

(2015) 07 P&H CK 0112
In the Punjab And Haryana At Chandigarh
Case No : CRA-S-1648-SB of 2011

Jai Singh and Others

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 319, 401 (3), 428
Penal Code, 1860 (IPC) — Section 328, 342, 376, 376 (2) (g), 506

Citation : (2015) 07 P&H CK 0112

Hon'ble Judges : Raj Rahul Garg, J

Bench : Single Bench

Advocate : Keshav Partap Singh, for the Appellant; Munish Dev Sharma, Assistant Advocate General, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Raj Rahul Garg, J—The appellants-accused have assailed the impugned judgment dated 04.06.2011 rendered by Sh. S.K. Kaushik, the then Additional Sessions Judge, Palwal whereby appellants Jai Singh and Sham Singh were convicted for committing offence punishable under Sections 376 (2) (g), 342 and 506 of Indian Penal Code (for short "IPC") whereas appellant Memwati was convicted for committing offence punishable under Sections 342 and 506 IPC vide order of sentence dated 07.06.2011. The appellants Jai Singh and Sham Singh were sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/- each with default clause for committing offence punishable under Section 376 (2) (g) IPC. They were also sentenced to undergo rigorous imprisonment for 6 months for committing offence punishable under Section 342 IPC and rigorous imprisonment for a period of 1 year with a fine of Rs. 1,000/- each with default clause for committing an offence punishable under Section 506 IPC whereas appellant Memwati was sentenced to undergo rigorous imprisonment for a period of 6 months for committing an offence punishable under Section 342 IPC and to undergo rigorous imprisonment for a period of 1 year alongwith fine of Rs. 1,000/- with default clause for committing offence

punishable under Section 506 IPC.

2. Brief history of the case is like this; that the accused- appellants were acquitted vide judgment dated 29.03.2003 rendered by Additional Sessions Judge (Adhoc), Fast Track Court-II, Faridabad. Against the aforesaid judgment of acquittal, prosecutrix preferred criminal revision petition No. 1798 of 2003 in this Court.

3. After hearing learned counsel for both the parties, this Court observed that while exercising the revisional jurisdiction, this Court cannot convert the finding of acquittal into the finding of conviction, as Section 401 (3) Cr.P.C. does not authorize this Court to do so. As such, since this Court came to the conclusion that the acquittal of appellants-accused was liable to be set aside and the case was to be remanded to the trial Court for passing a fresh judgment after properly scrutinizing the statement of the prosecutrix and the other evidence produced by the prosecution, therefore, the case was remanded to the trial Court for passing fresh judgment. The aforesaid judgment is dated 10.03.2011. In pursuance with this judgment, the learned trial Court heard the Public Prosecutor for the State and learned defence counsel at length and after scrutinizing the statement of the prosecutrix and other evidence produced on record, recorded the judgment of conviction against all the three appellants and punished them vide order dated 07.06.2011. This judgment is the impugned judgment. On the statement of prosecutrix which is Ex. PA, the case was registered. As per prosecutrix, she was 14 years of age and resident of Agwanpur, Tehsil Palwal, District Faridabad. On 22.08.2001, she was sleeping in the house of her Tau (father's elder brother) namely Om Parkash. At about 11:00 p.m. when she came out of her house for the purpose of passing urine, accused Jai Singh and Sham Singh whose house was opposite to the house of her Tau, came there. They gagged her mouth and pulled her inside their house. Jai Singh accused tied her hands on the cot with the help of rope, thereafter, Jai Singh and Sham Singh both the accused committed rape upon her turn by turn. Then, their mother namely Memwati (accused) came to the spot and told her not to disclose this fact to anyone in her house as whatsoever happened had already happened and otherwise they would kill both her brothers. Thereafter, Memwati brought some liquid in a glass (tumbler) and made her drink that liquid. At that time she also told her sons that (now) she will become unconscious and then after sometime she may be brought outside their house and left over there. Thereafter, she started feeling intoxicated and also became unconscious. At about 7:00 p.m. when she regained consciousness, she found herself amongst her family members. Then she disclosed the entire story to her Mausi (wife of Om Parkash). In order to save the honour of her family, they did not report the matter to the police. As on 25.08.2001, both the accused came to her house and said that they had heard that the complainant party was making a report against them in the police station. In case, they do so, they shall eliminate their entire family (khandan) and the complainant party would not be able to do anything against them. On this report, Ex. PA, Hukum Singh, ASI made endorsement Ex. PA/1 and sent the

same to the police station for registration of the case, whereupon, formal FIR Ex.PA/2 was recorded. Rough site plan of the spot at the instance of the prosecutrix was prepared which is Ex.PH. On 26.08.2001, the prosecutrix was got medico-legally examined from doctor Rekha Singh (PW-6). Doctor took the vaginal swab and sealed the same in a glass vial. "Salwar" of the prosecutrix was also converted into a sealed parcel. Sealed parcels were handed over to the police and were sent to the Forensic Science Laboratory. As per FSL, Ex.PF, no semen was detected on the aforesaid articles. Accused were arrested. Scaled site plan of the spot was also got prepared which is Ex.PG. Accused Jai Singh was got medico-legally examined vide MLR Ex. PD. Certificate regarding date of birth of prosecutrix was taken from Head Master, Government High School, Agwanpur (Faridabad.). After completion of necessary investigations, the challan was put in the Court against the appellants-accused.

4. Finding a prima-facie case against the appellants-accused Jai Singh and Sham Singh, they were charge-sheeted for committing offence punishable under Sections 376 (2) (g), 342 and 506 IPC whereas accused Memwati was charge-sheeted for committing offence punishable under Sections 342 and 506 IPC. To the charge, appellants- accused did not plead guilty but claimed trial.

5. After taking entire prosecution evidence, statements of accused under Section 313 Cr.P.C. were recorded, wherein, they denied each incriminating circumstance appearing against them in the prosecution evidence and pleaded their innocence. As per appellants- accused, they have been falsely implicated in this case. Biradari Panchayat was held in the village, in which Lakhpat Singh and Charan Singh were also present. Prosecutrix is the cousin of accused Jai Singh and Sham Singh. She was given a slap by Jai Singh on account of her indulgence in bad activities. She had fallen in bad company. Some love-letters written by her to someone had come to his possession. Panchayat was held in that connection. Accused-Jai Singh confessed before the Panchayat that he mis-behaved with the prosecutrix and felt sorry before the Panchayat. The prosecutrix in conspiracy with her aunt Laxmi, at whose instance she had been indulging in bad activities while staying away from her parents, got them booked on false allegations of rape. Even Mahavir had sworn in affidavit that he never brought the prosecutrix and never saw her in an unconscious condition. They were called upon to enter on their defence. They examined Lakhpat Singh as DW-1 and Charan Singh as DW-2.

6. After hearing both the sides and appraising the entire evidence and material coming on record, the learned trial Court acquitted the accused-appellants. As such, the prosecutrix went in revision petition against the aforesaid acquittal order, therefore, the case was remanded by this Court directing the trial Court to pass a fresh judgment after properly scrutinizing the statement of the prosecutrix and other evidence produced by the prosecution.

7. After remand of the case, the learned trial Court again heard both the counsel for the parties and appraising the entire evidence and material available on

record besides scrutinizing the statement of prosecutrix and then recorded the impugned judgment dated 04.06.2011, whereby the appellants-accused were convicted; vide order of sentence dated 07.06.2011, they were sentenced as mentioned in the earlier part of this judgment.

8. I have heard learned counsel for the appellants and learned State counsel, besides appraising the entire material coming on record.

9. Firstly, it was argued by learned counsel for the appellants that the case is false against them. In order to prove the falsity of the case, the statements of doctor Rekha Singh (PW-6), prosecutrix (PW-7) and her mausi namely Laxmi (PW-10) were referred contending that as per doctor Rekha Singh (PW-6), there was only one injury on left forehead of the prosecutrix. That injury was a small abrasion with crust formation, meaning thereby, there was no injury on the hands/wrist of the prosecutrix. Likewise, PW-10 did not state about the sufferance of any injury on the hands/wrists by the prosecutrix. Of course, prosecutrix deposed that she received scratches on the wrist of both of her hands yet no such injury has been mentioned by the doctor. Thus, in the absence of medical evidence regarding injuries on the wrists of prosecutrix, the prosecution story that her hands were tied by the appellants-accused and, thereafter, the appellants-accused Jai Singh and Sham Singh, committed rape upon her, is not believable.

10. The above argument of learned counsel for the appellants- accused is not sustainable. As in this case, occurrence took place at about 11:00 p.m. on 22.08.2001, whereas the prosecutrix was medico- legally examined on 26.08.2001. Doctor Rekha Singh (PW-6) categorically deposed that patient took bath and washed "salwar" on 23.08.2001. Thus, after gap of 3-4 days, even if prosecutrix received scratches, the same would have been healed and thus if the same were not mentioned by the doctor, it hardly makes any difference. Likewise, the argument of learned counsel for the appellants that no semen was detected on the "salwar" of the prosecutrix and even on the vaginal swab sent for chemical examiner as per report FSL Ex.PF; is not sustainable. Prosecutrix deposed that she was stripped off her clothes after she had been tied with the cot. As per the medico-legal report Ex.PE, the prosecutrix had also taken bath and washed "salwar". Therefore, the possibility of detection of semen on the vaginal swab as well on the "salwar" was not there and if the same was not detected, it alone cannot be made a ground of acquittal. It is settled proposition of law that the statement of prosecutrix is to be treated as that of an injured. The appellants-accused are relatives of prosecutrix. She is their cousin. There is no motive available on the file for false implication of accused-appellants by the prosecutrix. Even otherwise, from the statement of prosecutrix, her mausi Laxmi (PW-10) and doctor Rekha Singh (PW-6), it stands established on the file that accused Jai Singh and Sham Singh have committed rape upon her. Even doctor Rekha Singh (PW-6) deposed that in her opinion the possibility of sexual assault cannot be ruled out.

11. It was next argued by learned counsel for the appellants that Sham Singh-appellant was not got medico-legally examined. As such, whether he was capable of performing sexual intercourse is not established on the file. For committing rape, capacity to perform sexual intercourse by a person has to be got medico-legally ascertained but since he was not medico-legally examined, therefore, it cannot be said that Sham Singh was even capable of performing sexual act. As such, he cannot be convicted for the offence under Section 376 (2) (g) IPC and if the prosecution story is not believable on that count, he cannot be convicted for offence under Sections 342 and 506 IPC as well. In support of his contention, he has cited judgments i.e. Ujjagar Singh Vs. State of Punjab, (2008) CriLJ 808 : (2008) 1 JT 1 : (2007) 14 SCALE 428 : (2007) 13 SCC 90 .

12. Besides above, it was also argued by learned counsel for the appellants that Sham Singh is a married man having children who were present in the house. His sister was also present in the house as she had come to the house of Sham Singh on occasion of "rakshabandhan" and this fact is admitted by the prosecutrix when examined in the Court. Under these circumstances, when other family members of appellants-accused were also present in the house, it is not believable that they would pull prosecutrix inside their house and commit rape upon her.

13. From the above argument of learned counsel for the appellants, it is evident that Sham Singh is a married man. He has children as well. Even prosecutrix as PW-7 during the course of her cross-examination stated so. Under these circumstances, since Sham Singh is a married man, having children, and was about the age of 27/28 years on the date of occurrence, his capacity to perform sexual intercourse cannot be doubted at all, rather it stands established on the file.

14. Learned State counsel also contended that it is the case in which initially challan was put only against Jai Singh. Sham Singh and Memwati were found innocent during the course of investigation but they were later on summoned as an additional accused under Section 319 Cr.P.C. As such, under those circumstances Sham Singh was not medico-legally examined for ascertaining his capacity to perform sexual intercourse. Since, the investigation of the case was over, therefore, on account of that technical reason, he was not got medico-legally examined and now no benefit can be given to the accused on that account.

15. Taking into consideration the argument raised by learned State counsel and particularly the fact that since Sham Singh-accused is a married man, having children and of the age of around 28 years on the date of commission of this crime, therefore, his capacity to perform sexual act cannot be doubted in any way rather it is established on the file that he was capable of performing the sexual act.

16. The 2nd argument advanced by learned counsel for the appellants-accused that in the presence of family members the possibility of pulling prosecutrix

inside their house and commission of rape cannot be there; is also not sustainable. At the dead of night, the appellant-accused have committed this crime. There is nothing on record to show that they have done this crime in the presence of their family members. At night, the family members go to sleep and if the offence like the present one is committed in a room of one's own house, it cannot be said that such offence cannot be committed.

17. It was next contended by learned counsel for the appellants that Laxmi (PW-10) deposed that Mahavir, milk vendor, came to her house and gave a call and told her that prosecutrix was lying in front of house of Pappu. It was 5:00 a.m. that time. She and Mahavir had gone near the house of Pappu and brought prosecutrix to her house by putting her on a cot. She then called a doctor. Prosecutrix was given an injection by the doctor. Doctor told her that prosecutrix will regain consciousness after sometime and, thereafter, regained consciousness. Mahavir, milk vendor, is the material witness of this case. He was not kept as prosecution witness nor examined to prove the aforesaid fact. Even the doctor who gave injection to the prosecutrix, was neither named nor kept as prosecution witness nor examined as witness in the Court. Pappu, in front of whose house the prosecutrix was allegedly lying, has also not been kept as witness. Thus for all these reasons, prosecution case cannot be said to be free from doubt.

18. Of course milk vendor has not been kept as witness nor the doctor who gave injection to the prosecutrix yet absence of this evidence does not go to the root of the case. Even Jai Singh, in his statement recorded under Section 313 Cr.P.C. stated that Mahavir had given sworn affidavit to the extent that he never took the prosecutrix or saw her in an unconscious condition and never informed Laxmi (PW- 10). Affidavit of Mahavir remained unproved on the file. Accused could also examine Mahavir as defence witness but they also did not choose to do so. The most material witness of the prosecution is the prosecutrix and her mausi Laxmi (PW-10). Both the witnesses have been examined by the prosecution and they fully supported the prosecution story right from the very beginning till end. Statement of prosecutrix is like the statement of an injured person. Identity of the accused in this case is not doubtful. Appellants-accused are the relation of the prosecutrix. There is no point for the prosecutrix to depose against them or falsely implicate them as accused in this case. Prosecutrix herself narrated the entire story to PW-10 as well. She gave the true account of the incident to the police in her statement Ex.PA. The happening of the present occurrence is established from "mafinama" Ex.DB. This is the document which is related to the appellants-accused themselves. Accused had brought this document on the file in the statement of Lakhpat Singh, Ex. Sarpanch (DW-1). Lakhpat Singh (DW-1) and Charan Singh (DW-2) are the signatories of this document and they categorically stated that they know the parties and further that the Panchayat was held in the village over this matter. Meeting took place in CIA Palwal, in the matter of giving of a slap by accused Jai Singh to prosecutrix. He was called in that Panchayat by father of the prosecutrix. Jai Singh had apologized before the

Panchayat for having given a slap to prosecutrix to mend her ways in sexual matter. She had adopted wrong ways in the matter of her character at the behest of her aunt Laxmi (mother's sister). He further identify his signatures on Ex.DB. Charan Singh (DW-2) deposed that Panchayat was held in CIA Palwal. Jai Singh got written his apology in Ex.DB of having given a slap to prosecutrix (his cousin) because of her wrong activities. He identified his signatures on Ex.DB and also identified the signatures of Ram Gopal father of the prosecutrix, on this very document. During the course of his cross-examination, DW-2 admitted that in Ex.DB, there is no mention of slap having been given by Jai Singh to prosecutrix. He further deposed that he had never seen the prosecutrix and Ram Gopal reading and writing. Under those circumstances, his identification of signatures of prosecutrix and Ram Gopal on Ex.DB does not arise. Even, accused pleaded that they have been falsely implicated and they have nothing to do with the act of rape. A "biradari" Panchayat was held in the village, in which Lakhpatt Singh as DW-1 and Charan Singh as DW-2 were also present. Jai Singh had given a slap to prosecutrix who happened to be there with his cousin. He had given a slap on the ground of her involvement in bad activities. He had come to know that she was falling in bad company and some love-letters addressed by her to someone had also come to his possession. Therefore, accused Jai Singh had rebuked her on that basis. Panchayat was held and in that Panchayat accused Jai Singh candidly confessed that he had mis- behaved with the prosecutrix and for that he had felt sorry before the Panchayat but prosecutrix in conspiracy with her aunt Laxmi at whose instance she was indulging in bad practices; got booked accused falsely in this rape case.

19. From defence taken by the accused, it is evident that they wanted to make out from Ex.DB that accused Jai Singh had given a slap to prosecutrix as she was indulging in bad activities and love- letters written by her, had come to the possession of appellants- accused. On that account, Panchayat was held and he apologized before the village folk. The very wording of Ex.DB which is as follows:-

" Mai Jai Singh, Niwasi gaao Agwanpur, mere se apne chacha ki ladki se galat vaivhar galti se ho gaya, mai hath jod kar pure gaao se, sabhi logo se mafi mangta hu. Kripya mujhe maaf kiya jae agar ayanda koi galti mai karta hu to jo kuch pura gaao chahae wo saluk mere sath kiya jave"

Suggest that the apology was not on account of giving slap to the prosecutrix but it was for something much more than giving of slap. There is no mention about giving of slap to the prosecutrix in Ex.DB. Had the apology been on account of giving of slap to prosecutrix, there was nothing to conceal the mentioning of word slap and the same would have been mentioned in Ex.DB. Since, the offence of rape is a serious offence and the very act of commission of rape is shameful, therefore, only the same was not mentioned in Ex.DB. Instead the words "chacha ki ladki se galat vaivhar galti se ho gaya" find mentioned. A person would apologize from the entire village people for such a grave act only and not for just giving a slap and would not even go to the extent of saying that "agar

ayanda koi galti mai karta hu to jo kuch pura gaao chahae wo saluk mere sath kiya jave." "Mafinama" on account of giving slap would not give rise to the aforesaid wording. Thus from Ex.DB itself, the prosecution case corroborated and established beyond reasonable doubt. Love-letters Mark B and Mark C are of no meaning as the same remained unproved on the file. As such story of giving of slap to prosecutrix on account of her falling in love with someone in the village and writing of love letters remained unproved on the file.

20. Lastly, it was argued that there was enmity between Laxmi (PW-10) and Sham Singh accused. PW-10 admitted during the course of her cross-examination that Vinod is her son. A case is pending against him in Palwal Courts about inflicting of injury on Sham Singh- accused. As such, since Laxmi (PW-10) is having enmity with the Sham Singh, therefore, he has falsely implicated in this case.

21. The above argument of learned counsel for the appellants again is not sustainable as PW-10 voluntarily stated in her statement that the injury was caused to Sham Singh by his "Fufa". Further that in that case her son was discharged. Though, the factum of discharge was disputed by the accused yet there is nothing on record to prove the same. Even the particulars of the case are not on record so as to know as to whether the aforesaid case was registered. The occurrence of that case was prior to the present occurrence or thereafter; and further as to who were the injured and who are the assailants. Even otherwise, the enmity is the double edged weapon. When there is always a fear of false implication on account of enmity, at the same time the possibility of commission of crime on account of sour relation is also there. There is nothing on record to show that the prosecutrix was having enmity with the accused. As such, this contention of learned counsel for the appellants, is not sustainable.

22. About Memwati-accused, there cannot be any offence under Section 376 IPC as it is the settled proposition of law. As per prosecutrix and her statement to the police Ex.PA, Memwati-accused came in picture after the commission of crime. She is not the one who involved in pulling the prosecutrix inside her house or her detention in any way. As such offence under Section 342 IPC is not made out against her. As per prosecutrix, she (Memwati) had made her drink some liquid from a glass telling her sons that she will become unconscious and, thereafter, she may be thrown out of the house, and, thereafter, she felt intoxicated and became unconscious. In fact, no charge for committing offence under Section 328 IPC is against Memwati-accused. Even, it is not known as to what intoxicant was administered to her. Even Memwati did not administer the aforesaid substance with an intent to cause hurt to her or with an intent to commit or facilitate the commission of offence. The statement of prosecutrix that Memwati told her that she should not disclose the incident in question to anybody in his house and in case she tells the same, both of her brother would be killed by them. Second time when the threat was allegedly given to the prosecutrix on 25.08.2001, she only stated that both the accused came to her house and gave

threat to her life, in case she reports the matter to the police as they had heard that they were going to report the matter to the police. At that time, she also did not state anything about Memwati or that she also gave threat. Under these circumstance, even no case under Section 506 IPC is said to be made out against appellant-accused Memwati. As such, she is entitled to acquittal whereas prosecution has succeeded in bringing home guilt against the accused Jai Singh and Sham Singh beyond reasonable doubt. Therefore, the judgment of conviction dated 04.06.2011 and order on sentence dated 07.06.2011 recorded against both the accused Jai Singh and Sham Singh are maintained and appeal being without any merit qua them, is ordered to be dismissed. However, accused-appellant Memwati is acquitted of the charge for which she faced trial and appeal qua her is accepted.

23. For the aforesaid reasons, finding no merit in this appeal, it is ordered to be dismissed against accused Jai Singh and Sham Singh. If these appellants are on bail, their bail bonds, shall stand cancelled and they be taken in custody for serving the remaining period of sentence. The concerned Chief Judicial Magistrate, shall take necessary steps, to comply with the judgment, with due promptitude, keeping in view the applicability of the provisions of Section 428 of the Criminal Procedure Code, and submit compliance report within a period of two months, from the date of receipt of a copy thereof.

24. The District & Sessions Judge, Palwal, shall ensure that the directions are complied with, within the time frame, and the compliance report is submitted immediately thereafter.

25. The Registry shall keep track of the submission of compliance reports, and put up the papers whether the reports are received or not, within the time frame, immediately after the expiry thereof.