

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Appeal No. S-87-SB of 2004 (O&M)
Date of decision : February 06, 2019

Roshan

....Appellant

versus

State of Haryana

....Respondent

Coram: Hon'ble Mr. Justice Fateh Deep Singh

Present : Mr. Gurveer Sidhu, Advocate as Amicus Curiae
for the appellant

Mr. Ripu Daman Singh, AAG, Haryana for the State

Fateh Deep Singh, J. (Oral)

This is an appeal by the convict-appellant Roshan challenging the judgment of conviction dated 14.10.2003 of the court of learned Additional Sessions Judge, Fast Tract Court, Gurgaon whereby the appellant was found guilty for commission of offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of Rs 1000/- and in default of payment of fine to further undergo rigorous imprisonment for six

months.

Heard Mr. Gurveer Sidhu, Advocate as Amicus Curiae for the appellant and Mr. Ripu Daman Singh, AAG, Haryana for the State and perused the records of the case.

The allegations of the prosecution have come about from the statement of complainant a married lady who happens to be aged around 20 years and wife of PW7 Liyakat. In her testimony as PW6, the prosecutrix states that accused Roshan was known to them and had been visiting their house. About one and a half years prior to this occurrence which took place on 29.11.1999 accused had visited their house and told them that Government loan was available for a sum of Rs 50,000/- and took them on the next day to Nuh. The husband Liyakat, father-in-law of the prosecutrix along with the prosecutrix accompanied the accused. The prosecutrix was left at the Jama Masjid and the three male members went to the local courts for preparing documents to enable them to get loan and thereafter it is alleged that the accused came to the Jama Masjid and deceptively took the prosecutrix away to nearby forest area and raped her against her wishes and thereafter she came back to the Masjid whereas accused managed to escape and on arriving she disclosed the incident to her husband and father-in-law leading to the

registration of the FIR Ex. PE.

The contention of the counsel for the appellant that there is delay of two days in lodging the FIR. As incident took place on 29.11.1999 and FIR was registered on 1.12.1999 and therefore, fatal for the prosecution which has been controverted by the learned State counsel. Appreciating the submissions, PW7 has explained this delay who has stated in examination-in-chief that initially the police did not take any action against the accused as ASI Sabha Ram was known to the accused and he was favouring him is in itself sufficient explanation brought about by the prosecution to explain for this small delay. Even otherwise it is well settled preposition of law, reliance of which can be taken note of **Pandurang and others vs. State of Hyderabad, AIR 1956 SC 216** that mere delay is not fatal for the prosecution and it is only when it is established by the defence that tainted version has been brought about by delaying the matter, the same could be proved to be fatal but it is not so in the present case and the explanation of the prosecution that has come through PW7 is sufficient one.

The prosecutrix as PW6 has vividly accounted the manner in which she was deceptively taken by the accused to a nearby jungle area and after giving her slaps and kick blows threw

her on the ground and raped her against her wishes and has proved the report made to the police as Ex. PE. The argument that has sought to be raised by the learned Amicus Curiae on behalf of the appellant placing reliance on Ex. DW1/A purported to be an affidavit of the prosecutrix was never confronted with the victim in her cross-examination and therefore, in the absence of the same this document loses its credibility and this document did not even see the light of the day even during the cross-examination of other male witness including PW7 the husband of the prosecutrix who was accompanying her on that day and therefore, having come belatedly loses its legal worth and therefore, this argument of the appellant side falls to the ground. The impugned judgment has taken the statement of Tahir Hussain DW1 to be of no value as he has failed to prove the affidavit which has been brought on the record as Mark-A and it is a settled proposition of law, reliance of which can be placed on **Sait Tarajee Khimchand and others vs Yelamarti Satyam and others, 1971 AIR SC 1865** that mere exhibiting a document does not dispenses with its proof and her affidavit has not even been exhibited much less proved by legal means, therefore, it does not come to the aid of the defence.

The learned counsel for the appellant could not pin point

anything adverse that has come in cross-examination of PW6 and PW7 which could be a distressing feature for the prosecution story and rather both the witnesses have stood the rigour of cross-examination at the trial. Testimony of PW1 Sub Inspector Mawasi Ram who has proved presentation of report under Section 173 of the Code of Criminal Procedure is only formal in nature and similarly PW2 SI Anil Kumar has proved the factum of having moved application Ex. PA for medico legal examination of the accused by the doctor and PW3 Jamil Ahmad, Revenue Patwari has proved scaled site plan of the place of occurrence Ex. PB and formal witnesses PW4 Constable Tika Ram has tendered his affidavit Ex. PC and PW5 HC Sunil Dutt has tendered his affidavit Ex. PD, not all much legal worth except for completing the chain of events in the prosecution story. The other important witness as has come about in the arguments of the two sides is PW8 Dr. Anju Bala who medico legally examined the victim and has proved the report of the MLR as Ex. PG. The arguments that have come about from the side of the appellant that in her examination-in-chief, the doctor categorically states that there is no external mark of injury nor any bleeding has been well controverted by the learned State counsel bearing out that this witness had proved that on police application Ex. PG/1 she has

conducted the medico legal examination of the victim as Ex. PG arguing further that though the examination-in-chief of this witness to prove the FSL report was deferred and the same has been tendered as Ex. PJ does not comes to the aid of the appellant side when this witness was recalled has proved the FSL report as Ex. PJ and has categorically stated that semen stains were detected on the salwar and has positively given an opinion that sexual intercourse was made with the prosecutrix. This witness has proved salwar as Ex. P1 and swabs Ex. P2 and Ex.P3. Though on behalf of the appellant, counsel has sought to highlight the admission in the cross-examination of this witness that she admits that as per the report on the swaps no human sperms was detected on them does not cut much ice for the defence on account of the explanation given by this doctor as to the mortality of the sperms and the time that has lapsed in between the two besides the fact that victim as PW6 had denied in between the occurrence and the examination having undergone any sexual intercourse with her husband and has given sufficient explanation that vaginal swaps do not contain sperms which ceased to be there after 2/3 hours if they are motile and after 24 hours if they are non motile and being vaginal swabs it is not necessary that at the time of drawing the sample of the exhibits through and through the vaginal

canal the same could have been accomplished together with the fact that as has come in the cross-examination of this witness, there was semen on the salwar is sufficient to corroborate the allegations of rape and therefore, having corroborated the ocular version given by the victim are matters of much significance. The submission that no DNA examination has been conducted on the semen is not a mandatory pre-requisite as it is not a case of repeated rape by different persons and the fact that father-in-law of the victim has not been examined by the prosecution is well rebutted by the State counsel that it is the quality of evidence that matters and not quantity. The citations referred to by the learned counsel for the appellant in **Sadashiv Ramrao Habde vs State of Maharashtra & Anr., 2006(10) SCC 92; State of H.P. Vs Dheeraj Kumar, 2016 ILR (H.P.) 2096; Jitender alias Chintu and another vs State of Haryana, 2011(2) R.C.R. (Criminal) 697; Bhura @ Rashid vs State of Haryana, 2018(3) RCR (Criminal) 843 and Santosh Bai vs State of Haryana and others** are factually at much variance. No doubt as has been argued by the appellant side that there is no injury mark on the body of the victim by citing **Bhura @ Rashid vs State of Haryana, 2018(3) RCR (Criminal) 843** is not a rule of law and it is a preposition based on probability when the witness herself as PW6

states that she did not scratch the body of the accused in order to rescue herself and the fact that being a lady after she has been slapped and kicked must have been traumatized by sudden assault by the accused and have failed to struggle and merely absence of injuries on the body of the victim is no ground to hold that no such offence has been committed upon the victim. Besides the fact that such reaction depends from human to human and situation to situation and cannot be considered to be a hard and fast rule.

The learned court below while appreciating the evidence accepting the testimony of PW10 Dr. Satvir Singh held that accused was proved to be capable of undergoing sexual intercourse and the finer aspects of the investigations has been brought about by PW9 ASI Sabha Ram. It has been rightly appreciated that none of the prosecution witnesses could be shattered in the cross-examination.

In view of the fore-going discussions and the evidence detailed and discussed, the counsel for the appellant could not convince this Court how the findings of the court below in any manner are incorrect or unpalusible. The prosecution has certainly proved its case and the findings given by the trial court does not suffer from any perversity or illegality and the same needs to be upheld. The appeal being without any merit is hereby dismissed.

The appellant who is on bail shall surrender before the concerned court below to undergo his remaining part of the sentence.

February 06, 2019

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(Fateh Deep Singh)
Judge

Whether speaking/reasoned ?
Whether Reportable ?

Yes/No
Yes/No