
(2010) 05 P&H CK 0126
In the Punjab And Haryana At Chandigarh

Dharmender and Sher Singh and Others	APPELLANT
Vs	
State of Haryana	RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 173, 313, 319
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2010) 05 P&H CK 0126

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kanwaljit Singh Ahluwalia, J.—Criminal Appeal No. 1749-SB of 2002 has been preferred by Sher Singh son of Desraj, Mahender son of Hoshiar Singh, and Satish son of Roshan Lal, whereas Criminal Appeal No. 138-SB of 2003 has been instituted by Dharmender son sentence awarded for the offence under Sections of Om Parkash.

2. Since both the appeals are directed against the judgment of conviction dated 19.10.2002 and order of sentence dated 22.10.2002, rendered by the Court of Additional Sessions Judge, Narnaul, the same shall be decided by a common judgment. Along with these two appeals, Criminal Misc. No. 15737 of 2010 shall also be decided in which appellant Mahender Singh alias Raj Kumar has prayed that since he was juvenile at the time of occurrence, therefore, he could not be convicted and sentenced by the Court of Additional Sessions Judge, Narnaul.

3. All the four appellants were named as accused in case FIR No. 88 dated 6.12.1998, registered at Police Station Kanina, under Sections 376(2)(g), 366 and 363 IPC.

4. The Court of Additional Sessions Judge, Narnaul, found the appellants guilty for the offence under Sections 363, 366 and 376(2)(g) IPC and sentenced them to undergo rigorous imprisonment for a period of ten years and to pay a fine of

Rs. 2,000/- each, in default whereof, to further undergo rigorous imprisonment for a period of three months each, for the offence u/s 376(2)(g) IPC. They were also sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 1,000/- each, in default whereof to further undergo rigorous imprisonment for a period of two months each, for the offence u/s 366 IPC. They were also sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 500/- each, in default whereof to further undergo rigorous imprisonment for a period of one month each, for the offence u/s 363 IPC. The sentence awarded, on all the counts, was ordered to run concurrently.

5. FIR Ex.PJ/1 was registered on the basis of a written application submitted by PW.10 Som Dutt to the Station House Officer, Police Station Kanina, wherein it was submitted that he was an agriculturist. On 4.12.1998 at about 8/9.00 P.M. his daughter (a prosecutrix whose name is withheld to protect her identity) aged about 15/16 years had gone to fields to ease herself. At that time, Dharmender son of Om Parkash had enticed away his daughter in Tata Sumo 407 bearing registration No. HR-34-A-0120. On 4.12.1998 at about 6/7.00 P.M. Dharambir, brother of the complaint, heard appellant Satish saying that he would tell the place where the vehicle is parked. A request was made that his daughter be searched and protection be provided. On the basis of this written application dated 5.12.1998, FIR was registered on 6.12.1998. On 10.12.1998, PW.13 Tota Ram, the then Station House Officer of Police Station Kanina, had recovered the prosecutrix from the custody of appellant Dharmender near village Kotia and arrested him. On the same day, statement of the prosecutrix u/s 161 Cr.P.C. was recorded. Thereafter, she was produced, on the same day, in the Court of Judicial Magistrate Ist Class, Mahendergarh. On the next day i.e. on 11.12.1998, the statement of prosecutrix was recorded u/s 164 Cr.P.C. The statement was exhibited as Ex.PW.12/A and Ex.DA.

6. The above said FIR was investigated and the report u/s 173 Cr.P.C. was submitted against appellant Dharmender only. The police had found Sher Singh, Satish and Mahender innocent and placed them in column No. 2.

7. Thereafter, the prosecution had moved an application 319 Cr.P.C. on 2.6.1999, which was allowed vide order dated 11.6.1999 and appellants Sher Singh, Mahender and Satish were summoned to stand trial.

8. The Court of Additional Sessions Judge, Narnaul, on 24.9.1999, had framed charges u/s 376(2)(g) IPC against all the four appellants on the ground that on 4.12.1998 at about 8/9.00 P.M., in the area of village Kotia, they had committed gang rape with the prosecutrix. The charge for the offence under Sections 366 and 363 IPC was also framed. The appellants pleaded not guilty and claimed trial.

9. On 2.6.1999, the prosecutrix was examined as PW.1 and the prosecution had moved an application u/s 319 Cr.P.C. The other appellants, namely Sher Singh, Mahender and Satish were summoned to stand trial and the charges were also framed against them. The prosecutrix was again examined as PW.12. This Court

will only be concerned with the deposition of prosecutrix, recorded as PW.12.

10. On 10.12.1998, PW.8 Dr. (Mrs.) Alka Bishnoi, had medicolegally examined the prosecutrix. She noted her age as 17 years. The observations of the doctor can be noticed as under:

...The girl was conscious, co-operative, moderately built and nourished. Menstrual history. Menarche at the age of 14 years. LMP 25 Nov. 1998. On examination secondary sexual character well developed. Axillary and pubic hair well developed. No external mark of injury anywhere over body.

Local examination

No external mark of injury, no congestion and tenderness introitus admitted two fingers easily.

PS examination

(Per speculum) Cervix and vagina healthy.

Per Vaginal examination

Uterus multiparous retroverted, cervix upward.

Handed over to police

1. Vaginal swabs with five seals for forensic examination.
2. Sealed envelope with five seals containing (a) copy of MLR, (b) forwarding letter (c) attested sample of seal on clothes.
3. Girls underwear and salwar with five seals for forensic examination.

Opinion

I am of the opinion that the girl was sexually assaulted. I have seen the FSL report Ex.PF today. I confirm that the girl was subject to sexual assault.

11. In cross-examination, this witness stated that the prosecutrix herself had given her age as 17 years. She further stated that since vagina of the prosecutrix admitted two fingers easily, it would mean that she was habitual of sexual intercourse.

12. PW.3 Dr. Sanjay Bishnoi had medicolegally examined appellant Dharmender on 10.12.1998 and opined that there was nothing to suggest that Dharmender was not capable of performing sexual intercourse.

13. PW.2 Virender Singh, Head Teacher of Government Primary School, Kotia, testified that the prosecutrix was admitted in the school in first standard on 14.7.1990 and as per the school record, her date of birth was recorded as 30.7.1984. In cross-examination, he stated that the date of birth of the concerned boy/girl is recorded as narrated by his/her guardian/parents. He further stated that usually the date of birth, at the time of admission of a child, is

given on the lower side than the actual one.

14. PW.10 Som Dutt, complainant, sated that the prosecutrix, his daughter, on 4.12.1998 had gone to ease herself in the jungle. At that time, he was in his fields and when he returned home, his wife told him that the prosecutrix had not returned home. He enquired about his daughter in the nearby houses and then went to his brother Dharmbir who told that he heard Satish saying that he would tell the place where Dharmender had parked the vehicle. On 5.12.1998. he moved an application Ex.PJ to the police. On 10.12.1998, the police had handed over his daughter to him. He stated that it was incorrect that in application Ex.PJ he had given the age of prosecutrix as 15/16 years. He was confronted with his application Ex.PJ, wherein it was so recorded. In cross-examination, he stated that the date of birth of prosecutrix was got entered by him in the register of birth, maintained by the Chowkidar. His second daughter was born on 20.5.1982 i.e. 2 or 2? years after the birth of prosecutrix.

15. PW.11 Dharambir, brother of the complainant, had given the date of birth of the prosecutrix as 30.7.1984. He stated that on 4.12.1998 at about 6/6.30 P.M. he heard appellant Satish telling Dharmender that he would manage the parking of vehicle and he could bring the person (the person refers to the prosecutrix). He further stated that at about 8/8.30 P.M., his brother came to his house and stated that the prosecutrix was missing. In cross-examination, he admitted that the prosecutrix was found at Faridabad. The husband of sister of appellant Dharmender had brought the prosecutrix from Faridabad about seven/eight days after she was found missing. He had seen the prosecutrix in the Police Station on 9.12.1998. On the day when she was produced before the Magistrate, her statement was not recorded but was recorded on the next day i.e. 10.12.1998.

16. The prosecutrix appeared as PW.12 and stated that on 12.4.1998 (it seems a typographical mistake, the date should be 4.12.1998) at about 7/8.00 P.M. she had gone to the fields from her village to ease herself. When she was returning home, she saw four persons standing on the way, to whom she knew before and were present in the Court. Their names were Dharmender, Mahender, Sher Singh and Satish. Appellant Sher Singh gagged her mouth with her shawl. Appellant Dharmender gave a threat that in case she made an alarm they would kill her. Then the appellants dragged her to the poultry farm of Dharmender in village Kotia, which was at a distance of 8 or 9 killas. All the appellants had consumed liquor in the poultry farm. They also made her to drink liquor forcibly. Appellant Mahender had poured liquor in her mouth. Then appellant Dharmender had forcibly committed sexual intercourse with her. Thereafter, the remaining appellants had also forcibly committed sexual intercourse with her. All the appellants remained in the poultry farm till mid night. Then she was taken by Dharmender in a Commander Jeep towards canal. The remaining accused stayed at the spot. Dharmender brought her to Faridabad. There he took her to the room of his friend. She stayed there for four days and appellant Dharmender used to commit sexual intercourse with her daily. The husband of sister of

Dharmender had brought him and the prosecutrix to village Murlipur. On the same night, the police had brought them to Police Station Mahendergarh. Rakesh, police driver, had beaten her in the police station and told her to name only Dharmender in her statement and not any other person, otherwise, she would be subjected to further beating. This witness was subjected to cross-examination and was confronted with her statement Ex.PW.12/A, recorded by the Magistrate u/s 164 Cr.P.C., wherein it was not recorded that Sher Singh had gagged her mouth by putting a shawl and Dharmender had threatened her that in case she would raise any noise, he would kill her. She was further confronted with her statement Ex.PW.12/A wherein it was not recorded that all the accused had dragged her to the poultry farm of Dharmender, which was at a distance of eight or nine killas. She was further confronted with her statement Ex.PW.12/A wherein it was not recorded that the liquor was forcibly poured in her mouth. Since the statement of prosecutrix in the Court contained various improvements she was extensively confronted with her statement Ex.PW.12/A. This witness further stated that the police had not recorded her statement. The police had recorded her statement of its own. She further stated that she had not raised any alarm under the fear of threat as all the four accused-appellants were carrying knives with them. She further stated that she was dragged to the poultry farm and on that account she had sustained injury marks on her feet but the blood did not ooze. She further stated that at the time of sexual intercourse, the appellant had removed her salwar, shirt and underwear. A chadar was spread on the ground where she was made to lay down and then sexual intercourse was committed with her. The blood had fallen on that bed sheet. However, the following lines of cross-examination are to be noticed:

...There are houses near the house where I was kept at Faridabad. There were people present around that house but I did not narrate the occurrence because of the threat extended by accused. Dharmender was the sole occupant of the house where I was kept. After dropping us at Faridabad the jeep and its driver left that place. I had stated before the police in my statement Ex.PW.12/A that there was a jeep driver who took me and Dharmender in the jeep to Faridabad. I was given food etc. at Faridabad which was brought by Dharmender. I do not know from where he used to bring the same. Whenever he went to bring the food, I was all alone in that house. I do not wear bangles. I was not taken to Ballabhgarh. I was not taken out by Dharmender for sight seeing. Dharmender brought one suit for me. I was given all the comfort including food and shelter at Faridabad. I did not had to go outside for easing myself because there was a lavatory in that house. At Faridabad also Dharmender was carrying a knife.

17. She further stated that in her statement, she had given the names of four accused-appellants to the police but only the name of Dharmender had been recorded in her statement.

18. PW.4 Om Parkash, Patwari, had prepared the scaled site plan as Ex.PC/2.

19. PW.5 Pardeep Kumar, Judicial Magistrate Ist Class, Mahendergarh, had

recorded the statement of prosecutrix Ex.PW.12/A u/s 164 Cr.P.C. on 11.12.1998.

20. PW.6 Mahesh Kumar, Constable, stated that on 28.1.1999, he carried five sealed parcels to Forensic Science Laboratory, Madhuban.

21. PW.7 Jagdish Chander, Constable, had delivered the special report.

22. PW.9 Daya Ram, Head Constable, tendered into evidence his affidavit Ex.PH to prove link evidence.

23. PW.13 Tota Ram, the then Station House Officer, Police Station Kanina, proved various facets of the investigation. He stated that on 6.12.1998 on the basis of application Ex.PJ, a formal FIR Ex.PJ/1 was recorded. On 10.12.1998, he had recovered the prosecutrix from the custody of Dharmender near village Kotia. After the investigation was concluded, he had submitted a report u/s 173 Cr.P.C. He further stated that there was no record regarding date of birth of the prosecutrix. The prosecutrix was not subjected to ossification test. He further stated that it was a fact that the prosecutrix had told him only the name of Dharmender, but in her statement, recorded u/s 164 Cr.P.C., the names of all the four accused-appellants were given.

24. Thereafter, the prosecution had closed its evidence.

25. The statements of accused-appellants, u/s 313 Cr.P.C., were recorded. All the incriminating evidence was put to them. They denied the same and pleaded false implication.

26. In defence, the accused-appellants examined Sanwal Ram, Election Kanungo, as DW.1. He proved voter list wherein the age of prosecutrix was recorded as 26 years.

27. DW.2 Roshan Lal stated that the prosecutrix was the elder daughter of Som Dutt. Thereafter, her sister was born and the prosecutrix was married on 23.6.1999. He admitted in cross examination that his son Satish Kumar was facing trial. It was further stated that first husband of the prosecutrix had died and she had performed marriage with younger brother of her husband and was blessed with a child.

28. Thereafter, the defence examined Bhur Singh as DW.3, who stated that the prosecutrix was remarried with the younger brother of her husband.

29. From the evidence noticed above, the following three questions are required to be answered by this Court:

(1) What is the age of prosecutrix?

(2) Whether appellant-Dharmender alone or all the four accused had committed forcible sexual intercourse with the prosecutrix?

30. I have heard learned Counsel for the parties and with their able assistance, the above said questions are to be determined by this Court.

Question No. 1

31. As per the statement made by PW.2 Virender Singh, Head Teacher, Government Primary School, Kotia, the date of birth of prosecutrix, recorded in the school, was 30.7.1984. Therefore, on 4.12.1998 when the prosecutrix had left her house, she was above 14 years of age but less than 15 years of age. He gave the date of birth of prosecutrix, from the record of school, which was given by her parents/guardian. He further stated that it is the fact that at the time of admission of their wards, the parents used to give less age without any supportive evidence or document, cannot be ruled out.

32. There are certain other features of this case, which are to be noticed. The prosecutrix, when was examined by PW.8 Dr. (Mrs.) Alka Bishnoi, had given her age on 10.12.1998 as 17 years. In the written application Ex.PJ, father of the prosecutrix gave her age as 15/16 years. PW.8 Dr. (Mrs.) Alka Bishnoi has specifically stated that she recorded the age of prosecutrix as it was divulged by her. What is pertinent to be noticed in the cross examination of PW.10 Som Dutt, father of the prosecutrix, is that he stated that a daughter named Sarbati was born after the birth of prosecutrix. She was 2/2? years younger than the prosecutrix. The date of birth of his younger daughter was 20.5.1982. If that is so, the prosecutrix was born in the mid of 1979 or in early 1980. Therefore, she would be more than 18 years of age on the date of occurrence.

33. PW.10 Som Dutt, in his cross-examination, has stated that the date of birth of the prosecutrix was got recorded by him in the register of birth, maintained by the Chowkidar. The prosecution has made no effort to produce the entry made in the register of birth, maintained by the Government.

34. In the present case, no ossification test was got conducted to determine the age of the prosecutrix. This Court cannot ignore the fact that there is a tendency amongst the parents to give less age of their wards, at the time of their admission in the school. Therefore, an entry made in the school record is not sufficient to determine the age of the prosecutrix. In the present case, an entry regarding the date of birth was made in the register maintained by the public authorities. The prosecutrix had herself given her age as 17 years when she was medicolegally examined. As per the cross-examination of PW.10 Som Dutt, father of the prosecutrix, she was born 2/2? years before 20.5.1982. Thus, it can be safely inferred that the prosecutrix was above 16 years of age but less than 18 years of age on the date of occurrence.

Question No. 2

35. In the first application Ex.PJ, moved by PW.10 Som Dutt, father of the prosecutrix, it was stated that the prosecutrix had been enticed away by appellant Dharmender. After five days of the occurrence, she was allegedly recovered by the police from the custody of appellant Dharmender. The prosecutrix and his uncle PW.11 Dharambir have stated that she was brought from Faridabad by the husband of sister of appellant Dharmender. The

prosecutrix has stated that she was staying in a room with appellant Dharmender. She further stated that she was provided food by him at Faridabad. She had accompanied him in a Jeep to Faridabad. He had bought a suit for her also. She further stated that appellant Dharmender was the sole occupant of the house. Therefore, it can be safely inferred that she had eloped with him. This Court can also, on the basis of probabilities, hold that due to love affair she had gone with appellant Dharmender. In her first statement, recorded before the police, the prosecutrix had only named appellant Dharmender. The prosecution case is that when she had left her house, she had accompanied appellant Dharmender and six days later, she was found in his company. On 10.12.1998 when the prosecutrix was recovered, she had only furnished the name of appellant Dharmender. It was on the next day i.e. on 11.12.1998 when her statement, u/s 164 Cr.P.C. was to be recorded, as a result of consultation and deliberation, an exaggeration surfaced, the net was widened too far and when she named accused-appellants Dharmender, Sher Singh, Mahender and Satish. The story that they gave threat to her by showing knife and she was dragged by all of them was not recorded in her statement recorded u/s 164 Cr.P.C. She was extensively confronted with her statement Ex.PW.12/A. After 10.12.1998 when she was handed over to her parents and produced before the Magistrate on 11.12.1998, it cannot be ruled out that on being tutored, she had named other three appellants namely Sher Singh, Satish and Mahender. The police had found them innocent and had placed them in column No. 2. Therefore, in the investigation also, the innocence of these three appellants was proved.

36. Taking the attending circumstances into account, benefit of doubt is extended to appellants Sher Singh, Mahender and Satish.

37. As this Court has already held that the prosecutrix had accompanied appellant Dharmender at her own volition and she was aged above 16 years but less than 18 years, no offence of rape is made out qua him also.

38. Mr. N.S. Shekhawat, Advocate, appearing for appellant Dharmender, has stated that the appellant has already undergone seven years, one month and 28 days out of the actual sentence of ten years awarded to him. Therefore, there is no need to reduce the sentence awarded for the offence under Sections 363 and 366 IPC as appellant Dharmender has already undergone the sentence awarded under these two counts.

39. Consequently, as a result of above discussion, Criminal Appeal No. 1749-SB of 2002, preferred by appellants Sher Singh, Mahender and Satish is accepted. Their conviction and sentence are set aside by granting benefit of doubt as a matter of abundant caution, they are acquitted of the charges.

40. In Criminal Appeal No. 138-SB of 2003, appellant Dharmender is acquitted of the offence u/s 376(2)(g) IPC. However, his conviction and sentence, for the offence u/s 363 and 366 IPC is maintained. Thus, his appeal is partly allowed.