

SONU KUMAR
v.
STATE OF H.P.
(Criminal Appeal No. 1660 of 2008)

OCTOBER 22, 2008

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860/Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – ss. 452 and 323 r/w s. 34 and s. 376 (2) (g)/ s. 3 (x) – Commission of rape of woman belonging to Scheduled Caste – Offence committed by six accused – In Test Identification Parade, prosecutrix identifying five of the accused – The five accused convicted by courts below – However, courts holding that TI Parade was not conforming to the requirement of Law – Appeal by one of the accused – Held: Presence of the appellant-accused at the spot of occurrence or his participation in crime not proved – Hence acquitted.

Appellant-accused alongwith five other accused was , E prosecuted for offences punishable u/ss. 452, 323 r/w s. 34 and s. 376 (2) (g) IPC and u/ s. 3 (x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989. Prosecution case was that the prosecutrix was sitting in the room with her 11years old son (PW3), three of the accused came and forcibly dragged her out of the room. Thereafter three of the other accused joined them and forcibly carried the prosecutrix to a nearby forest. One old lady (PW 4) unsuccessfully tried to rescue her. On being telephonically informed, the Police reached the forest and overpowered three of the accused. In Test Identification Parade, the Prosecutrix identified appellant-accused and other four accused.

Trial Court held that the Test Identification was non-

- A existent in the eye of law, because it was accepted by the prosecutrix that she had been shown the accused before the TI Parade. However, relying on the evidence of Prosecutrix (PW1), PW3 and PW4, trial court convicted five of the six accused (including the appellant-accused)
- B for the offences charged. High Court confirmed the trial court judgment dismissing the appeal filed by the appellant:

In appeal to this Court, appellant contended that he was not liable to be convicted as TI Parade was not exist-

- C ent in the eye of law; that he was not caught by the police from the place of occurrence; and that it could not be the ground to hold the appellant guilty merely because accused were addressing each other by names, without showing that he was the person whose name was uttered
- D by the co-accused.

Allowing the appeal, the Court

HELD: 1.1 No evidence was led to show the presence of the appellant at the spot of occurrence or to have

- E participated in the crime. That being so, the prosecution has miserably failed to prove the accusations so far as the appellant is concerned. He is acquitted of the charges. [Para 8] (1025-A)

1.2 It is not disputed by the State that unlike some

- F other accused, the appellant was not caught at the place of occurrence. The Trial Court had itself held that there was no Test Identification Parade in the eye of law. Therefore, identification of the appellant for the first time in court was really of no consequence. Added to that, the only
- G evidence pressed into service by the prosecution so far as the appellant is concerned, was that his name was similar to one of the names which the accused persons were addressing each other, as stated by the prosecutrix. That cannot be, by any stretch of imagination, an incriminating material. [Para 7] (1024-F, G, H)

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
No. 1660 of 2008

From the final Judgment and Order dated 29.3.2007 of the High Court of Himachal Pradesh at Shimla in Crl. Appeal No. 413 of 2003

B
Jagjit Singh Chhabra (A.C.) Tatini Basu and Sudhir Nandrajog for the Appellant.

Naresh K. Sharma for the Respondent.

C
The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

D
2. Challenge in this appeal is to the judgment of a Division Bench of the Himachal Pradesh High Court dismissing the appeal filed by the appellant questioning the conviction for offence punishable under Sections 452, 323 read with Section 34 and Section 376(2)(g) of the Indian Penal Code, 1860 (in short the 'IPC').

E
3. By a common judgment five appeals preferred by the accused persons were disposed of. The accused persons were found guilty of offence punishable under the aforesaid offences by learned Sessions Judge, Kangra at Dharamshala.

4. The prosecution versions during trial is as follows:

F
The prosecutrix, aged 32 years, was married to a man, who was employed at a butcher's shop at Baijnath. Her husband fell ill and was perhaps rendered incapable of doing the job with the butcher. The prosecutrix approached the butcher for employing her son, who was then aged just eleven years, for doing odd jobs. The butcher offered to employ her son for grazing his sheep and goats on monthly salary of Rs.700/. On 3.6.2002 the prosecutrix took her son to the butcher's shop at Baijnath with the intention of leaving him there. Her son was required to take the sheep and goats to the forest, by the employer, immediately after they reached. The prosecutrix accom-

G

H

A panied her son to the forest. They returned with the herd in the evening. By then the last bus going towards the village of the prosecutrix, had already left. The butcher offered that she could stay with her son in the upper storey of the shop for the night. She accepted the offer. Around 9.30 p.m., when the prosecutrix

B and her son were sitting in the room on the upper storey of the shop of the butcher, accused Kamlesh, Arjun Singh and Suresh Kumar went there. They forcibly dragged the prosecutrix out of that room and when they reached the ground floor of the structure, two other persons, appellants, Bal Kishan and Sonu joined them.

C One more person, named Chuni Lal, who too was tried along with the appellants, also joined them. The prosecutrix was forcibly carried to a near forest. She cried for help. One old lady, living nearby intervened, but she could not get her released. The son of the prosecutrix got so scared that he climbed a truck parked nearby and hid himself in the tool-box. Someone informed the police telephonically. Soon the police reached the forest and over-powered two of the appellants, namely, Kamlesh and Suresh and the sixth accomplice of the appellants, named Chuni Lal (who stands acquitted by the Trial Court), when they tried to flee from the spot on seeing the police. Statement of the

E prosecutrix was recorded by HC Pawan Sharma, heading the police party that reached the spot. The prosecutrix besides narrating the details about her visit to Baijnath and having gone to the upper storey of the shop of the butcher for night stay and having then been dragged and taken to the forest in the manner

F as summarized hereinabove, stated that those who committed the rape, were calling each other by the names of Bal Kishan, Arjun, Sonu, Kamlesh etc.

G Police investigated the matter and filed the case against the six accused persons. The trial Court charged all the six for offences punishable under Sections 452 read with Section 34, 323 read with Section 34, 376(2)(g) of IPC and Section 3(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.....(in short 'SC.ST Act') because the prosecutrix was alleged to belong to a scheduled caste. All the accused

H

pleaded not guilty to the charge. The Trial Court then proceeded to try the case and ultimately convicted and sentenced the five accused persons as aforesaid, but acquitted their sixth accomplice. A

Appellants' plea was that they were not involved in the crime and have been implicated just on suspicion. Learned counsel, representing the appellants, argued that there is no evidence on record establishing the identity of the appellants as the perpetrators of the crime. B

Prosecution examined the prosecutrix as PW-1, her son Onkar Chand as PW-3, an old woman, named Gitan Devi, PW-4, who allegedly tried to get the prosecutrix rescued from the accused persons, D.R. Thakur, PW-7, the then Judicial Magistrate Baijnath, who conducted the test identification parade, police Head Constable Pawan Sharma, PW-15, who on the receipt of telephonic information at the police station about the incident went to the spot and over-powered three of the alleged rapists on the spot and recorded the statement of the prosecutrix, under Section 154 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'), and ASI Chain Lal, PW-16 and Dy. S.P. Prittam Singh, PW-18, who conducted the investigation of the case. The police also examined lady doctor named, Bindu Sood, PW-19, who conducted the medico legal examination of the prosecutrix and Dr. S.K. Sood, PW-2, who medically examined the accused persons with a view to ascertaining whether there were any injury marks on their persons and whether they were capable of performing sexual intercourse. All the accused persons took the plea of denial simpliciter and claimed that they were innocent and had been falsely implicated at the behest of the police. C D E F

The Trial Court placed reliance on the evidence of the witnesses i.e. prosecutrix PW-1, her son PW-3 and an old women PW-4. The Trial Court, however, found that the so called test identification parade conducted by the then Judicial Magistrate, Baijnath PW-7 did not meet the requirements of law and had G H

- A no evidentiary value. It was noted that the prosecutrix in the witness box had stated that she had identified five boys at the police station on 4.6.2002. It was accepted by her that she had been shown the accused persons by the police before identification.
- B Primary stand before the High Court taken by the appellant was that there was no evidence so far as his involvement is concerned. He was not apprehended at the spot unlike some other accused persons. The prosecutrix did not know him and had clearly accepted this fact. She only stated that the accused persons were addressing each other by some names and that is how she claimed to know the names of the accused persons. The High Court did not find any substance in this plea and as noted above dismissed the appellants' appeal along with other appeals.
- C
- D 5. Learned counsel for the appellant submitted that there was no material to link the accused with the alleged crime. The Trial Court held that there was no test identification parade in the eye of law and this view was affirmed by the High Court. Merely because the accused persons purportedly addressing each other by names that cannot be a ground to hold the appellant guilty without any material to show that he was the person whose name was being uttered by the co-accused persons.
- E
- F 6. Learned counsel for the State on the other hand supported the judgment of the Trial Court and the High Court.
- G 7. It is not disputed by learned counsel for the State that unlike some others the appellant was not caught at the place of occurrence. The Trial Court had itself held that there was no test identification parade in the eye of law. Therefore, identification of the appellant for the first time in court was really of no consequence. Added to that, the only evidence pressed into service by the prosecution so far as the appellant is concerned, was that his name was similar to one of the names which the accused persons were addressing each other, as stated by the prosecutrix. That cannot be by any stretch of imagination an
- H incriminating material.

8. No evidence was led to show the presence of the appellant at the spot of occurrence or to have participated in the crime. That being so, the prosecution has miserably failed to prove the accusations so far as the appellant is concerned. He is acquitted of the charges. He shall be released forthwith from custody unless required to be in custody in connection with any other case. A

9. The appeal is allowed. B

K.K.T.

Appeal allowed.