

A BAL KISHAN
v.
STATE OF HIMACHAL PRADESH
(Criminal Appeal No. 1659 of 2008)

OCTOBER 22, 2008

B [DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]

C *Penal Code, 1860 – ss. 452, 323 r/w s. 34 and s. 376(2)(g)*
– Conviction under – Prosecution case that accused along
with others committed rape on prosecutrix – Conviction by
courts below – Challenge to, by accused – Held: Prosecution
D failed to prove accusations as regard the accused – It did not
lead any evidence to show presence of accused at the place
of occurrence or to have participated in the crime – Test iden-
tification parade did not meet requirements of law – Hence,
accused is acquitted – Evidence.

E According to the prosecution case, on the fateful day,
the appellant along with others forcibly dragged the pros-
ecutrix to the forest and committed rape on her. PW 4-old
lady who was living nearby, tried to intervene but could
not save the prosecutrix. PW 3-son of prosecutrix aged
11 years, got so scared that he hid himself. Someone in-
formed the police. The police reached the place of inci-
F dent and over-powered two of the appellants and the sixth
accomplice on the spot. The statement of the prosecutrix
was recorded. She narrated the incident and stated that
the accused persons were calling each other by names
and that is how she knew names of persons who com-
mitted the offence. Investigation was carried out. Trial
G court relying on the evidence of PW 1-prosecutrix, PW 3
and PW 4 convicted all the accused for offence punish-
able u/ss. 452, 323 r/w s. 34 and s. 376(2)(g) IPC, though it
found that the test identification parade conducted by the

magistrate-PW 7 did not meet the requirements of law as the prosecutrix stated in the witness box that she had identified five accused in the police station and that too before identification. However, the sixth accomplice was acquitted. The accused persons filed appeal which were disposed of. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1 It is not disputed by counsel for the State that unlike some others the appellant was not caught at the place of occurrence. The trial court had itself held that there was no test identification parade in the eye of law. Therefore, identification of the appellant for the first time in court was really of no consequence. The only evidence pressed into service by the prosecution so far as the appellant is concerned, was that his name was similar to one of the names which the accused persons were addressing each other, as stated by the prosecutrix. That cannot be by any stretch of imagination an incriminating material. [Para 7] (1031-D, E)

1.2 No evidence was led to show the presence of the appellant at the spot of occurrence or to have participated in the crime. That being so, the prosecution has miserably failed to prove the accusations so far as the appellant is concerned. He is acquitted of the charges. [Para 7] (1031-F)

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 1659 of 2008

From the final Judgment and Order dated 29.3.2007 of the High Court of Himachal Pradesh at Shimla in Crl. Appeal No. 414 of 2003

Jagjit Singh Chhabra (A.C.), Tatini Basu and Sudhir Nandrajog for the Appellant.

Naresh K. Sharma for the Respondent.

A The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

B 2. Challenge in this appeal is to the judgment of a Division bench of the Himachal Pradesh High Court dismissing the appeal filed by the appellant questioning the conviction for offence punishable under Sections 452, 323 read with Section 34 and Section 376(2)(g) of the Indian Penal Code, 1860 (in short the 'IPC').

C 3. By a common judgment five appeals preferred by the accused persons were disposed of. The accused persons were found guilty of offence punishable under the aforesaid offences by learned Sessions Judge, Kangra at Dharamshala.

4. The prosecution versions during trial is as follows:

D The prosecutrix, aged 32 years, was married to a man, who was employed at a butcher's shop at Baijnath. Her husband fell ill and was perhaps rendered incapable of doing the job with the butcher. The prosecutrix approached the butcher for employing her son, who was then aged just eleven years, for doing odd jobs. The butcher offered to employ her son for grazing his sheep and goats on monthly salary of Rs.700/-. On E 3.6.2002 the prosecutrix took her son to the butcher's shop at Baijnath with the intention of leaving him there. Her son was required to take the sheep and goats to the forest, by the employer, immediately after they reached. The prosecutrix accompanied her son to the forest. They returned with the herd in the evening. By then the last bus going towards the village of the prosecutrix, had already left. The butcher offered that she could stay with her son in the upper storey of the shop for the night. F She accepted the offer. Around 9.30 p.m., when the prosecutrix and her son were sitting in the room on the upper storey of the shop of the butcher, accused Kamlesh, Arjun Singh and Suresh Kumar went there. They forcibly dragged the prosecutrix out of that room and when they reached the ground floor of the structure, two other persons, appellants, Bal Kishan and Sonu joined G H

them. One more person, named Chuni Lal, who too was tried along with the appellants, also joined them. The prosecutrix was forcibly carried to a near forest. She cried for help. One old lady, living nearby intervened, but she could not get her released. The son of the prosecutrix got so scared that he climbed a truck parked nearby and hid himself in the tool-box. Someone informed the police telephonically. Soon the police reached the forest and over-powered two of the appellants, namely, Kamlesh and Suresh and the sixth accomplice of the appellants, named Chuni Lal (who stands acquitted by the Trial Court), when they tried to flee from the spot on seeing the police. Statement of the prosecutrix was recorded by HC Pawan Sharma, heading the police party that reached the spot. The prosecutrix besides narrating the details about her visit to Baijnath and having gone to the upper storey of the shop of the butcher for night stay and having then been dragged and taken to the forest in the manner as summarized hereinabove, stated that those who committed the rape, were calling each other by the names of Bal Kishan, Arjun, Sonu, Kamlesh etc.

Police investigated the matter and filed the case against the six accused persons. The trial Court charged all the six for offences punishable under Sections 452 read with Section 34, 323 read with Section 34, 376(2)(g) of IPC and Section 3(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.....(in short 'SC.ST Act') because the prosecutrix was alleged to belong to a scheduled caste. All the accused pleaded not guilty to the charge. The Trial Court then proceeded to try the case and ultimately convicted and sentenced the five accused persons as aforesaid, but acquitted their sixth accomplice.

Appellants' plea was that they were not involved in the crime and have been implicated just on suspicion. Learned counsel, representing the appellants, argued that there is no evidence on record establishing the identity of the appellants as the perpetrators of the crime.

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A Prosecution examined the prosecutrix as PW-1, her son
Onkar Chand as PW-3, an old woman, named Gitan Devi, PW-
4, who allegedly tried to get the prosecutrix rescued from the
B accused persons, D.R. Thakur, PW-7, the then Judicial Magis-
trate Baijnath, who conducted the test identification parade,
police Head Constable Pawan Sharma, PW-15, who on the
receipt of telephonic information at the police station about the
incident went to the spot and over-powered three of the alleged
rapists on the spot and recorded the statement of the prosecu-
C trix, under Section 154 of the Code of Criminal Procedure, 1973
(in short 'Cr.P.C.'), and ASI Chain Lal, PW-16 and Dy. S.P.
Prittam Singh, PW-18, who conducted the investigation of the
case. The police also examined lady doctor named, Bindu
Sood, PW-19, who conducted the medico legal examination of
D the prosecutrix and Dr. S.K. Sood, PW-2, who medically exam-
ined the accused persons with a view to ascertaining whether
there were any injury marks on their persons and whether they
were capable of performing sexual intercourse. All the accused
persons took the plea of denial simpliciter and claimed that they
were innocent and had been falsely implicated at the behest of
E the police.

The Trial Court placed reliance on the evidence of the wit-
nesses i.e. prosecutrix PW-1, her son PW-3 and an old women
PW-4. The Trial Court, however, found that the so called test iden-
tification parade conducted by the then Judicial Magistrate,
Baijnath PW-7 did not meet the requirements of law and had no
F evidentiary value. It was noted that the prosecutrix in the witness
box had stated that she had identified five boys at the police sta-
tion on 4.6.2002. It was accepted by her that she had been shown
the accused persons by the police before identification.

G Primary stand before the High Court taken by the appel-
lant was that there was no evidence so far as his involvement is
concerned. He was not apprehended at the spot unlike some
other accused persons. The prosecutrix did not know him and
had clearly accepted this fact. She only stated that the accused
H persons were addressing each other by some names and that

is how she claimed to know the names of the accused persons. The High Court did not find any substance in this plea and as noted above dismissed the appellants' appeal along with other appeals.

5. Learned counsel for the appellant submitted that there was no material to link the accused with the alleged crime. The Trial Court held that there was no test identification parade in the eye of law and this view was affirmed by the High Court. Merely because the accused persons purportedly addressing each other by names that cannot be a ground to hold the appellant guilty without any material to show that he was the person whose name was being uttered by the co-accused persons.

6. Learned counsel for the State on the other hand supported the judgment of the Trial Court and the High Court.

7. It is not disputed by learned counsel for the State that unlike some others the appellant was not caught at the place of occurrence. The Trial Court had itself held that there was no test identification parade in the eye of law. Therefore, identification of the appellant for the first time in court was really of no consequence. Added to that, the only evidence pressed into service by the prosecution so far as the appellant is concerned, was that his name was similar to one of the names which the accused persons were addressing each other, as stated by the prosecutrix. That cannot be by any stretch of imagination an incriminating material.

8. No evidence was led to show the presence of the appellant at the spot of occurrence or to have participated in the crime. That being so, the prosecution has miserably failed to prove the accusations so far as the appellant is concerned. He is acquitted of the charges. He shall be released forthwith from custody unless required to be in custody in connection with any other case.

9. The appeal is allowed.