

High Court Of himachal pradesh

Criminal Appeal No. 340 Of 2012

Judgment Date:

16-11-2016

State Of Himachal Pradesh

..Petitioner

Suraj @ Surjit Singh & Another

..Respondent

Bench:

**{HON'BLE MR. JUSTICE SANJAY KAROL , HON'BLE MR. JUSTICE VIVEK SINGH
THAKUR }**

Citation:

ILR 2017 1 HP 3 ; LQ/HimHC/2016/2328 ;

Sanjay Karol, Judge

1. In relation to FIR No.94, dated 9.11.2008, registered at Police Station, Nirmand, District Kullu, Himachal Pradesh, accused Suraj and Hari Singh, hereinafter referred to as the accused, were charged to face trial, for having committed offences, punishable under Section 376(g) of the Indian Penal Code; and Sections 341 and 506-II, both read with Section 34 of the Indian Penal Code.

2. Finding the prosecution not to have established its case, through the testimonies of 12 witnesses, trial Court, vide judgment dated 25.4.2012, passed by Additional Sessions Judge, Kinnaur at Rampur, Himachal Pradesh, in Sessions Trial No.25-AR/7 of 2009/11, titled as State of Himachal Pradesh v. Suraj @ Surjit Singh & another, has acquitted both the accused on all counts.

3. Prosecution case primarily rests upon the testimonies of prosecutrix (PW-1) as also her husband Durga Dass (PW-2).

4. It is not in dispute that prosecutrix is a married lady. Allegedly, she was subjected to sexual assault by both the accused on 26.9.2008. This was in a secluded path, while she was on way to her parental house at a place known as Lagora, accused Suraj caught her by her arm and after committing sexual assault, called his co-accused Hari Singh on telephone, who also committed the said act. Such incident of assault never came to be reported by her to anyone, purely on account of threats extended by these two persons. However, subsequently prosecutrix realized that she was pregnant, as such, on 8.11.2008, she disclosed the incident to her husband, who immediately reported the matter to the police, which led to the registration of FIR, referred to supra. Prosecutrix was got medically examined and report of the doctor (Ex.PW 4/B & Ex.PW 4/C) taken on record. During the

course of investigation, so conducted by ASI Kanwar Singh (PW-8) and SI Dulo Ram (PW-9), prosecutrix gave birth to a child. Police got conducted test of DNA profiling, which revealed accused Suraj to be the biological father of the child.

5. When we peruse the testimonies of the prosecutrix and her husband, we find the prosecution not to have established its case. Testimonies of the witnesses cannot be said to be inspiring in confidence and their version believable. We find testimony of the prosecutrix to be self contradictory. Also, there are improvements, exaggerations and embellishments on record, which not only remain unexplained but further renders their version to be doubtful. In our considered view, delay of more than 1? month in lodging the FIR also remains unexplained. Also, if the version of prosecutrix and her husband is to be believed, then it remains unexplained as to how, either they or the Investigating Officer, was able to reach up to the accused at the first instance, for in the FIR, identity of the accused remained undisclosed. In fact, there is nothing disclosed herein, which would even remotely link, only the accused to the crime.

6. Perusal of the FIR reveals that prosecutrix was subjected to sexual assault on 26.9.2008. At the time of lodging of the FIR, she only disclosed that one person, whose name she is not aware, but whom she can identify, for he plies a bus as a driver on Tharla-Ani route, had subjected her to rape, and whereafter, on telephone, he called the Conductor of the Bus, who also subjected her to rape. She further narrates that purely on account of shame, she could not disclose the incident to anyone. Only when she realized that she had conceived a child, which cannot be that of her husband, for he had already undergone operation of sterilization, did she disclose the incident to her husband on 8.11.2008.

7. Quite apparently, the Investigating Officers did not conduct the Test Identification Parade. There is nothing on record to establish as to how police reached to the accused. No doubt, in Court, prosecutrix and her husband have identified the accused to be the persons who allegedly committed the crime, but however, the question which arises for consideration is as to how, at the first instance, did the police reach to the accused and got conducted their medical examination during the course of investigation. Police was not aware of the identity of the accused, which also never came to be disclosed either by the prosecutrix or her husband. Bus driven by the accused was not the only one plied on the said route. Certainly, police has not recorded the whole truth. We clarify that this fact has not weighed with us at all, while deciding the present appeal.

8. Prosecutrix wants the Court to believe that out of shame and alleged threats, she did not disclose the incident to anyone, muchless her parents or her husband. But we do not find this version of hers to be inspiring in confidence. In fact, the alleged threats never came to be disclosed by her either to her husband or to the police. Quite evidently, prosecutrix disclosed the incident and lodged the complaint only, as is so admitted by her, after she realized that she had become pregnant, for she uncontrovertedly states that ?I have filed this case as I got pregnant?. One may only observe that the alleged threats is a mere exaggeration, for she admits not to have got recorded the said fact, in her previous statement, with which she was confronted. Also, prosecutrix admits that from the spot of crime, she went to her parents? house. She admits that closeby, i.e. within a vicinity of half a kilometer, one JCB machine was operating. Alleged incident took place not in the thick of dark or middle of the night. The alleged crime came to be committed during broad day light. Prosecutrix walked up to her parental house. Hence, she could have immediately reported the incident to anyone. She also admits not to have resisted the acts of the accused. In fact, she goes to state that she had asked the Driver not to call the Conductor. Admittedly, this Conductor reached the spot after five minutes. What all did she do during this period remains unexplained by her. It is not her case that alleged threats came to be extended prior to accused Suraj ravishing her or immediately thereafter. Her version of having been subjected to sexual assault is thus rendered uninspiring in confidence.

9. Version of the prosecutrix of accused Suraj having called, on telephone, his co-accused Hari Singh, also remains uncorroborated on record. Record of the telephonic conversation has not been produced in Court. That apart, this version of the prosecutrix is rendered doubtful from her admissions made in the cross-examination part of her testimony, where she admits that the Bus in question stood parked at village Kalag, which was at a distance of 4-5 kms from the spot of crime. It is humanly impossible to cover such a distance, on foot, within

five minutes.

10. Significantly, she did not make any attempt of finding the identity of the accused. She only states that later on ?I came to know that the name of the Driver was Suraj and name of the Conductor was Hari?, whom she identified in Court. On this issue, we find her to have contradicted herself, for she states that ?I had not seen the accused person prior to this occurrence as they had never met me before?, but in the very next breath she states that ?it is correct that I had visited Durah two to four times in the bus of the accused person?. It is not the case of prosecution that the Bus driven by the accused was the only one which plies on the Tharla-Ani route. She admits that after the occurrence, she continued to conduct her day-to-day affairs in a normal manner. She had been freely visiting several places, including her relatives and house of her parents. Hence, her version of both the accused having subjected her to sexual assault is absolutely uninspiring in confidence.

11. When we peruse the testimony of Durga Dass (PW-2), husband of the prosecutrix, we find him not to have advanced the case of the prosecution any better or further. He only states that later on, on enquiry made by him, he learnt about the identity of the assailants, but then from whom and how, he does not disclose.

12. It has come on record that within 2? months of birth, the child died. To establish the factum of paternity, our attention is invited to the report of the Expert (Ex.PW-8/N), which prima facie establishes that accused Suraj was the biological father of the deceased baby Satish Kumar. This fact alone itself would not be sufficient enough to establish complicity of the accused in the crime. To us, it appears not to be a case of sexual assault but that of consent, if any.

13. Under what circumstances, Court can direct a party to undergo DNA test, what is the presumptuous value of the report of DNA examination, is now well settled by the apex Court in Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365 ; Narayan Dutt Tiwari v. Rohit Shekhar and another, (2012) 12 SCC 554; Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107 ; Selvi and others v. State of Karnataka, (2010) 7 SCC 263 ; Patangi Balarama Venkata Ganesh v. State of Andhra Pradesh, (2009) 14 SCC 607 ; Jarnail Singh and others v. State of Punjab, (2009) 9 SCC 719 ; Narender G. Goel v. State of Maharashtra and another, (2009) 6 SCC 65 ; Kamalanantha and others v. State of T.N., (2005) SCC 194; and Banarsi Dass v. Teeku Dutta (Mrs) and another, (2005) 4 SCC 449 .

14. In the given facts and circumstances, one need not dilate thereupon, for the simple reason that in the instant case testimony of the prosecutrix itself, on the question of sexual assault, is found to be uninspiring in confidence.

15. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons gang raped the prosecutrix, and in furtherance of their common intention, they wrongfully restrained and also criminally intimidated her.

16. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

17. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94 , it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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