
(2020) 09 P&H CK 0024

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 148-DB Of 2016 (O&M).

Kamaljeet And Others

APPELLANT

Vs

State Of Haryana

RESPONDENT

Date of Decision : 02-09-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 323, 365, 376D, 506
Code Of Criminal Procedure, 1973 — Section 164
Evidence Act, 1872 — Section 114A

Citation : (2020) 09 P&H CK 0024

Hon'ble Judges : Ajay Tewari, J; Jasgurpreet Singh, J

Bench : Division Bench

Advocate : R.S.Dhull, Aman Bahri, Ankit Chaudhary

Final Decision : Disposed Of

Judgement

Ajay Tewari, J

This appeal has been filed against the judgment of conviction dated 8.12.2015 and order of sentence dated 10.12.2015 whereby the appellants namely Kamaljeet, Nasib and Amit @ Mittu, have been convicted under Sections 365 read with Section 34 IPC, 323 read with Section 34 IPC, Section 376-D IPC and Section 506 IPC in FIR No.28 dated 18.02.2015 registered at Police Station Chhappar (Yamuna Nagar). The sentences which have been awarded to the appellants are as under :-

Under Section

Sentence

Under Section

365 r/w 34 IPC

To undergo rigorous imprisonment for a period of 07 (seven) years each and to pay a fine of Rs.5,000/- (rupees five thousand only) each. In default of payment

of fine, they shall further undergo rigorous imprisonment for one month each.

Under Section

323 r/w 34 IPC

To undergo rigorous imprisonment for a period of 01 (one) year each.

Under Section 376-D IPC

To undergo rigorous imprisonment for a period of 20 (twenty) years each and to pay a fine of Rs.20,000/- (rupees twenty thousand only) each. In default of payment of fine, they shall further undergo rigorous imprisonment for six months each.

Under Section 506 IPC

To undergo rigorous imprisonment for a period of 02 (two) years each.

It was ordered that all the sentences shall run concurrently.

As per the FIR, the case was registered on the basis of the statement/complaint made by the prosecutrix who had reported that she is aged 34 years having two sons and one daughter, aged 17 years, 15 years and 13 years respectively. Her husband Pala Ram is employed in Oriental Engineering Works, Yamuna Nagar. On 15.2.2015, she along with her daughter and one son had gone to the house of her sister in village Gadhauli and stayed there for two days. On 17.2.2015, at about 5/5:30 PM, she had received a call on her mobile phone from Kamaljeet, who was earlier known to her and he enquired from her as to where she was upon which she disclosed to him about her presence at the house of her sister in village Gadhauli. After some time, said Kamaljeet accompanied by Nasib and Amit @ Mitu reached there in a Swift Car of white colour. At that time, her sister and her husband were not at home. The said persons asked her to board their car. When she resisted for the same, they started hurling abuses. They forcibly made her and her children to sit in the car and proceeded from there in the car while extending threats to the persons present there. When she asked them as to where they were being taken, then Kamaljeet started giving beatings to her. When they reached near Bus Stand, Bhambholi, on her request, they dropped her daughter at Bus Stand, Bhambholi and took her and her son to village Gadhauli, towards Bilaspur where Kamaljeet made a telephonic call to one of his friends asking him for a room and when a room could not be arranged, then all the three above named persons took her and her son into a dry river where there was a hut. Kamaljeet and Nasib dragged her in the hut. They threatened her to do as to what they want otherwise they would kill her son.

They forcibly removed her trouser (Salwar) and firstly accused Kamaljeet committed rape upon her by addressing her as "Randi" and "Gittali." Nasib also committed rape upon her. Then, they called Amit who was standing near her son. Accused Amit also committed rape upon her. The incident took place at about 8/8:30 PM. She, however, got herself and her son freed from the said persons.

On the basis of above statement, a case was registered and investigation was put into action.

The aforesaid FIR was registered on 18.2.2015 and the statement of the prosecutrix (EX.PW4/B) was recorded under Section 164 Cr.P.C. before the Judicial Magistrate First Class, Yamuna Nagar, at Jagadhari which is reproduced as under:-

"One boy namely Kamaljit is in my village itself. He is of village Sudhail. He is threatening for many days that he would kidnap my daughter. On the night of Saturday, I along with my children have hidden in the house of neighbor due to fear of Kamaljit. My husband had not come to house. Then on Sunday, we went to the house of my sister in village Gadhauli, then on the third day, Kanwaljit came to know where I was he called telephonically and then he said that I am coming there in Gadhauli and he came there and there he gave beating. Then he took me forcibly in car. My younger son was along with me. He also gave me intoxicant substance forcibly and thereafter, he and two more boys, namely Nasib and Mitu committed rape upon me. Then in my absence, my husband had moved application, then Kanwaljit said that she would have to be killed. Then I asked him to leave me and my son, I would do whatever you would ask me and my son because I would not disclose anything against you in the police station but I disclosed the entire facts to police."

On 20.2.2015, Dr.Abhimanyu Anand, Medical Officer, CHC, Radaur, Yamuna Nagar, conducted the medico-legal- examination of Kamaljit and Nasib and opined that there is nothing to suggest that the concerned persons are incapable of performing the sexual activity. Similarly, medico-legal- examination of the third accused namely Amit @ Mitu was also conducted by the same doctor on 23.2.2015 and similar opinion was expressed that there is nothing to suggest that the concerned person is incapable of performing the sexual activity.

The said doctor also deposed as witness No.1 and tendered into evidence his duly sworn affidavits EX.PW1/A and EX.PW1/B, apart from the copies of MLRs of all the three accused as EX.PW1/C, EX.PW1/D and EX.PW1/E respectively. He deposed that in his opinion there was nothing to suggest that the persons examined were incapable of performing the sexual intercourse.

He further deposed that he had seen the report of the FSL (EX.PA) and as per the same semen was found present on the underwear of all the above named three accused persons.

Thereafter, Dr.Sumita, Medical Officer, Civil Hospital, Yamuna Nagar, deposed as witness No.2 and tendered into evidence her duly sworn attested affidavit as EX.PW2/A and opined on the basis of clinical examinations that possibility of sexual assault cannot be ruled out in this case. Then on the basis of the FSL report, semen was detected on the Salwar and shirt.

A perusal of the affidavit of Dr. Sumita, Medical Officer, Civil Hospital, Yamuna

Nagar, would show that she had stated in her affidavit EX.PW2/A, that there were two marks found i.e. one was reddish blue contusion which was below the left eye and on nose and the second contusion on lateral aspect of left arm. She further stated in the affidavit that there was no external mark of fresh injury on the body and that on external examination no injury mark was seen and further that swabs could not be taken because of menstruating.

The prosecutrix while appearing as PW.4 deposed that she has two sons and one daughter. Her husband is working in Oriental Engineering Works, Yamuna Nagar. On 15.2.2015, she had gone to the house of her sister Ram Kali wife of Rajbir in village Gadhauli. She stayed there for two days. On the third day, i.e. on 17.2.2015, at about 4/4:30 PM, she received a phone call from Kamaljeet who enquired from her as to where she was. She told him that she was at the house of her sister in Gadhauli. At 5/5:30 PM, accused Kamaljeet along with Nasib and Amit reached in village Gadhauli and asked her to board his car. All the three accused facing trial told that she was having some honour but they forcibly made her and her children Harpreet and Nitin to sit in the car. The persons present there asked them as to where they were taking them on which Kamaljeet threatened them and left. When she made several requests to the accused, they alighted her daughter Harpreet at Bus Stand, Bhambholi and took her and her son towards Bilaspur side. There they inquired about a room from their friend. However, since no room was found available, they took the car to a dry river in which there were sand and stones and a hut nearby. They dragged her to the hut. Firstly accused Kamaljeet committed rape upon her and then he asked Nasib to do wrong act/Mauj Masti with me addressing me as Randi and Gittali on which Nasib accused also committed rape upon her. Accused Amit was standing with her son and was beating him. Then Kamaljit asked Amit also to commit wrong act with her and he (Amit) committed rape upon her. At about 8/8:30 PM, she rescued herself and her son from accused and reached on the main road and by an auto-rickshaw, she reached Police Station, Chhappar and disclosed the entire incident to the police. The police asked her that a lady police officer would deal with the case. Next day i.e. on 18.2.2015, Parveen Kaur reached there and recorded her statement EX.PW4/A, which bears her signatures. She was also got medico-legally examined and after medico-legal examination, her clothes i.e. Salwar EX.M.O.4 and shirt EX.M.O.5, were taken by the doctor and thereafter, she was produced before Ms.Archana Kohli, JMIC, Jagadhari, who recorded her statement (EX.PW4/B) under Section 164 Cr.P.C. She identified her signatures on the same at points A, B and C. She stated that all the three accused are present in the Court and that she belongs to Harijan caste. On 19.2.2015, she showed the place of occurrence to the DSP.

Pala Ram husband of the prosecutrix who appeared as PW.7 deposed that the prosecutrix is his wife. They have three children namely Neeraj Kumar, Harpreet and Nitin Kumar. All the three accused facing trial committed rape upon his wife and the same was disclosed to him by his wife on 17.2.2015 at about 9/9:30 PM telephonically stating that three persons had committed rape upon her and also

told that she was reaching Police Station, Chhappar through an auto-rickshaw and asked him also to reach there and he accordingly reached the Police Station. Next day, the police registered the FIR. He further stated that he belongs to Harijan (Chamar) caste which falls in the Scheduled Caste. On 1.3.2015, he had produced the Caste Certificate of his wife EX.PW7/A, attested by Notary before the police and the same was taken into possession by the police vide Memo EX.PW7/B which bears his signatures.

ASI Tarsem Lal PW.8 has deposed that appellants Kamaljeet and Nasib, were arrested from Bus Stand, Bhambholi on 19.2.2015.

In defence, the appellants had examined Pawan Kumar, Warder, District Jail, Yamuna Nagar, who deposed that during the trial, the prosecutrix had come to meet appellant Kamaljeet in Jail on 22.5.2015.

We have heard the learned counsel for the parties and perused the record.

The learned trial Court has primarily relied upon the testimony of the victim as well as the medical evidence to hold the appellants guilty and convicted all the three appellants as stated above.

The learned counsel for the appellants has laid a frontal challenge to the testimony and credibility of prosecutrix (PW-4). He has pointed out from the cross-examination of the prosecutrix in which she stated that appellant Kamaljeet used to see her with a bad eye and that she had made complaint against him 2 - 3 times but the same was compromised. As per the counsel for the appellants, there was no reason for her to have first entertained the phone calls of the appellant Kamaljeet and then to disclose her location to him. He has further argued that if any man had a bad eye on the women who had even filed complaints against him such a woman would normally never entertain the phone call of such a person and go to the extent of disclosing her whereabouts. He has also pointed out that the explanation given by her of his behavior is highly incredible because she stated as follows: -

"When Kamaljit gave me phone call, I told him I about my presence at Ghandauli because I thought elders in his family were good human beings so I thought he would also be a good human being."

The learned counsel for the appellants has also submitted that the prosecutrix had in her statement under Section 164 Cr.P.C. stated that accused Kamaljeet was threatening her for many days and that he would kidnap her daughter and that she was therefore, hiding in the house of a neighbor due to fear of Kamaljeet and thereafter, she went to the house of her sister and Kamaljeet came to know where she was and telephonically called her. However, in her statement during trial prosecutrix while appearing as PW.4 had stated that she had told about her presence at Ghadauli and that she did so because she thought that elders in his family were good human beings and so she thought that he would also be a good person.

The argument raised by the learned counsel for the appellants was that the deposition made by the prosecutrix was not credible and was improbable and has demolished the case.

The prosecutrix further stated that the house of her sister was surrounded from all sides by other houses and further stated as follows:-

"The car was at a distance of approximately 300/400 yards from the house of my sister. Accused Kamaljeet had come inside the house of my sister to call him. Volunteered he gave him beatings also inside the house. At that time I raised alarms but my sister and her husband were not at home. Volunteered their daughters were at home. Many persons mostly the ladies came at the spot. However, I kept mum and they thought that the accused was my husband. I did not tell any one that the accused was beating me. I myself also did not tell any one that the accused was not my husband. From the house, I was taken up to car by dragging. At that time also I did not tell any one any thing. Volunteered I was thinking that we may be defamed. My children went to the car of their own. My children were also raising a lot of hue and cries. They also did not disclose the identity of the accused to any one. There was no proper day light at that time. The number of persons who gathered at the spot were 20-25. They all could not catch hold of the accused persons. Volunteered as I was mum. I and my children were sitting on the rear seat of the car."

As per the learned counsel, in the normal course of human conduct, if such a thing happened there was no occasion for the prosecutrix to have remained silent, if somebody has forcibly abducted her and her children and once she raised alarm and people had gathered, there was no reason for her to accompany the appellants. There was no explanation about her daughter who was aged about 17 years and was dropped by the appellants at Bus Stand, Bhambholi. As per the learned counsel, they would have normally feared that the daughter would immediately inform her father or the police about the abduction. He has further argued that mere presence of semen on the underwear of the appellants who were arrested after two days could not prove that they had sexual intercourse with the prosecutrix. He has further argued that act of rape on the bare ground would result in at least abrasions and lacerations but except for one small injury (which was sustained on the face) there was no injury mark upon the prosecutrix. He has further argued that the human semen found on the Salwar of the prosecutrix and on the underwear of the accused were not compared by any test and therefore, according to the learned counsel for the appellants, the medical evidence does not suggest any act of rape.

On the other hand, learned State counsel has argued that in the present case, the prosecution has been able to prove their case and according to the learned State counsel, the prosecution has been able to corroborate the statement of the prosecutrix along with the medical evidence. He has further submitted that the legal presumption under Section 114-A of the Indian Evidence Act, will come into play and that the visit of the prosecutrix to meet the appellant Kamaljeet in Jail

cannot falsify the case of the prosecution. He has further submitted that detection of the semen on the clothes of the accused as well as of the victim proves the case of the prosecution.

The Supreme Court in *Tameezuddin alias Tammi Vs. State (NCT of Delhi)*, (2009) 15 Supreme Court Cases, 566, observed that in case of rape the evidence of the prosecutrix must be given pre-dominant consideration but to hold that this evidence has to be accepted even if the story is improbable and belies the logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter and while considering the background of that case, it was further observed that merely because the vaginal swab and swab of semen thereupon would have the evidence of sexual intercourse and not of rape and the semen found was not co-related with the appellants as their blood samples had not been taken. In the aforesaid case, it was held by the Supreme Court that the doctors had opined that there was nothing to suggest that the accused was incapable of performing sexual intercourse and the report of the Laboratory revealed the presence of semen on the vaginal swab as well as on the Salwar. The relevant portion of the judgment is reproduced as under:-

"9 It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.

11 As already mentioned above the medical evidence does not support the commission of rape. Moreover, the two or three persons who were present in the factory premises when the rape had been committed were not examined in Court as witnesses though their statements had been recorded during the course of the investigation. In this background, merely because the vaginal swabs and the salwar had semen stains thereon would, at best, be evidence of the commission of sexual intercourse but not of rape. Significantly also, the semen found was not co-related to the appellant as his blood samples had not been taken."

The Supreme Court in (2007) 12 Supreme Court Cases 57, *Radhu Vs. State of Madhya Pradesh*, observed as follows:-

"12. Dr. Vandana (PW-8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion as to whether any rape had been committed. These were also recorded in the examination Report (Ex. P8).

She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg, of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination.

But no evidence is placed about the results of the examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

13 We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration."

The Supreme Court in *Rai Sandeep alias Deepu Vs. State (NCT of Delhi)*, (2012) 2 Supreme Court Cases 21, discussed the concept of sterling witness as follows:-

"22 In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

We have gone through the testimony of the prosecutrix and have even extracted the relevant portion of the same above. There is no doubt that it is settled law that testimony of the victim of a sexual offence has to be placed at a high

pedestal yet it cannot be held as a matter of law that every utterance has to be implicitly believed. From the impugned judgment passed by the learned trial Court, it appears that the appellants have been convicted solely relying upon the deposition of the prosecutrix. Neither any independent witness nor even the medical evidence supports the case of the prosecution. When the prosecutrix made statement (EX.PW4/B) under Section 164 Cr.P.C. on 18.2.2015 before the learned Judicial Magistrate First Class, Yamuna Nagar, she stated that accused Kamaljeet had been threatening her for many days that he would kidnap her daughter and therefore, she had hidden herself along with children in the house of a neighbor due to fear of Kamaljeet and thereafter, she had gone to the house of her sister at village Gadhauli. She further stated that Kamaljeet came to know where she was and he called her on phone.

During trial, she stated in her cross-examination that Kamaljeet used to see her with a bad eye and that she had complained against him 2 -3 times in the Police Station, Chhappar and the matter was compromised. However, in the same breath, she stated that she told Kamaljeet about her presence at Gadhauli, and the reasoning given by her in her statement was that she thought that the elders of his family were good human beings and so she thought he would also be a good person. She further stated that when the accused came to the house of her sister and gave beatings to her, she raised alarm and many persons came on the spot but she did not tell anything to them. The testimony of the prosecutrix would, therefore, raise various issues as to why she at the first instance disclosed her whereabouts to Kamaljeet when she herself had stated that he had a bad eye upon her and she was rather hiding from him and had fled away from her own house to the house of her sister; why she did not inform the people who had gathered around the house of her sister that Kamaljeet was trying to forcibly abduct her; why the appellants would drop her 17 years old daughter knowing fully well that she can inform her father or the police and accompanied with the fact that the prosecutrix had stated in her statement under Section 164 Cr.P.C. that they wanted to kidnap her daughter.

Apart from above, while dissecting the medical evidence which has been produced on record, Dr.Abhimanyu had opined that there is nothing to suggest that the concerned persons were incapable of performing the sexual intercourse and Dr.Sumita had opined that the possibility of sexual assault cannot be ruled out.

A perusal of the affidavits which have been filed by Dr.Abhimanyu and Dr.Sumita show that there were only two contusions i.e. one below the left eye on the nose and the second on the left arm and it was specifically stated in the report that there were no external marks of fresh injury on the body. The vaginal swabs could not be taken because she was menstruating on that day, but fact remains that as per the allegations, the prosecutrix was dragged and taken to a dry river and the hut and it has also come in the cross-examination of the prosecutrix that the hut was made of straw (phoos) and there was stone and sand on the ground

in the hut. However, no bruises were found elsewhere on the body of the prosecutrix as per the medical report. Similarly, as held by the Supreme Court in Tameezuddin (supra), mere presence of semen on the clothes itself cannot prove that the act of sexual intercourse was committed particularly when it was not correlated with the persons whose clothes are examined by way of other tests including the blood samples.

It is true that conviction can certainly be based upon the sole testimony of the prosecutrix but this can be done only when the testimony is so strong that even in the absence of any corroborating evidence, the conviction is safe. Therefore, each and every case has to be considered on its own facts and circumstances. In the present case, however, there is no answer to the questions which are discussed above and the evidence available on record raise doubt in the manner in which the prosecution story has been put forth. It cannot be also lost sight of that no witness of the locality was examined who may have corroborated the occurrence which may have taken place and even the daughter and son of the victim were not examined. There are clear contradictions in the testimony of the prosecutrix which clearly demolish the case of the prosecution at the threshold. The medical evidence does not support the prosecution story at all. In such a case, it cannot be said that the prosecution has been able to prove the allegations beyond any reasonable doubt. The other argument raised by the learned State counsel regarding presumption under Section 114-A of the Indian Evidence Act, would therefore, be of no avail as the above provision pertains to presumption of consent once sexual intercourse is proved.

Consequently, the present appeal is allowed. The judgment of conviction dated 8.12.2015 and order of sentence dated 10.12.2015 whereby the appellants namely Kamaljeet, Nasib and Amit @ Mittu, have been convicted and sentenced is hereby set aside. The appellants are acquitted of all the charges and they be set at liberty forthwith if not required in any other case.

Since the main case has been decided, the pending C.M. application, if any, also stands disposed of.