beyond reasonable doubt on basis of cogent evidence and material on record. The sole testimony of prosecutrix can be relied for the purpose of conviction without any corroboration if the same inspires confidence, but if court finds it difficult to accept version of prosecutrix on its face value, it may look for corroboration by other evidence, direct or circumstantial.

Adverting to the facts of the case in hand, it is not disputed that the prosecutrix was about 23 years at the time of incident. She was major. Her conduct leaves no doubt that she was a consenting party. According to her, she was sexually assaulted by the accused on 04.10.2014 in the night. After that she returned to her room to sleep. The accused then went to sleep in the courtyard and he left her house at 4:00 a.m. Her husband returned in the morning on 05.10.2014. Had it been a case of forcible act, the accused would have left the house after incident. The prosecutrix did not reveal the

incident to her husband. Her children were at home. No resistance was shown to have made. As per prosecution story, the accused again came to the house of prosecutrix on 26.10.2014 and this time she did not open the door. She informed her husband of incident of 04.10.2014. But this time also, the matter was not reported to the police. It was on 28.10.2014 the complainant came forward with a complaint, on the basis of which FIR was registered. The stand taken by the prosecutrix that she was under fear of threat extended by the accused, does not appeal to prudence. Her husband had returned the very next day i.e. 05.10.2014 but she kept silent. Her husband was there and it cannot be accepted that she was under fear of any threat. She had occasion to disclose the incident to her husband, but silence on her part speaks volume about her veracity. On coming to know of the incident on 26.10.2014 her husband failed to inform the police. No explanation had been offered in the complaint Ex.PW10/A as to why the matter was not reported on 26.10.2014.

The medical of the prosecutrix was conducted after 24 days of the incident. No mark of injury was noticed on her person. The accused was medically examined on 08.01.2015 i.e. about two months of the incident. Presence of semen on the undergarments of prosecutrix was found but cannot help the prosecution. No DNA test was carried out. The same cannot be connected with the incident of 04.10.2014.

In the case of **Munna Vs. State of Madhya Pradesh, 2014(10)**

SCC 254, in a similar situation, the Hon'ble Apex Court held as under:-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecution in view of the statutory presumption

under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

The accused in his statement under Section 313 Cr.P.C. had admitted having relations with the prosecutrix and had stated that whatever was done was with the consent of the prosecutrix. The stand taken by him was that he was falsely implicated in deliberations with her husband. The trial Court rejected the defence version and it was observed that initially the suggestion given to the witnesses was that the husband had borrowed Rs.2 lakh from the accused and did not want to return the same. Later the defence changed the version and took the plea of consent. It is settled that the prosecution has to prove its case by cogent and convincing evidence and it cannot take the benefit of defence. As noticed above, the unnatural conduct of the prosecutrix coupled with the delay in reporting the matter and absence of medical evidence makes prosecution story doubtful.

For the reasons recorded above, it is found that the evidence led by the prosecution suffers from serious infirmities and inconsistencies. 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 beyond shadow of reasonable doubt and the trial Court had erred in convicting and sentencing the appellant on the basis of untrustworthy and unreliable evidence. Accordingly, the appeal is allowed.

Judgment of conviction and sentence is set aside. Accused is acquitted. He be released forthwith, if not required in any other case.

November, 17, 2018
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(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No