
(2015) 08 RAJ CK 0118

In the Rajasthan High Court

Case No : Criminal Appeal No. 519/2006 and Criminal (Jail) Appeal No. 245 of 2012

Balwant Rai and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 34, 366, 376(2)(g)

Citation : (2015) 08 RAJ CK 0118

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J; Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Govind Prasad Rawat and Deeraj Singhal, for the Appellant; Aladeen Khan, Public Prosecutor, Advocates for the Respondent

Judgement

Kanwaljit Singh Ahluwalia, J—On 22.1.2006 at about 11.00 AM, a 14 years old girl (hereinafter called as "victim" to protect identity) daughter of Babulal (P.W.4) was abducted by Surendra Kumar accused and Balwant Rai accused. Further case of the prosecution is that both the accused, Surendra Kumar and Balwant Rai, committed rape with her and thus, made themselves liable for offence under Section 376(2)(g) IPC. The prosecution further led evidence to the fact that after gang rape was committed, victim was murdered.

2. The Court of Additional Sessions Judge (Fast Track) No. 1, Alwar vide impugned judgment dated 21.4.2006 held both Surendra Kumar and Balwant Rai guilty of offences under Sections 366, 302 read with 34 and 376(2)(g) IPC. Vide a separate order of even date, the trial Judge sentenced the appellants as under:-

"U/s. 366 IPC: Seven years rigorous imprisonment, to pay a fine of Rs. 2000/- each and in default thereof to undergo six months rigorous imprisonment.

U/s. 302 r.w. 34 IPC: Life imprisonment and to pay a fine of Rs. 10,000/- each.

U/s. 376(2)(g) IPC: Life imprisonment and to pay a fine of Rs. 10,000/- each."

3. Aggrieved against his conviction and sentence, Balwant Rai has directed D.B. Criminal Appeal No. 519/2006 to challenge his conviction and sentence, whereas Surendra Kumar had sent an appeal through Jail, bearing D.B. Criminal (Jail) Appeal No. 245/2012.

4. Babulal (P.W.4) on 26.1.2006 at 10.35 A.M. presented a written report (Ex. P.9) before Mishri Lal (P.W.9) who was then posted as SHO, Police Station Shivaji Park, Alwar. In the written report (Ex. P.9), Babulal (P.W.4) had averred that on 22.1.2006 at 11.00 A.M. the victim, his daughter, aged 14 years was induced by Surendra Kumar S/o. Mohar Singh, caste Jatav, r/o Fajilka (Punjab) and Balwant Rai S/o. Kanni Ram, caste Jatav, r/o Bhoogor and was taken away by them on motorcycle No. RJ-32M-8494. Complainant stated that this fact was disclosed to him by his wife (P.W.2). In the written report (Ex. P.9) it was stated that since both the accused had abducted his daughter, legal action be taken against them. The above said report was investigated.

5. On the date of lodging of the report itself, dead body of victim was found and on the same day, i.e. 26.1.2006 Dr. Phool Singh Choudhary (P.W.1) who was then posted as Medical Jurist at Government Hospital, Alwar had conducted autopsy being a member of the medical board alongwith Dr. S.K. Gupta and Dr. Kanchan Batra. The post-mortem was conducted on 26.1.2006 at about 5.45 PM. In the post-mortem report (Ex. P.1), doctor had found following injuries on the person of deceased:-

"1. Abraded bruise present on neck anterior in almost whole length of size 14 x 5 cm placed anterior and on both sides of neck.

On dissection of neck, there is sub cut staining present beneath the ligature mark. Staining is also present in the muscles beneath the ligature. On dissection trachea contained mucous filled with blood.

2. Abraded bruise present on lower lip right side of size 1/2 x 1/2 cm with swelling of lip and blood in mouth.

3. Abrasion present on lower lip left side of size 1/4 x 1/4 cm.

4. Swelling present on nose with dry blood at nostrils.

5. Laceration present on right side at labia minora just at inferior margin of vaginal orifice. Vaginal orifice allowed two fingers, easily passed. Hymen is torn. Dry blood present at vaginal orifice. The laceration is 1/2 x 1/4 x 1/4 cm with dry blood. Swabs taken of vaginal regional and slides prepared.

6. Abraded wound present on left thumb and index finger at distal phalanx and palmer aspect of size 1/2 x 1/2 x 1/4 cm on both.

7. Abraded wound present on right thumb and index finger at distal phalanx of size 1/4 x 1/4 x 1/4 cm on both.

8. Abraded wound present on right foot at big toe and second toe at distal

phalanx of size 1/2 x 1/2 x 1/4 and 1/4 x 1/4 x 1/4 cm.

9. Abraded wound present on left foot at bit toe and second toe of size 1/2 x 1/2 x 1/4 and 1/4 x 1/4 x 1/4 cm."

6. All the injuries were ante mortem in nature.

7. As per opinion of the medical board, cause of death was asphyxia due to strangulation and findings were also suggested penetration of hard blunt object like male organ. Doctor further opined that death of victim had taken place between evening of 23.1.2006 to morning of 25.1.2006.

8. Dr. M.K. Gupta (P.W.7) another member of the medical board on 26.1.2006 had examined Surendra Kumar accused. This witness, as per his report (Ex. P.21), stated that there was nothing on record to say that Surendra Kumar was not capable of performing sexual intercourse. This witness also proved the post-mortem report (Ex. P.1).

9. Nirmala (P.W.2), mother of victim, and Devaki are two sisters. Nirmala was married with Babulal, whereas Devaki was married to Surendra, accused appellant. Balwant Rai accused is husband of sister of Surendra Kumar accused.

10. Nirmala (P.W.2) in court deposed that the victim, aged 12 years, was his daughter. She was a student of Class-IV in Aanganbadi School. On 22nd January, 2006 both accused Surendra Kumar and Balwant Rai came. They came around 11.00 AM. They came on a motorcycle of maroon colour. Surendra assured her that the victim is also his daughter as she is daughter of the witness (P.W.2) and he will take the victim to meet her Maudi (maternal aunt) and both the accused took her daughter i.e. victim on motorcycle. Her sister was staying in a rented house in Hope Circus (katala). Husband of her sister used to work in an oil mill at Alwar. On 24th she met husband of her sister who stated that the child had not come to him and had given wrong replies. Then she made a telephonic call to her brother on 24th. On 25th her brother came from her native place and she had sent her husband and brother to police station to lodge the report. The witness stated that Surendra accused is husband of her younger sister, whereas Balwant Rai accused is Nandoi of her sister. In cross-examination Nirmala (P.W.2) stated that she had told the police that Surendra had taken her daughter on a motorcycle. She further stated that she had told the police that Surendra while taking away her daughter said that the victim is his daughter as is the daughter of the witness (P.W.2). The witness further admitted that it is wrongly recorded in her statement (Ex. D.1) made to the police under Section 161 Cr.P.C. that Balwant had stated that on the same day they had left the girl on the way. In cross-examination, the witness further admitted that she is related to Balwant through her sister. She further stated that she cannot tell name of Nandad (sister of the husband) of her sister. She had never gone to the house of Balwant. The police had not got identified Balwant from her. She had not verified before the police that another person with Surendra was Balwant or some other person. She further stated that after accused were arrested, she had not gone to the police

station to see them. It is apposite here to reproduce the following portion of testimony of Nirmala (P.W.2):-

11. Heeralal (P.W.3) is brother of Nirmala (P.W.2). This witness stated that on 24.1.2006 at 3.00 P.M. he received a telephonic message from his sister Nirmala (P.W.2) that on 22nd Surendra and Balwant had taken her daughter on a motorcycle on the pretext that she will meet her maternal aunt (Mausi). Heeralal (P.W.3) further stated that her sister Devaki has informed that Surendra is missing since 24th January. Heeralal (P.W.3) had a telephonic talk with Surendra who disclosed that he is at Bhoogor and the girl is not with him.

12. Babulal (P.W.4) also reiterated the version given by his wife Nirmala (P.W.2). He further stated that he presented a written report (Ex. P.9) on the basis of which a formal FIR (Ex. P.10) was registered. The witness further stated that the police personnels had taken him towards Bhoogor where near Kali Mori they had seen both the accused coming on a motorcycle. Motorcycle was being driven by Balwant. In cross-examination this witness stated that Balwant was never known to him. It will be apposite here to reproduce the following portion of the testimony of the witness Babulal (P.W.4) recorded by the trial court:-

13. Sapat Khan (P.W.5) stated that on 26.1.2006 the police had gone towards jungle and in a mustard field they had lifted blood stained soil, simple soil, one blood stained stone, one woolen cardigan, salwar tied around the neck and chappal. Police had also conducted inquest proceedings. They had found dead body of a girl. There was blood on the head and private parts of the dead body. The witness further stated that when police came inside the field, they were accompanied by only one person.

14. Ummed Singh (P.W.6) being Constable had carried sealed packets to the State Forensic Science Laboratory.

15. Som Dutt (P.W.8) was posted as a Constable at Police Station Shivaji Park, Alwar. This witness stated that on 26.1.2006 in his presence, both the accused were arrested.

16. Mishri Lal (P.W.9) being investigating officer has proved various facets of the investigation.

17. Sadhu Ram (P.W.10) was in-charge of the Malkhana, he was examined to prove link evidence.

18. Thereafter, statements of the accused were recorded under Section 313 Cr.P.C.

19. Accused Surendra Kumar in his statement recorded under Section 313 Cr.P.C. has denied all incriminating circumstances. He further stated that he and Balwant had brought the victim from her house and he had left the victim with Balwant at Daudpur Railway Crossing.

20. Accused Balwant Rai in his statement recorded under Section 313 Cr.P.C. also

denied all incriminating circumstances put to him. He took a stand that he has no relationship with the victim or co-accused Surendra. From 21.1.2006 to 25.1.2006 he had gone to attend the marriage of his nephew. There are photographs and videograph prepared to this effect. He further stated that the police had taken his signatures on blank papers.

21. In defence, accused had examined five witnesses.

22. Shri Ram (D.W.1) in court stated that he knew Balwant Rai. On 21.1.2006 Balwant Rai being maternal uncle of Deen Dayal had come to attend the marriage at Gadhi Sawairam. This witness has been examined to prove alibi of Balwant Rai.

23. Nawal Bairwa (D.W.2) stated that marriage of son of his uncle (Chacha) namely Deen Dayal was to be performed. Balwant Rai being maternal uncle had come to attend the marriage. He also attended marriage. This witness has placed on record photographs (Ex. D.7, D.8 and D.9) to say that between 21st to 25th July, Balwant remained with them and he had not gone anywhere.

24. To similar effect is the statement of Sarita Devi (D.W.3) wife of Balwant Rai accused. She stated that Balwant Rai had gone to attend the marriage alongwith her and he has falsely been implicated in the case.

25. Anil Kumar (D.W.4) is Photographer. He stated that Balwant Rai had attended the marriage from 21.1.2006 till 25.1.2006. He proved photographs alongwith negatives, compact disc containing videography. He further deposed that in C.D. time and date have been correctly displayed.

26. Ram Singh (D.W.5) in court stated that Surendra Kumar had worked with him for 10-15 days. The witness stated that it is wrong to say that Surendra Kumar had worked with him from 1.1.2006 to 25.1.2006. The witness further stated that he cannot tell whether he had paid Rs. 850/- to Surendra Kumar on 25.1.2006 or not.

27. In the present case, the child was taken away by Surendra Kumar, his Mausea allegedly alongwith Balwant Rai. Dead body was found on 26.1.2006 and on the said day at 10.35 AM, complainant had presented the written report (Ex. P.9) to the police. The special report reached to the Ilaka Magistrate at Alwar on 27.1.2006. It has come in evidence that on 26.1.2006, the day the written report (Ex. P.9) was presented by Babulal (P.W.4), both Surendra Kumar and Balwant Rai were arrested while coming on a motorcycle. The motorcycle was being driven by Balwant Rai. Thus, even though the victim had left the house on 22.1.2006, name of Balwant Rai had not surfaced till 26.1.2006 when written report leading to FIR was presented. On the said date appellant Balwant Rai was arrested alongwith Surendra Kumar. Nirmala (P.W.2) sister of wife of Surendra Kumar in court has stated that Balwant Rai was not known to her earlier. To similar effect is the statement made by Babulal (P.W.4) who in court stated, "Main Balwant Ko Janta Hi Nahi". Nirmala (P.W.2) has further stated that no test

identification of Balwant Rai was carried. Balwant Rai has produced photographs and various relations in defence to say that at the time of alleged incident, he was attending marriage of his nephew. Be that as it may, Surendra Kumar in court has stated that after they had brought the girl, he had left the girl with Balwant Rai. Statement of the appellant Surendra Kumar can be used to corroborate the prosecution witnesses only to the extent that the victim had left with him, but other part of the statement made by Surendra Kumar cannot be used against Balwant Rai.

28. The Hon"ble Apex Court in Mohan Singh Vs. Prem Singh and Another, (2003) CriLJ 11 : (2002) 8 JT 7 : (2002) 7 SCALE 168 : (2002) 10 SCC 236 : (2002) 3 SCR 5 Supp has held as under:-

"27. The statement made in defence by accused under Section 313, Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 Cr.P.C. of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution See Nishi Kant Jha Vs. The State of Bihar, AIR 1969 SC 422 : (1969) CriLJ 671 : (1969) 1 SCC 347 : (1969) 2 SCR 1033 .

"23. "In this case the exculpatory part of the statement in Ex. 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under S, 342 Cr.P.C. to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13th October 1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in the river Patro, the amount of bleeding and the washing of the blood-stains being so considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Ex, 6 the High Court had acted rightly in accepting the inculpatory part and piercing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime."

[emphasis supplied]"

29. Statement of Nirmala (P.W.2) and Babulal (P.W.4) that deceased had left with Surendra Kumar is corroborated by the version given by Surendra Kumar in his statement recorded under Section 313 Cr.P.C. So far as Balwant Rai accused is concerned, both the witnesses have been confronted with their previous statements recorded under Section 161 Cr.P.C. Taking into account confrontation emerging in the testimony of Nirmala (P.W.2) and Babulal (P.W.4), delay in reaching of special report to the Ilaka Magistrate and the fact that Balwant Rai was not known to the witnesses earlier and his name was surfaced only on 26.1.2006 when he was arrested while driving the motorcycle with Surendra Kumar who was a pillion rider, we are of the view that it was not safe to uphold conviction of accused Balwant Rai.

30. It is to be noted that Heeralal (P.W.3) in court has stated that since 24.1.2006 it was Surendra Kumar appellant who was absconding. Therefore, testimony of witnesses, statement made by Surendra Kumar under Section 313 Cr.P.C. and his conduct lead to the conclusion that the prosecution has succeeded to prove its case against Surendra Kumar accused as the one who took the victim niece of his wife alongwith him and thereafter has not satisfactorily explained about her whereabouts.

31. However, so far appellant Balwant Rai is concerned, we are of the view that delay in reaching of special report to the Ilaka Magistrate in the same town at Alwar and the fact that till 26.1.2006 his name had not surfaced anywhere in the investigation and he was not known to the witnesses and the fact that the witnesses in their deposition in court were confronted with their previous statement recorded under Section 161 Cr.P.C. and the evidence led to the effect that he has attended marriage of his nephew specially statement of Photographer Anil Kumar (D.W.4), make out a case to extent that the benefit of doubt can be granted to Balwant Rai appellant as a matter of abundant caution. It may be clarified here that we have not taken the evidence of defence in isolation, but as one of the factor alongwith various other parts of the evidence emerging in the case of the prosecution to extend the benefit of doubt to the accused Balwant Rai.

32. As a result of above discussion, D.B. Criminal (Jail) Appeal No. 245/2012 preferred by Surendra Kumar is dismissed being devoid of merit. However, D.B. Criminal Appeal No. 519/2006 preferred by Balwant Rai is accepted while granting benefit of doubt to him. He is acquitted of the charges framed against him by setting aside his conviction and sentence.