
(2013) 04 P&H CK 0065

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 298-SB of 2010 (O and M)

Amit and Another

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 320
Penal Code, 1860 (IPC) — Section 34, 376, 376(2)(g), 506

Citation : (2013) 04 P&H CK 0065

Hon'ble Judges : Jitendra Chauhan, J

Bench : Single Bench

Advocate : Kashish Garg, for the Appellant; Ashish Sanghi, D.A.G., Punjab, for the Respondent

Judgement

Jitendra Chauhan, J.—The present appeal was filed against the judgment/order dated 2.12.2009, whereby the learned Additional Sessions Judge, Bathinda, convicted and sentenced the appellants Amit alias Monu and Golu alias Deepak, u/s 376(2)(g) of the Indian Penal Code for a period of ten years and to pay a fine of Rs. 2000/- each; in default of payment of fine, to further undergo RI for three months, and for a period of six months u/s 506 read with section 34 of the Indian Penal Code. In brief, the case of the prosecution is that on 23.3.2007, ASI Harinder Singh was present in P.S. Kotwali, Bathinda, where complainant Dolly Chauhan, daughter of Yograj Chauhan, resident of Bathinda got recorded her statement to the effect that "She is aged about 11 years. She is resident of Mall Godown Road, Bathinda and studying in 6th class. Her parents are doing the work of ironing clothes at Kamla Nehru Colony and remains out of house during the day time. On 8.3.2007, at about 5.30/6.00 p.m. when she along with her brother Karan aged about 8-9 years, were present at their house and were watching T.V. then Amit @ Monu s/o Uttam Chand, Golu son of Nanak Chand, Vicky son of Ashok Kumar @ Popal and Aman son of Mohan Lal @ Babli, residents of their locality entered their room. She asked the reason for their arrival. They gave some balls to her younger brother Karan and asked him to

play outside in the street and he went outside. Vicky, aged about 16 years, put his hand on her mouth from the back side. Golu, aged about 20 years and Aman, aged about 12-13 years, caught hold of her arms and legs. They took her on the bed. Amit @ Monu, aged about 24 years, locked the hook of the door from inside. They started teasing her. She tried to raise the noise, but they gagged her mouth. Vicky and Aman committed rape on her and thereafter all the accused fled from the spot. While going they threatened her to be killed in case she narrates the incident to any person. She did not disclose anything for 4-5 days. But disclose ultimately to her mother, who took her to Civil Hospital, Bathinda, where a lady doctor Swapanjit Kaur checked her and gave medicines. Ultimately, the matter was reported to the police".

2. She after admitting the statement to be correct, signed the same. On the basis of her statement, FIR was registered against the accused appellants including two others. After completion of investigation, challan was presented against the accused-appellants. They were charged with sections 376/ 34 of the Indian Penal Code to which they pleaded not guilty and claimed trial. Charge was subsequently corrected to section 376(2)(g) of the Code. Vicky and Aman, being juveniles were tried separately by the Juvenile Justice Board, Bathinda.

3. In order to prove its case, the prosecution examined, PW 1 Dr. Gurpal Singh, PW 2 Dauli Chauhan, prosecutrix, PW 3 Meenu Chauhan, mother of the prosecutrix, PW 4, Yograj Chauhan, father of the prosecutrix and PW 5, Head constable Sukhdev Singh and closed its case.

4. In their statements recorded u/s 313 of the Code, the appellants pleaded false implication. In defence, DW 1 Mathra Dass was examined.

5. After going through the evidence and hearing the counsel for the parties, the learned Additional Sessions Judge (Fast Track Court), Bathinda convicted and sentenced the accused appellants indicated in para No. 1.

6. Aggrieved against the judgment of conviction and sentence, the appellants preferred the present appeal which was admitted by this court on 04.02.2010, and recovery of fine was stayed during the pendency of this appeal.

7. During the pendency of this appeal, the appellants filed Cr. Misc No. 13875 of 2011, u/s 320 of the Code of Criminal Procedure for compounding the offence and acquitting the appellants on the basis of compromise arrived at between the parties, which was dismissed on 13.07.2011, by this Court.

8. Learned counsel for the appellants submits that allegation of rape is against the co-accused Vicky and Aman, who were declared juvenile stand acquitted by the learned Principal Magistrate, Juvenile Justice Board, Bathinda, vide his judgment dated 18.12.2010, whereas there is no allegation of rape against the present appellants. It is further submitted that the alleged incident took place on 8.3.2007, whereas the FIR was lodged on 23.3.2007. In the circumstances, the Ld. Trial court failed to appreciate the fact that there was unexplained delay of

sixteen days in lodging the FIR. He emphasized that infect the FIR was lodged to settle a property dispute pending between the parties. The prosecutrix and the accused-appellants are first cousins. It is further submitted that the trial court has ignored the substantial and material improvements made by the prosecutrix and her mother, who appeared as PW 2 and PW 3 respectively. It is asserted that as per medical examination, no injury on the private parts of the prosecutrix was noticed and the fact that vagina admitted only one finger goes to rule out any possibility of sexual intercourse. It is further contended that the two minors allegedly involved in the crime were found to be unfit to perform the sexual act. Learned counsel lastly submits that no allegations of rape were made against the appellants in the initial statements and the same were leveled against the other two accused, who were minor as described by the doctors and not capable of having sexual intercourse.

9. On the other hand, learned State counsel prays for dismissal of the appeal and states that the prosecutrix was minor at the time of committing the rape and the discrepancies, if any, are minor in nature and deserve to be ignored.

10. I have heard the learned counsel for the parties and perused the record with their able assistance.

11. From the perusal of the order dated 6.6.2008, it is made out that prosecutrix was declared to be a competent witness by the trial court. With regard to the delay in lodging the FIR, it is to be noticed that the rape was allegedly committed on 8.3.2007. The prosecutrix was medically examined on 13.3.2007, whereas the FIR was lodged on 23.3.2007 i.e. 10 days after the medical examination. Threat extended by the appellant was stated to be the cause for not lodging the FIR promptly. PW 5, HC Sukhdev Singh has stated in his cross examination that there was no information prior to the lodging of the FIR. There is no denying the fact that there could have been a threat to the victim or fear of stigma attached to the victim and her family honour. However, once the prosecutrix sought a direction from the Court for medical examination, it can be safely inferred that she had made up her mind to overcome the purported threat or fear of stigma.

12. With regard to the delay in lodging the first information report, it has been noticed that rape is alleged on 8.3.2007. The prosecutrix was medically examined on 13.3.2007, in pursuance of Ex. PD on 23.3.2007. The FIR was lodged on 23.3.2007 i.e. 10 days after her medical examination, which was done after obtaining the orders from the learned Chief Judicial Magistrate, Bathinda.

13. The learned counsel for the appellants had placed on record, the judgment of the Juvenile Justice Board (Annexure A-1) along with the statement of witnesses, vide which the two co-accused (namely Vicky and Aman) were tried and acquitted as the prosecutrix and her parents did not support the prosecution version. The said judgment was taken on record as additional evidence in the present case. Their statements recorded in the case have been placed on the file of this appeal as Annexures A-2, A-3 and A-4. Statement of the prosecutrix

recorded before the Principal Magistrate, Juvenile Justice Board, Bhatinda (in Punjabi, the translated version) is as under:-

My father does work of Ironing at Kamla Nehru Colony. He remains at the shop from 8/9 morning till 8/9 night. On 8.3.2007, my parents went to the shop. On that day, I and my brother Karan aged about 9/10 years at time, were at home. At about 5.30/6 p.m. I and my brother were watching T.V. in the drawing room. My cousins, Vicky, Aman, Golu and Amit came in the drawing room of our house. They forcibly entered the room and said that they would also watch the T.V. I said that they were not allowed to watch the T.V. Because we were not in speaking terms with them. They insisted on seeing the T.V. Then they slapped my brother and went away. I told this fact to my mother on 12.3.2007 that they had quarreled with us and did not agree. Therefore, we had to go to the police station. They did nothing wrong to me.

14. Similar is the statement of the mother of the prosecutrix before the Principal Magistrate, Juvenile Justice Board, Bhatinda.

15. This Court has carefully gone through the statements of the witnesses recorded in both the trials and the judgment Annexure P. 1. The findings of the learned Juvenile Justice Board are reproduced as under:

12. In the present case, criminal machinery came into motion on the statement of Dolly Chauhan complainant. The prosecution was mainly relying upon the statement of Dolly Chauhan who appeared as PW 2, Meenu Chauhan who appeared as PW 3 and Yograj Chauhan who appeared as PW 3 but all these star witnesses have not supported the prosecution version. Dolly Chauhan complainant while appearing in the witness box as PW 2 stated on oath her father is running ironing cloth shop in Kamla Nehru colony and remain at the shop till 8/9 p.m. On 8.3.2007 her parents had gone at the shop. On that day she along with her younger brother Karan was at the home. It was about 5.30/6.00 p.m. She and her brother were watching TV in the drawing room, then her cousins Vicky, Aman, Golu, Amit came in the drawing room of their home and insisted to watch television forcibly. She stated that they did not allow them to watch TV as they were not in good terms with each other. She further deposed that thereafter they gave slaps to her brother. Then they left from there. She told to her brother. Then they left from there. She told to her mother on 12th date that they all went after quarrelling with them. When they did not agree, they approached to the police station. They have not committed anything with her. On her this deposition, this witness was declared hostile at the instance of learned APP for the state and was cross examined at length and during her cross examination every endeavour was made by the learned APP for the state to bring on record the involvement of juveniles but cross examination of this witness reveals that there is nothing in it from which it can be inferred that juveniles are in any way connected with the occurrence. Further prosecution examined PW 3 Meenu Chauhan who is none else but mother of complainant Dolly Chauhan. Her deposition is revealing that she deposed that her husband is doing the work of

ironing the clothes. They use to go to shop in the morning and came back in the evening. She further deposed that on 8.3.2007 they were in colony and her children were present in the house and they were watching television. Her daughter Dolly narrated to her that four children namely Amit, Golu, Vicky and Aman came to their house and insisted to watch T.V. As they were not on good terms, her daughter did not allow them to watch television. She further deposed that Vicky, Aman, Amit and Golu alias Deepak neither committed any rape upon her daughter nor they teased her daughter. This fact was not narrated to her by her daughter. On her this deposition this witness was declared hostile at the instance of the learned APP for the state and was cross examined at length and during her cross examination every endeavour was made by learned APP for the state to bring on record the involvement of juveniles but cross examination of this witness reveals that there is nothing in it from which it can be inferred that juveniles are in any way connected with the occurrence. Further prosecution examined PW 4 Yograj Chauhan, who is none else but father of the complainant Dolly. He deposed on oath that he did not get recorded his statement before the police. He further deposed on 8.3.2007 a dispute took place between the children and only that information was given to the police. On his this deposition this witness was also declared hostile at the instance of learned APP for the state and was cross examined at length not nothing favourable comes to the prosecution from his detailed cross examination. From his lengthy cross examination learned APP failed to bring on record the involvement of the juveniles in this occurrence.

13. As discussed above by me, complainant Dolly as well as other star witnesses namely Meenu Chauhan and Yograj Chauhan who are none else but mother and father of complainant Dolly Chauhan did not support the prosecution version and did not identify the juveniles as persons who committed any offence at the time of alleged occurrence. So, in the given circumstances it can be safely concluded that there is no sufficient evidence from the side of the prosecution to establish that it was juveniles who committed the offence of alleged rape. Further I have come to this conclusion that identity of the juveniles in the present case could not be established on file. Hence in the given circumstances, benefit of doubt goes to the juveniles. As such, both the juveniles are hereby acquitted of the notice served upon them by giving them the benefit of doubt.

16. The statement of PW 1, prosecutrix recorded before the trial court on 6.6.2008, in this case is as under:-

We are two brothers and sister. My parents are doing the work of ironing the clothes in Kamla Nehru Colony. On 8.3.2007, I alongwith my brother were watching T.V. While sitting in our drawing room. The door of the room was partly closed. Vicky, Aman, Golu and Amit, they are my cousins, entered into the said room and they asked as to what were doing. We replied that we are watching T.V. They also showed their willingness to watch T.V. Thereafter, Vicky, nabbed my mouth. Then Golu and Aman caught hold of me from my legs and arms and then they had taken me to the bed. Vicky tried to rape me. Vicky raped me.

Thereafter Aman raped me. Thereafter Golu raped me. Thereafter Amit the fourth accused raped me. Thereafter leaving me alone, all the accused had fled the scene of occurrence by threatening not to disclose this incident to anybody else. Thereafter, I wore my clothes. I did not disclose the same to my parents because of the threat given by the accused persons. Whole of my body was aching and due to this I was to stay away from the school and ultimately on 12.3.2007, I disclose everything to my mother. My parents then had taken me to the hospital. Doctor refused to examine me. After getting the orders from the Court, I was got medically examined on 13.3.2007. Even thereafter, the parents of the accused persons used to scare us not to approach the police authorities. On 23.3.2007, we approached the police at about 7.30 p.m., where my statement was recorded. I identify my signatures on Ex. PA. Amit had given glass balls to my brother to play outside and to leave the room and he had gone to play the glass balls outside. Accused present in the Court raped me. My statement Ex. PA was read over to me and after admitting the same to be correct, I signed the same.

17. As per the facts stated in the F.I.R., rape was not alleged against the present appellants but against the Juveniles i.e. Vicky and Aman only. The allegations against the present appellants were that they aided the juveniles. PW 5 HC Sukhdev Singh has said in his cross examination that during the course of investigation and from the statement of witnesses, no allegations of rape were made against the present appellants. Relevant extract of the F.I.R. is reproduced as under:

.....Vicky, aged about 16 years, put his hand on her mouth from the back side. Golu, aged about 20 years and Aman, aged about 12-13 years, caught hold of her arms and legs. They took her on the bed. Amit @ Monu, aged about 24 years, locked the hook of the door from inside. They started teasing her. She tried to raise the noise, but they gagged her mouth. Vicky and Aman committed rape on her and thereafter all the accused fled from the spot. While going they threatened her to be killed in case she narrates the incidence to any person.

18. While dealing with this allegation, the judgment Annexure A-1 is very much relevant. In the judgment Annexure A-1 it has been held as under:

So, in the given circumstances it can be safely concluded that there is no sufficient evidence from the side of the prosecution to establish that it was juveniles who committed the offence of alleged rape. Further, I have come to this conclusion that identity of the juveniles in the have come to this conclusion that identity of the juveniles in the present case could not be established on file. Hence, in the given circumstances, benefit of doubt goes to the juveniles. As such, both the juveniles are hereby acquitted of the notice served upon them by giving them the benefit of doubt.

19. It is relevant to note that before the Ld. Juvenile Justice Board, prosecutrix was confronted with the statement made before the trial court. However, the

prosecutrix categorically denied having made such statement that rape was committed upon her.

20. When the main culprits are found not to have committed rape upon the prosecutrix, then the so called aides i.e. the present appellants cannot be held liable for rendering assistance to the main accused in committing the main crime, which itself has not been proved.

21. Now this court shall deliberate as to whether the allegations of rape are supported by medical evidence.

22. As per the FIR, the allegation of rape is against the juveniles namely Vicky and Aman. In her statement before the learned Trial Court, the prosecutrix improved upon her version and alleged rape against all the four accused. There is contradiction in the statement of the prosecutrix to the extent that lady doctor Swapanjit Kaur refused to examine her on 12.3.2007. Doctor Swapanjit Kaur in her cross examination has categorically stated that the prosecutrix came to her for the first time on 13.3.2007, and before that the prosecutrix or her parents never contacted her for the purpose of medical examination.

23. Thus, there are material contradictions in the statements of the witnesses, which go to the root of the case and make the prosecution story doubtful. One such major contradiction is with regard to her staying away from school. This Court has carefully scrutinized the statement of the prosecutrix. The prosecutrix in her examination in-chief had stated that due to pain, she stayed away from school and ultimately disclosed it to her mother on 12.3.2007. However, in her cross examination she had stated that she appeared in all her exams on 9th, 10th, 12th and 13th March, 2007, from 9 a.m. to 12 noon. It was further stated by the prosecutrix that she disclosed it to her mother on 12.3.2007 in the morning at the time of going to school and that on 13.3.2007, she was present along with her parents in the court when permission for her medical examination was sought. There is another contradiction with regard to the time of the incident. The prosecutrix had stated in the F.I.R. the time of incident to be around 5.30/6 p.m. Whereas in her cross examination she had stated that she cannot tell the time of incident. The prosecutrix in her statement before the learned trial court, had stated that the parents of the accused used to scare us whereas nothing has been stated in the F.I.R. in this regard. Rather in the F.I.R. she had stated that the parents of the accused asked us not to report to the police and wanted to compromise the matter. Even the mother in her statement Annexure P. 3 had before the Juvenile Justice Board that nothing wrong was done with her and only a quarrel took place between them.

24. The Hon"ble Supreme Court in State of Himachal Pradesh Vs. Lekh Raj and Another, has distinguished discrepancy from contradiction, and had observed that "in order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses

and environment in which such witness was making the statement."

25. Material discrepancies are those which go to the root of the matter i.e. Prosecution case. The statements are not only contradictory but they are conflicting and the conflict is such that one statement cannot stand in the light of another. Either the prosecutrix was raped or not. Both the versions cannot be relied upon. Before the learned trial court, she says that she had been raped, and basing on this statement, the appellants were convicted. In her statement before the juvenile board, she states that nothing wrong was done with her and she only had a quarrel. Basing on this statement, there is acquittal of the main accused Both statements cannot be believed because they cannot be reconciled.

26. As per the MLR report, Ex. PB, and the opinion of the Dr. Swapanjit Kaur PW 3, there were no injury marks found on the body or genitals of the prosecutrix. But hymen admitted one finger with difficulty. The hymen was reported to be ruptured showing that rape had occurred. The prosecutrix showed the presence of sperms on salwar so as there being no signs of resistance.

27. This makes her medical examination suspicious as the prosecutrix had got her medical examination done on her own. This fact is also supported by statement of HC Sukhdev Singh, PW 5, as he has specifically stated in his cross examination that the police did not get the prosecutrix medically examined. In her cross examination, intercourse is asserted with full penetration whereas no bleeding was noticed. Considering the age of the prosecutrix, even if it is assumed that the juveniles raped her, it would not be possible that there has not been even a single scratch or any sign of bruise on her body. Regarding the presence of sperm on the salwar, Ex. DA, on 12.3.2007, when the prosecutrix was taken to Dr. Swapanjit Kaur, the doctor kept the clothes worn by her. The crucial question is whether the prosecutrix was wearing the same clothes worn by her on 8.3.2007, when she was allegedly raped? It was difficult to substantiate that it was the same salwar which she was wearing on the date of alleged rape. Regarding hymen rupture, as per medical jurisprudence, hymen rupture cannot conclusively establish rape as there can be various reasons for hymen rupture, other than rape. Relevant extract from John. J. Resse's book on medical jurisprudence and toxicology is reproduced as under:-

In making an examination, in the case of an alleged rape on a child, several points are to be considered. In the first place, it should be recollected that for the legal establishment of the crime, both in children and adults, it is only necessary vulval penetration, however slight, be proven. It is not required that hymen should be destroyed. It has been so decided repeatedly. If after an early examination no marks of violence about the sexual organs or other portions of the person are discovered, this would be a strong presumption against the validity of the charge. On the other hand, the mere presence of marks of violence about the pudendum is not of itself sufficient to prove a rape, since these are sometimes inflicted purposely upon young children by designing mothers in order to make out a false charge against innocent man. Further, the

absence of hymen is not of itself a proof of rape, since this membrane may have been previously destroyed by supportive inflammation, or by ulceration, also by accident, or even designedly, in order to substantiate a false charge.

28. As the statements of the prosecutrix and her mother are not reliable and believable, this Court does not hesitate to hold that hymen rupture may not be the result of the alleged rape, which has not been proved by any cogent evidence.

29. The learned trial court erred in making a presumption that the juveniles committed the rape and thereby considering the first fact in issue to be proved and thereby convicting the appellants under explanation 1. The juveniles were not before the learned Trial court; therefore the learned trial court erred in arriving at a finding that the juveniles committed rape based on the statement of prosecutrix. The learned trial court could have waited for the decision of the learned Juvenile Justice Board, trying the main accused, on the charge as to whether juveniles have raped the prosecutrix or not. Moreover the prosecution's burden of proof in criminal cases is to prove the guilt of accused beyond all reasonable doubts and conviction in criminal cases cannot be based on presumptions. Therefore the first fact in issue remains not proved and hence, the requirements of the section are not fulfilled to sustain conviction under this section. Accordingly, it is held that the present appellants are not guilty of the charges framed against them.

30. Admittedly the prosecutrix and the accused are first cousins. Two amongst the four are staying in the same house in which the prosecutrix is staying. There is a dispute regarding the house in which they are staying, which is supported by version of DW 1, Mathura Dass. He has also stated that the family of the prosecutrix were demanding five lakhs for vacating the house, which is supported by statement of the mother of the prosecutrix, who in her statement before the learned trial court had stated that Mohan Lal, father of Aman, never asked her to vacate the house. But in her statement before the learned juvenile justice board, she stated that they have got this house in partition and they used to ask us to vacate it. In view of this admitted position, this court comes to the conclusion that there are chances of false implication of the accused appellants in this case.

31. Keeping in view the statements of the prosecutrix, her mother and father recorded in both the trials, this court is of the opinion that the statement of the prosecutrix in this case is a tutored version, and no conviction can be based on such like testimony especially when the main accused against whom the rape was alleged have been acquitted by the Juvenile Justice Board vide judgment dated 18.12.2010, Annexure A. 1. Allegations against the present appellants are that of aiding the offence, which itself has not been proved. Considering the totality of the circumstances of the case, this Court comes to the conclusion that the prosecution has failed to prove the case against Amit alias Monu and Golu alias Deepak, the present appellants beyond reasonable doubt. Thus the prosecution case becomes doubtful. The case of the prosecution fails in the face

of irreconcilable statements of the prosecutrix and her mother. Resultantly, the present appeal is allowed, the conviction and sentence of the present appellants, are set aside, and both are acquitted of the charge framed against them. Both are in custody, they be set at liberty forthwith, if not required, in any other case.