

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA.

Cr. Appeal No. 208 of 1998

Reserved on: July 28, 2010

Date of Decision : September 30, 2010

State of H.P.	Versus:	...Appellant.
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Joginder Singh @ Jinder & Ors.		...Respondents.
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Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice Sanjay Karol, Judge.

Whether approved for reporting?¹ No

For the appellant: M/s. Rajesh Mandhotra, & Vikas Rathore, Dy. A. Gs.

For the respondents : Mr. Ajay Sharma, Advocate

Sanjay Karol, J.

For an offence, which is alleged to have been committed on 18.10.1995, accused were put to trial. In terms of judgment dated 26.11.1997 passed by the learned Addl. Sessions Judge(2), Kangra at Dharamshala, in Sessions Case No. 5-N/VII/97 titled as State of H.P. vs. Joginder Singh @ Jinder & Ors., accused persons stand acquitted of the charged offence.

2. It is the case of the prosecution that the prosecutrix (PW-2) was married to Mohammed Mian (PW-5). Her husband was living with his second wife in village Bela Sariana (Punjab) and the prosecutrix was living in village Kodu Bela (H.P.). On

¹ Whether reporters of Local Papers may be allowed to see the judgment?

18.10.1995 at about 7.30 p.m prosecutrix was returning home carrying grass on her head when the three accused persons namely, Chhindo, Jinder and Jernail all sons of Gurbhachan Singh resident of Deh, caught her and dragged her behind the 'Kharkana' bushes. There all of them forcibly committed sexual intercourse without her consent. She raised hue and cry but none came to her rescue. She did make a futile attempt to rescue herself. In this process she lost her nose ring and golden ear ring and her clothes were torn. She was first raped by accused Jinder then by accused Chhindo and lastly by accused Jernail. Hearing her cries, S/Sh. Gurbax (not examined), Masoom (PW-3) and Swaru (PW-4) reached at the spot. Seeing them accused fled away. Prosecutrix narrated the incident to them and on their advise visited the house of her husband in Bela Sariana. The matter was reported to the police on 22.10.1995 and her statement (Ext.DX) was recorded on the basis of which F.I.R. No. 371/95 dated 20.10.1995 under Section 376/34 IPC (Ext.PW-10/A) was registered at Police Station, Indora. With the registration of the F.I.R., ASI Jagdish Chand (PW-12) commenced investigation. Prosecutrix was got medically examined by Dr. (Mrs.) Neerja Gupta (PW-1) who gave MLC report (Ext.PW-1/C). The police recovered the broken pieces of bangles (Ext.P-3) from the spot and her torn clothes were also taken into possession. Accused were arrested on 21.10.1995. Their clothes were taken into possession by the police. The vaginal swabs and the undergarments of the accused

were sent for chemical analysis and report (Ex.PW-12/B) taken by the police. With the completion of the investigation challan was presented in the Court for trial.

3. The accused were charged for having committed an offence punishable under Section 376/34 IPC to which they did not plead guilty and claimed trial. In order to prove its case prosecution examined 12 witnesses and the statements of the accused under Section 313 Cr.PC were also recorded in which they took the following common defence:

"I am innocent. The present prosecution has been initiated against me and my brothers co-accused, to pressurize me and my brother, since our father had filed a civil suit in the year 1991, for declaration and possession of land on the basis of tenancy and succession against the present complainant and her witnesses and other prosecution witnesses. The suit is still pending disposal in the Court of Sub Judge Ist Class, Jawali. Entire false story has been concocted to pressurize us to withdraw the civil suit."

4. The court below acquitted the accused of the charged offence, hence the present appeal.

5. From the statement of Dr. (Mrs.) Neerja Gupta (PW-1), it is evident that no marks of injuries were noticed on the private parts of the prosecutrix. No seminal and blood stains were detected on her thighs, pelvis and private parts. Prosecutrix was used to sexual intercourse. After receipt of the Chemical Examiner's report it was opined that there was evidence of

recent sexual intercourse. But from this report it cannot be said that the semen found on the clothes of the prosecutrix and the vaginal swab was that of the accused.

6. In the instant case, the alleged incident took place in the evening of 18.10.1995 and the matter was reported to the police on 20.10.1995. Undoubtedly there is delay. According to PW-2, she narrated the incident to S/Sh. Gurbax, Masoom and Swaru, who advised her to inform her husband about the incident. First she went to the house of her mother. Her mother who was sick advised her to report the incident to Sh. Dharam Singh, Namberdar of the village. Accordingly, she went to the house of Namberdar and narrated the entire incident to him. He in turn advised her to inform her husband. It was quite late, therefore she spent the night in the house of her mother. In the morning she went to meet her husband in village Bela Sariana. Her husband asked her to stay home. He went to inquire what action could be taken against the accused persons. That night she slept in the house of her husband and the following morning i.e. on 20.10.1995 at 10.00 a.m. both of them went to the Police Post, Thakurdwara and reported the matter there. PW-2 admits that Police Post is at a distance of about 4 kms. from Kodu Bela and the distance between the two villages is not more than 7 kms. She further admits to have left her mother's house only at about 11.00 a.m. and disclosed the incident to him at about 3.30 p.m.

7. Now according to PW-5, on 19.10.1995 his wife informed him about the alleged incident. He went to meet Sh.

Dharam Singh, Namberdar who advised him to report the matter to the police. He came back home and the following morning went to lodge the report to the police. This witness admits that Police Post, Thakurdwara is just at a distance of 7 kms. from Bela Sariana. He admits that he did not meet his mother-in-law in village Kodu Bela. He had gone to meet the Namberdar and yet did not meet his mother-in-law. Now if the prosecutrix had disclosed the incident to her husband on 19.10.1995 at about 3.30 p.m. itself then why is it that the F.I.R. was lodged the following day. Unfortunately, Sh. Dharam Singh could not be examined as he is stated to have expired during trial. Assuming that PW-5 had actually met Sh. Dharam Singh on 19.10.1995 even then why is it that the matter was not promptly reported to the police. Police Station was just at a distance of 7 kilometers. It is not the case of the prosecution that the village was not connected by road, public transport was not available or that there was no telephone in the village. Prosecutrix was a fully grown up lady. She could have herself reported the matter to the police. The delay in lodging the FIR may not be fatal but it definitely casts doubt about the prosecution case.

8. It is a settled position of law that if the version of the prosecutrix inspires confidence the same can be relied upon to convict the accused even in the absence of any corroboration.

9. To prove the charge, the prosecution has relied upon the statement of the prosecutrix and the two independent

witnesses i.e. PW-3 & PW-4. According to PW-2, at about 7-7.30 p.m. on 18.10.1995 she was coming back home with a load of grass on her head. The accused persons caught her and dragged her behind the 'Kharkana' bushes. Accused Jinder laid her on the ground and gagged her mouth with his hands. Accused Jernail caught hold of her from the legs. After opening the string accused Chhindo removed her salwar and then forcibly committed sexual intercourse. At that time the other two accused were holding her arms and legs. Thereafter in the same manner she was raped first by accused Jinder and then accused Jernail. Her mouth was gagged hence she could not raise any alarm. Bangles which she was wearing on her arms were broken. For some time she was able to raise hue and cry and hearing the same PW-3 came at the spot. He cautioned the accused persons who after taking away their clothes fled away from the spot. At that time it was semi dark. She narrated the incident to PW-3. Thereafter "Swaru Din also reached the spot alone". The incident was also narrated to him. After him Sh. Gurbax came to whom also the incident was narrated. They advised her to inform her husband.

10. In cross-examination, she admits her house to be at a distance of half kilometer from the place of occurrence of the incident. She admits that the bushes where the incident took place is just about 25 to 30 steps from the main path. This path leads to the village. She admits that she was not dragged on the ground. She also admits that the accused persons continued to

rape her for about half an hour. She also admits that when PW-3 reached the spot she was putting on her clothes. She admits not to have suffered any scratches/injuries on her back. She admits to have changed her clothes before leaving for her husband's house. Further there is slight variation in her statement (Ext.DX) with which she was confronted. The incident is alleged to have taken place adjoining the public path. She admits to have been raped for about half an hour. This is alleged to happen at a time when normally the villagers return home. As per the Doctor, no injuries were found on her body. The incident allegedly took place at a short distance from the village and not in the jungle. Her version that she had raised hue and cry for a little while does not inspire confidence. Her version that the accused persons had gagged her mouth is not corroborated by any medical evidence. No marks of injury/abrasion were found on her mouth or nose.

11. Her version in Court is contradictory to her statement (Ext.DX). In Court she does not even mention about the loss of ear/nose rings. In Court a new version about broken bangles is given. Police is alleged to have recovered these broken bangles from the spot after a period of three days. Further in Ext.DX it is mentioned that after Gurbax, Masoom and Swaru Din challenged them and accused fled away from the spot but in Court she refers to only PW-3. For all the aforesaid reasons her statement does not inspire confidence. Her testimony cannot be said to be unimpeachable.

12. The accused are real brothers. The possibility of all three of them, in the absence of any animosity, together raping the prosecutrix appears to be bleak.

13. Further PW-3 does not completely support the prosecutrix. He has not been declared hostile. According to him, when he reached near Kodu Bela he heard some commotion and accordingly shouted. Thereafter, he saw three persons running away from the 'Kharkana' bushes which were near the village path. He could not identify these persons. Now there is no cross-examination on this point. He went towards 'Kharkana' bushes to see as to what had happened. There he saw the prosecutrix wearing her clothes. He was told that she had been raped by the three accused. This statement is hearsay. In any event this witness has no relations in village Kodu Bela. He belongs to village Gera. There was no occasion for him to be present at the place of occurrence of the alleged crime. Version of PW-4 is also on similar lines. But this is contradiction in his statement. According to him, Gurbax and PW-3 were already present before he reached the spot whereas according to the prosecutrix Gurbax came last. Now importantly he admits not to have reported the matter to anyone. Sh. Gurbax has not been examined in Court.

14. Witnesses to recovery, namely, S/Shri Karam Singh (PW-6) and Waryam Singh (PW-7) have not supported the prosecution at all. They were declared hostile and nothing incriminating has come out in their statements.

15. Surprisingly, the Investigating Officer did not think it proper to record the statement of the mother of the prosecutrix. She would have definitely disclosed the complete truth. Prosecutrix spent one night with her.

16. It cannot be said that prosecution has been able to prove, beyond reasonable doubt, the guilt of the accused for the charged offence. Record reveals that civil litigation is pending between the parties. The story of the prosecution that all the three real brothers, turn by turn, ravished the prosecutrix does not appear to be plausible.

17. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down in *Mohammed Ankoos and others vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*, (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the persons has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

(Deepak Gupta)
Judge.

(Sanjay Karol),
Judge.

September 30, 2010.
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