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OM PRAKASH

v.

STATE OF HARYANA

(Criminal Appeal No. 807 of 2010)

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OCTOBER 14, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND
PRAFULLA C. PANT, JJ.]

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Penal Code, 1860 – ss.376(2)(g), 107 and 109 – Rape of 15 year old girl – Conviction of A-1 and A-2 u/s.376(2)(g), and A-3 (wife of A-2) u/s.109 – Justification – Held: Justified – Evidence adduced by the victim was natural and trustworthy – Delay in lodging FIR was sufficiently explained – Incident occurred at the house of A-2 and his wife A-3 – Positive evidence adduced by the prosecution that A-3 aided the commission of offence by asking the victim to go to her house to take 'lassi' where A-1 and A-2 bolted the room and subjected the victim to rape.

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Dismissing the appeals, the Court

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HELD:1.1. No doubt there is a delay of some twenty days in lodging the first information report but there is sufficient explanation on record for the same. PW5 (victim), who was minor on the date of incident, has stated that she could disclose the horrifying incident only after her mother came back from her maternal house after 20 days. Explanation for delay in lodging FIR gets corroborated by the statement of PW 6 (mother of the victim). [Para 7] [548-E-H]

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1.2. The evidence adduced by the victim is natural and trustworthy and it does not appear that the victim has falsely implicated the appellants due to enmity. [Para 9] [549-D]

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1.3. In the present case, there is positive evidence adduced by the prosecution that A-3 has aided the commission of offence by asking the victim to go to her house to take 'lassi' where A-1 and A-2 bolted the room and subjected the victim to rape. From the record, it appears that for about an hour, the victim was not allowed to go out from the house where she was subjected to rape. It was the house of A-3 and her husband where the incident is said to have taken place. As such, both the courts below have rightly concluded that it cannot be said that A-3 has not abetted the crime in the manner suggested by prosecution. [Para 15] [551-E-G]

Kulwant Singh @ Kulbansh Singh vs. State of Bihar (2007) 15 SCC 670: 2007 (7) SCR 1178 and Priya Patel vs. State of M.P. and another (2006) 6 SCC 263: 2006 (3) Suppl. SCR 456 – referred to.

Case Law Reference:

2007 (7) SCR 1178 referred to Para 10

2006 (3) Suppl. SCR 456 referred to Para 10

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 807 of 2010.

From the Judgment and Order dated 30.07.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 35-SB/97.

WITH

CrI. A. Nos. 1309 and 1310 of 2009

Rishi Malhotra, Prem Malhotra for the Appellant.

Nupur Chaudhary, Vivekta Singh, Kamal Mohan Gupta for the Respondent.

A The Judgment of the Court was delivered by

PRAFULLA C. PANT, J. 1. These appeals are directed against the judgment and order dated 30.7.2008 passed by the High Court of Punjab and Haryana whereby conviction and sentence recorded against accused/appellants Om Prakash and Kartar Singh under Section 376(2)(g) IPC, and one against accused/appellant Chhoti, under Section 109 IPC, are affirmed.

2. The prosecution case in brief is that on the day of incident, prosecutrix aged about 15 years, was alone in her house, in Village Jagan. Her mother had gone to Village Hasanga on account of death of her grand mother, and other family members were also not present in the house. Accused/appellant Chhoti came there and asked the prosecutrix to bring 'lassi' from her house. On this, prosecutrix went to the house of accused Chhoti but as soon as she entered the house, accused Kartar Singh (husband of Chhoti) and another accused Om Prakash, who were already sitting there, bolted the door from inside and the prosecutrix was raped by them. She was freed by them after about an hour. She was threatened to be eliminated if she disclosed about the incident to any one. Prosecutrix came back to her house and did not disclose about the above incident for 20 days till her mother came back to the village on 12.6.1995 from her maternal house. The prosecutrix narrated the incident to her mother whereafter she was taken by her father to get the report lodged at the Police Station Agroha. On 13.6.1995, first information report was registered; and investigation was taken up by SI Jaipal Singh (PW8) who inspected the spot and after interrogating the victim, took her to Ilaqa Magistrate where her statement was got recorded under Section 164 Cr.P.C. Thereafter the prosecutrix was taken to hospital where she was medically examined by Dr. Sunita Bishnoi (PW9) who observed in her report Exb. PC that secondary sexual characters of prosecutrix were found well developed. It is further reported that the victim disclosed to the Medical Officer the history of rape allegedly committed about

20 days back. No marks of external injury were found on her body. There was no mark of injury over perineum and thighs. Hymen was of healed ruptured type and admitted one finger easily. The victim was undergoing her periods. She was referred to Radiologist for determination of her age. Dr. Pawan Jain (PW2), after radiological examination, opined in his report Exb. PE that the girl was aged between 14 to 16 years. Her upper end of radius was found fused but lower end of radius was not yet fused. Upper end of fibula was also not found fused.

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3. After investigation, charge-sheet was submitted by the police before the Magistrate for trial of accused Om Prakash, Kartar Singh and Chhoti in respect of offences punishable under Section 376, 342,506 r/w Section 34 IPC.

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4. On committal of the case, after hearing the parties on 26.9.1995, the trial court framed charge for the offence punishable under Section 376 IPC against accused Om Prakash and Kartar Singh. As against accused Chhoti (wife of accused Kartar Singh), charge was framed for the offence punishable under Section 109 IPC for aiding the commission of rape. All the three accused pleaded not guilty and claimed to be tried. On this, the prosecution got examined eleven witnesses namely; PW1 Dr. Dale Singh, PW2 Dr. Pawan Jain, PW3 Inderjit, PW4 H.C. Ramphal, PW5 prosecutrix, PW6 Chando (mother of prosecutrix), PW7 ASI Krishan Lal, PW8 SI Jaipal Singh, PW9 Dr. Sunita Bishnoi, PW10 Baldev Singh and PW11 Gopal Krishan. Oral and documentary evidence was put to the accused, in reply to which, the accused alleged that the evidence is incorrect and false and they were implicated due to enmity. Accused Kartar Singh took a specific defence plea that he was falsely implicated, after prosecutrix had undergone abortion in a private nursing home and she suspected that it was he (Kartar Singh) who spread the news in the village about the abortion, and due to that reason, he was falsely implicated. The trial court, after examining the evidence

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- A on record and hearing the parties, found that the prosecution has successfully proved charge of offence punishable under Section 376(2)(g) IPC against accused Om Prakash and Kartar Singh, and offence punishable under Section 109 IPC against accused Chhoti. After hearing on the sentence, the trial court sentenced each one of the accused Om Prakash and Kartar Singh to undergo rigorous imprisonment for a period of 10 years and directed them to pay fine of Rs. 10,000/- each. Accused Chhoti was sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs. 10,000/-.

D 5. Aggrieved by the said judgment and order dated 16.12.1996 passed by the learned Additional Sessions Judge, Hissar, the convicts filed appeal before the High Court of Punjab and Haryana which was dismissed vide impugned judgment and order dated 30.7.2008, challenged before us.

E 6. We have gone through the record of the trial court and also considered the submissions of the learned counsel for the parties.

F 7. No doubt there is a delay of some twenty days in lodging the first information report but there is sufficient explanation on record for the same. PW5 (victim), who was minor on the date of incident, has stated that she could disclose the horrifying incident only after her mother came back from her maternal house after 20 days. PW5 (victim) narrated to her mother as to how she was duped by accused/appellant Chhoti who sent to her house to take 'lassi', and the fact that she was subjected to rape by the two accused namely; Om Prakash and Kartar Singh. She told that after she went in the house of Chhoti, she was raped by accused Om Prakash and Kartar Singh who threatened her of dire consequences before she was freed. Explanation for delay in lodging FIR gets corroborated by the statement of Chando PW 6 (mother of the victim). Both the witnesses have been subjected to lengthy cross-examination

but nothing has come out to create reasonable doubt in their testimony. A

8. There is sufficient evidence on record to prove that on the date of incident the victim was aged less than 16 years. Not only the report Exb. PE prepared by Radiologist discloses that the age of the victim was between 14 to 16 years, the school certificate (Exb. PS) proved by Gopal Krishan (PW11), Headmaster of Government Middle School, Jagan proves the fact that date of birth of the victim was 10.1.1980 which means that in June, 1995, she was only 15 years old. As such the consent of the victim is also not material in the present case. B C

9. On behalf of the appellants, though it has been pleaded that the appellants were falsely implicated due to enmity but on scrutiny of the evidence on record, we agree with courts below that the evidence adduced by the victim is natural and trustworthy and it does not appear that the victim has falsely implicated the appellants due to enmity. D

10. It is vehemently argued on behalf of the appellant Chhoti that she being a woman, neither can be convicted under Section 376 IPC read with Section 34 IPC nor under Section 109 IPC. In this connection, our attention was drawn to the case of *Kulwant Singh @ Kulbansh Singh vs. State of Bihar* (2007) 15 SCC 670. Paragraph 12 of the said judgment reads as under: E F

“Where a person aids and abets the perpetrator of a crime at the very time the crime is committed, he is a principal of the second degree and Section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment of that offence. Considering the definition in Section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person G H

A can be guilty of abetment by instigation. Section 109 is
 attracted even if the abettor is not present when the offence
 abetted is committed provided that he had instigated the
 commission of the offence or has engaged with one or
 B more other persons in a conspiracy to commit an offence
 and pursuant to the conspiracy some act or illegal
 omission takes place or has intentionally induced the
 commission of an offence by an act or illegal omission. In
 the absence of direct involvement, conviction for abetment
 is not sustainable. (See *Joseph Kurian v. State of Kerala*
 C (1994) 6 SCC 535.)”

Also placing reliance to the case of *Priya Patel vs. State
 of M.P. and another* (2006) 6 SCC 263, it is contended that
 accused appellant Chhoti has been wrongly convicted under
 Section 109 IPC read with Section 376 IPC.

D 11. Mr. Rishi Malhotra, learned counsel for the appellants
 relying on the cases of *Kulwant Singh* (supra) and *Priya Patel*
 (supra) submitted that merely for the reason that someone has
 not protected the victim, one cannot be convicted for the offence
 E of abetment.

12. However, accused Chhoti is neither convicted under
 Section 376 IPC, nor found guilty (of abetment) by reading the
 offence punishable with the aid of Section 34 IPC. Rather she
 F is convicted and sentenced only under Section 109 IPC for
 abetment as she aided the commission of rape by other two
 accused.

13. Section 109 IPC provides that whoever abets any
 offence, shall, if the act abetted is committed in consequence
 G of the abetment, and no express provision is made for the
 punishment of such abetment, be punished with the punishment
 provided for the main offence.

14. Section 107 IPC defines “abetment of a thing” as
 H under:

"107. Abetment of a thing.—A person abets the doing of a thing, who— A

First — Instigates any person to do that thing; or

Secondly—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or B

Thirdly — Intentionally aids, by any act or illegal omission, the doing of that thing. C

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing." D

15. In the light of above provisions of law, we have carefully gone through the record and considered the cases referred as above. We find that in the present case, there is positive evidence adduced by the prosecution that accused Chhoti has aided the commission of offence by asking the victim to go to her house to take 'lassi' where accused Om Prakash and Kartar Singh bolted the room and subjected the victim to rape. From the record, it appears that for about an hour, the victim was not allowed to go out from the house where she was subjected to rape. It was the house of accused Chhoti and her husband where the incident is said to have taken place. As such, both the courts below have rightly concluded that it cannot be said that accused Chhoti has not abetted the crime in the manner suggested by prosecution. We concur with the view taken by the courts below. Intentional aiding of the offence is covered by the third clause mentioned in Section 107 IPC. E F G

16. Lastly, it is submitted by the learned counsel for the appellants that the sentence awarded against accused Chhoti H

A be reduced to the period already undergone by her. However, considering the facts and circumstances of the case and after going through the record, we find that the sentence awarded by the trial court as upheld by the High Court, is just and proper.

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C 17. Therefore, we find no force in these appeals which are liable to be dismissed. Accordingly, all the three appeals are dismissed. Accused Chhoti, Kartar Singh and Om Prakash were granted bail by this Court vide orders dated 18.5.2009, 20.7.2009 and 16.4.2010 respectively. Consequent upon the dismissal of their appeals, accused/appellants Om Prakash, Kartar Singh and Chhoti shall be taken into custody forthwith to serve out the remaining of their sentence.

Bibhuti Bhushan Bose

Appeals dismissed.