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Om Prakash Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Jul-30-1999

Reported in : 2000CriLJ1591

Judge : R.L. Khurana and M.R. Verma, JJ.

Acts : Indian Penal Code (IPC), 1860 - Section 376(2); ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Cri. Appeal No. 4 of 1999

Appellant : Om Prakash

Respondent : State of H.P.

Advocate for Def. : B.B. Sharma, Asstt. Adv. General

Advocate for Pet/Ap. : Anup Chitkara and Bhupender Ahuja, Advs.

Disposition : Appeal allowed

Judgement :

M.R. Verma, J.

1. This is an appeal preferred by the appellant/accused (hereafter referred to as the 'accused') against the judgment dated November 9, 1998 passed by the learned Sessions Judge, Chamba whereby the accused has been convicted under

Section 376(2)(e) of the Indian Penal Code and has been sentenced to rigorous imprisonment for ten years and to pay fine in the sum of Rs. 2,000/- and in default of payment of fine, to further rigorous imprisonment for one year.

2. Briefly, the case of the prosecution is as follows. PW 1 Pano Devi (hereafter referred to as the 'prosecutrix') is married in village Kandog. On August 20, 1977 she came to her parents' house in village Ohla and was staying there. At the relevant time, she had eight months pregnancy. On August 22, 1997, she left per parental house for Jijwas to bring grass. At about 4.00 p.m. when she reached at a place known as 'Kilat Nali', the accused met her who was staring at her. When the prosecutrix was crossing him, he abruptly caught hold of her and threw her 'Darati' away which she was carrying in her right-hand. The prosecutrix started weeping but the accused forcibly broke the string of her 'Salvar' and laid her on the ground and committed sexual intercourse with her. Being pregnant, the prosecutrix could not adequately resist the assault and continued crying. In the meanwhile, PW-3 Lal Chand, who was carrying grass, appeared on the scene. He asked the accused as to why he was raping the prosecutrix whereupon the accused left the prosecutrix and ran downwards. The prosecutrix narrated the whole occurrece to PW-3 Lal Chand and also showed him the condition of her clothes. Thereafter, alongwith Lal Chand, she returned to village Ohla where she narrated the occurrence to her maternal aunt PW-2 Devki alias Debu and also got her body ckecked up from said Devki.

3. On August 23,1997, the prosecutrix alongwith PW-2 Devki and PW-3 Lal Chand went to Police Station Tissa and reported the occurrence to the police whereupon FIR Ext. PA under Section 376(2)(e) of the Indian Penal Code came into being. The case was investigated by PW-12 Mangal Singh, ASI. The prosecutrix was medically examined by PW-11 Dr. Supriya Atwal in Community Healh Centre, Tissa and issued MLC. Ext. PH about the said medical examination. After visiting the spot, the Investigating Officer prepared the 'Naksha-Mouka-Nazri' Exts. PJ and PL. From the place of occurrence the police took in possession a few human hair and also took in possession some earth, grass etc. Ext. PF.

4. After the arrest of the accused, the Investigating Officer recorded the disclosure statement of the accused about 'Bunyian' and 'Pant' of the accused which he was wearing at the time of the occurrence, Ext. PC and as a consequence, recovered the said clothes at the instance of the accused vide memo. Ext. PB. The wearing apparels, hair and earth etc. so taken in possession alongwith the wearing apparels of the prosecutrix, namely, shirt Ext. P-1 and 'Salvar' Ext. P-2 were sent to the State Forensic Science Laboratory for analysis. The opinion in this regard received by the Investigating Agency is Ext. P-14. The accused was also got medically examined and the M.L.C. about such examination is Ext. PD. On being satisfied that the accused had committed the offence of rape on a pregnant woman, the police accordingly submitted a charge-sheet against the accused.

5. The learned trial Judge framed charge under Section 376(2)(e) of the Indian Penal Code against the accused who pleaded not guilty to the said charge.

6. To prove the charge against the accused, prosecution examined as many as 12 witnesses.

7. The defence taken by the accused in his statement under Section 313 of the Criminal Procedure Code is that prior to their respective marriages he and the prosecutrix were in love and wanted to marry, however, their parents did not agree and this case has now been falsely engineered against him due to enmity. The accused also examined two witnesses in his defence.

8. The learned trial Judge found the accused guilty of the commission of an offence punishable under Section 376(2)(e) of the Indian Penal Code and accordingly convicted and sentenced him as aforesaid, hence this appeal.

9. We have heard the learned counsel for the accused and the learned Assistant Advocate General for the State.

10. A charge under Section 376(2)(e) of the Indian Penal Code can be proved if the prosecution has proved :

(i) that the prosecutrix at the relevant time was pregnant;

(ii) that the accused committed sexual intercourse with her; and

(iii) that the sexual intercourse was against the will or without the consent of the prosecutrix.

11. In this case, in view of the evidence on record, it cannot be disputed and is not disputed that at the time of the alleged occurrence the prosecutrix was having pregnancy of about eight months.

12. To conclude that the accused subjected the prosecutrix to sexual intercourse against her will and/or without her consent, the learned Sessions Judge has relied on the following :

(a) Eye account of the occurrence by PW-1 Pano, the prosecutrix and PW-3 Lal Chand.

(b) Conduct of the prosecutrix in narrating the occurrence immediately thereafter to PW-2 Devki.

(c) The medical evidence to the effect (i) that the prosecutrix was found to have had the sexual intercourse around the relevant time and (ii) that the accused was capable of sexual intercourse.

(d) Recovery of the torn clothes of the accused, i.e. 'Pant' Ext. P-3 and 'Bunyian' Ext. P-4 on the basis of disclosure statement of the accused.

(e) Recovery of the torn clothes of the prosecutrix and existence of semen stains on her 'Salwar'.

(f) The recovery of the hairs of the prosecutrix and the accused from the spot.

(g) The accused having absconded from the village, and

(h) The failure of the accused to explain his conduct and to prove the pleas raised in defence.

13. On consideration of the evidence and relying on the ratio in case State of Punjab v. Gurmit Singh 1996 Cri LJ 1728 : (AIR 1996 SC 1393), the trial Court

held 'that the statement of the prosecutrix Smt. Pano, which is fully corroborated by the medical and circumstantial evidence on record is sufficient to hold the accused guilty of the offence in question'.

14. Be it stated that the case supra relied on by the trial Court as a guide to appreciate the evidence in the case lays down comprehensive guidelines to appreciate the statement of a prosecutrix in a rape case but the learned trial Judge appears to have referred to only a portion thereof, It is, thus, expedient to refer to the guidelines therein in entirety which are as follows :

7. ...The Courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim of such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense

that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable....

It has further been held in para 20 that:

20. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.

If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

15. It is in view of the above guidelines laid down by the Apex Court that we now proceed to examine the evidence on record.

16. PW-1 Pano, the prosecutrix has stated that while going to bring grass from Jijwas, she came across the accused at Kilat Nala who caught hold of her, threw her 'Darati' (sickle) away, then threw her on the path and had forcible sexual intercourse with her against her will and consent. She has further stated that she tried to save herself and in the process the 'Bunyian' of the accused was torn but ultimately the accused overpowered her. When she was being subjected to sexual intercourse, PW-3 Lal Chand came there and rebuked the accused saying as to why he was committing 'forcible' sexual act with her. The accused then ran downwards. She has further stated that with PW-3 Lal Chand she returned to the village and on reaching the parental house where she was then residing, narrated the occurrence to her father's sister PW-2 Devki and on the next day went to Police Station, Tissa alongwith said devku and narrated the occurrence to the police. She was then medically examined where she handed over her wearing apparels to the doctor who medically examined her. She has identified her thumb impression on F.I.R. Ext PA and identified 'Kameej' Ext. P-1 and 'Salwar' Ext. P-2 as the clothes she was wearing at the time of the incident. She has further identified the 'Pant' Ext. P-3 and 'Bunyian' Ext. P-4 as the clothes the accused was wearing at the time of occurrence and which had been taken in possession by the police. She has further stated that the police had found hair on the spot with the help of magnifying glass and had also taken 15 hairs from her head. The police had also taken in possession some earth.

17. It may be pointed out here that there are material contradictions in the statement of the prosecutrix and the contents of the F.I.R. Ext. PA lodged by her.

Firstly, according to the contents of the First Information Report, the prosecutrix started crying when she was caught hold of by the accused and continued to do so till on hearing it PW-3 Lal Chand came on the spot. In her statement she has not stated so. In the F.I.R. her version is that being pregnant she could not resist the assault of the accused but could not cry. It is not her version therein that she caught hold of the accused from the hairs of his head or tore away any of his wearing apparels. In her statement she claims to have torn the 'Bunyian' of the accused and also vouchsafe about the recovery of the hairs of the accused From the spot. Her version in the F.I.R. is that fee accused had broken the string of her 'Salwar' and then laid her on the ground. In her statement she has not stated anything about it. It may also be pointed out here that broken string of the 'Salwar' in a rape case is a very material corroborative piece of evidence. In this case neither the prosecutrix has stated about breaking of the string of her 'Salwar' by the accused, nor it is explained in any matter as to what happened to the broken string and why it has not been produced in evidence. It may also be noticed that as per the contents of the F.I.R. the prosecutrix had seen the accused staring at her when she was at a little distance from him. For a grown up woman, as the prosecutrix is, the manner of staring as described by her, could be sufficient signal to be on guard and being armed with a sickle, she was in a position to put up a stiff resistence.

18. There is an established circumstance also which has to be kept in view while appreciating the statement of the prosecutrix. The circumstance is that on the date of the alleged incident, i.e. on August 22, 1997, one Dropati had died and was cremated in village Ohla. It is admitted by PW-1 Pano, PW-2 Devki, PW-3 Lal Chand, PW-5 Man Singh and PW-6 Chaman Lal. It is further admitted by PW-2 Devki that said Dropati was the maternal aunt of the accused. The cremation took place at about 6.00 p.m. and it is so admitted by PW-1 Pano, PW-5 Man Singh and PW-6 Chaman Lal. Presence of the accused at the time of cremation is a fact admitted by all these witnesses who are near relations of the prosecutrix and not so related to the accused whose forefather belonged to Pangi and his grand-father had settled in village Ohla. These facts create serious doubt about the presence of the accused on the scene of occurrence at about 4.00 p.m.

19. In view of what has been stated above, the statement of the prosecutrix is not of the nature which may require some assuring evidence only to rely but is such which cannot be relied upon unless corroborated by independent evidence on all material particulars.

20. PW-3 Lal Chand, the eye witness, has stated that he was returning with a load of grass from his fields on August 22, 1997 at about 4.00 p.m. when he saw the accused having sexual intercourse with the prosecutrix on the path and when he called the accused loudly as to why he was committing sexual act with the prosecutrix, the accused ran downwards. He has further stated that he was informed by the prosecutrix that the accused committed the sexual intercourse with her without her consent. As per narration given by this witness, he appeared on the scene per chance whereas according to the contents of the F.I.R. Ext. PA, he came to the place of occurrence on hearing the 'calls' of the prosecutrix. He does not state that he heard the prosecutrix crying or she was crying when he appeared on the scene. The First Information Report contains that this witness asked the accused as to why he was committing forcible sexual act with the prosecutrix whereas this witness does not state that the accused used force to commit the alleged act. His statement that the accused committed the sexual intercourse without the consent of the prosecutrix, is based on what she had allegedly told him. Assuming, though not admitting, that the witness saw the accused and the prosecutrix in compromising position, then on being surprised by his sudden appearance on the scene, in the ordinary course of human conduct, the prosecutrix would put the entire blame on the accused to save herself of the shame and indignity and social consequences of indulgence in extra-marital sex. Thus, the statement of this witness does not lend any independent corroboration to the statement of the prosecutrix.

21. PW-2 Devki alias Debu, who is sister of the father of the prosecutrix and reached Ohla on the same day at about 4.00 p.m., has stated that Pano came back from the fields where she had gone to bring grass and started weeping. The clothes she was wearing, were torn and hair dishevelled. On enquiry by her, the prosecutrix told her that she was raped by the accused on the path and she was saved from the accused by Lal Chand who had seen the occurrence. She has

further stated that she asked the prosecutrix to change the clothes and also noticed the scratches on the back of the prosecutrix. On the next day she accompanied the prosecutrix to the Police Station to report the occurrence. In her cross-examination, she has admitted that before her arrival to the village. Pano was all alone in the house of her parents. She has further stated that 'string' of the prosecutrix was missing, and the accused raped her after he had returned from the cremation of his maternal aunt Dropati. She further goes on to state that in addition to the scratches at the back, the prosecutrix had such scratches on the back of her shoulders also. Thus, this witness has made a highly impoved and improbable statement. She herself reached the village at 4.00 p.m. on the date of occurrence. She has admittedly not seen the accused in the cremation ground or while returning there-from. She admits cremation of Dropati which was attended by the accused, was over at 6.00 p.m. Despite these admissions she states that the accused after return from the cremation committed rape on the prosecutrix. In view of the facts admitted by her as aforesaid, she has no basis to say so. She is, thus, apparently stating so falsely. It is not the case of the prosecutrix even that she sustained injury in the incident but this witness found even scratches on the back and shoulder-back of the prosecutrix, though a medical expert could not find such scratches on the person of the prosecutrix at the time of her medical examination. PW-1 Pano does not state about her torn clothes and dishevelled hairs but this witness finds them to be so. She states about the prosecturix returning home without string in her 'Salwar' and having kept the 'Salwar' on the body without 'Nara' (string) which is not the case of the prosecutrix herself. She appears to have stated in the manner as if she knew about the occurrence and later events more than the prosecutrix. She is not even an independent witness. She is closely related to the prosecutrix. Agreed that near relations will not try to implicate an innocent person in an offence committed against their kin as they will like to ensure that it is the tormentor alone who must be punished so that their desire of vengeance is fulfilled. But in the facts and circumstances as in this cast., the near relation can be interested more in saving the honour of the alleged victim and the family. The statement of PW-2 Devki,, thus, is not reliable.

22. The prosecutrix was medically examined by PW-11 Dr. Supriya Atwal, Medical Officer, Community Health Centre, Tissa on August 23, 1997 at 5.00 p.m. The

Medicolegal Certificate issued by him is Ext. PH wherein it has been opined that there were signs of recent sexual intercourse. However, the Medicolegal Certificate shows that no injury what-so-ever was found on the person of the prosecutrix. In this regard it has been mentioned in the Medicolegal Certificate Ext. PH that 'Examination of the whole body revealed no marks of violence resulting from struggle. While appearing as a witness, PW-11 has proved the contents of the Medicolegal Certificate Ext. PH and has stated that in case of struggle there would have been injuries even on the private part such as inflamation, redness etc. The statement of PW-11 read with Medicolegal Certificate Ext. PH rules out the prosecution version about the alleged rape. There is nothing in the Medicolegal Certificate which may create even slightest doubt about the opinion given therein. Thus, the statement of PW-11 read with Medicolegal Certificate Ext. PH, instead of corroborating the version of the prosecutrix, controverts it.

23. The accused had been medically examined by PW-4 Dr. V.K. Pathak, Radiologist, District Hospital, Chamba on August 26, 1997 at 6.40 p.m. The Medicolegal Certificate about such examination is Ext. PD. As per the opinion therein the accused was found capable of sexual intercourse and there was possibility of his having sexual intercourse within 24 hours. Further, multiple abrasions were found on his person which were opined to be of more than 24 hours duration. PW-4 in his statement has proved the contents of the Medicolegal Certificate Ext. PD in this regard and has stated that the duration of the abrasions was of not more than 72 hours. The statement of PW-4 read with Medicolegal Certificate Ext. PD also does not lend any support to the prosecution case as nothing therein corroborates the statement of the prosecutrix. The accused was medically examined on August 26, 1997 at 6.40 p.m. Therefore, the opinion that the possibility of his having sexual intercourse within 24 hours before such examination i.e. between 6.40 p.m. on August 25, 1997 to 6.40 p.m. on August 26, 1997 has no relevance to the alleged rape committed by him on August 22, 1997 at about 4.00 p.m. The abrasions found on his person also have no nexus with the alleged commission of rape because the maximum duration of such abrasions being 72 hours but more than 24 hours at the time of medical examination, he must have sustained these injuries some-time between 6.40 p.m. on August 23, 1997 and 6.40 p.m. on August 26, 1997. Thus, these injuries (abrasions) cannot

be said to have been sustained on August 22, 1997, the date of alleged commission of rape. This medical opinion vide Medicolegal Certificate Ext. PD on this count cannot be disbelieved even for the reason that it is not the case of the prosecution or version of the prosecutrix that she put up stiff resistence to save herself and the accused therein sustained injuries. Thus, this piece of medical evidence also does not lend any credence to the prosecution version.

24. As per the prosecution, the accused made a statement Ext. PC under Section 27 of the Evidence Act about his clothes, i.e. 'Cant' Ext. P-3 and 'Bunyian' Ext. P-4, having been kept in a store-room which he could get recovered. This statement was made in the presence of PW-3 Lal Chand and one Tek Chand and was recorded by PW-12 Mangal Singh, ASI. According to PW-12 Mangal Singh, this statement was recorded at the Police Station on August 30, 1997. One of the marginal witness of this statement, namely, Tek Chand, has not been examined. PW-3 Lal Chand in his examination-in-chief supports the statement of PW-12. However, in the cross-examination, he states in most certain and unambiguous terms that from the date of lodging of the First Information Report (when he admittedly accompanied the prosecutrix to the Police Station), till the date of his statement in the Court he did not go to the Police Station. If so, it is apparently false that the accused made the disclosure statement Ext. PC in his presence on August 30, 1997 at the Police Station. Thus, no independent witness has supported the making of statement Ext. PC by the accused. The accused has denied making of this statement. This statement made on the 5th day after the arrest of the accused, is suspicious also for the reason that at. one stage its contents read that the clothes are kept concealed in between the 'Slippers' in the storeroom and at the other it reads that these could be got recovered from the 'residential room'. A store wherein timber is stacked, cannot be a 'residential room'. The statement Ext. PC thus appears to be a piece of padding rendering the subsequent recovery of 'Pant' Ext. P-3 and 'Bunyian' Ext. P-4 vide memo. Ext. PB inadmissible.

25. Assuming, though not admitting, that the 'Pant' Ext. P-3 and 'Bunyian' Ext. P4 belong to the accused, still this does not corroborate the prosecution case. No semen or blood stains have been found on these articles vide report Ext. P-14

received from the State Forensic Science Laboratory. In case the accused was noticed at the time of the rape and he had to suddenly bolt away from the place in the circumstances as alleged, semen stains could have been present at least on the 'Pant' Ext. P-3 which he is alleged to be wearing at the time of alleged rape, more so, when it is nobody's case that these clothes were washed after the occurrence. These clothes, admittedly, were dirty thus unwashed. The 'Bunyian' Ext. P-4 is stated to be torn. In the F.I.R. Ext. PA there is no mention that in any struggle at the time of the alleged rape, the prosecutrix tore or in any other manner the 'Bunyian' came to be torn. There is no evidence to prove as to the torn part(s) of this 'Bunyian' as at the time of the occurrence and as at the time of its production in the Court.

26. There is yet another circumstance to show that the case property in this case was not properly sealed and preserved and appears to have been tampered with. As per the contents of Ext. PB, recovery memo of the 'Pant' Ext. P-3 and 'Bunyian' Ex. P-4 the colour of the recovered 'Pant' was 'Slaiti'. The 'Pant' and the 'Bunyian' were kept in a parcel which was sealed by 12 seals of seal 'K'. It was allegedly kept in the Police 'Malkhana' and then sent to the aforesaid laboratory without any tampering in between. However, a perusal of the report Ext. P-14 shows that such a parcel received in the laboratory when opened, it contained one torn 'Pant' of 'green colour' and a torn 'Bunyian' of 'white colour' and both were dirty. Thus, the 'Pant' of 'Slaiti' colour, the accused was allegedly wearing at the time of the rape, which 'Pant' was recovered by the Police vide memo. Ext. PB on the basis of disclosure statement of the accused Ext. PC was evidently not found in the parcel in which it was kept as per contents of memo. Ext. PB. Instead, a torn 'Pant' of 'Slaiti' colour not stated to be torn vide contents of Ext. PB, appears to have been replaced by a green coloured torn 'Pant' to lend credibility to the version which is non-existent in the F. I.R. Ext. PA. To treat such manipulative evidence as corroborative piece of evidence as done by the learned Sessions Judge, is utterly unsafe and hazardous. This circumstance further shows that the investigation in the case has not been fair which renders the entire prosecution case as highly suspicious.

27. Equally unreliable and undependable is the recovery of the 'torn shirt' Ext. P-1 and torn 'Salwar' Ext. P-2 of the prosecutrix. The F.I.R. Ext. PA does not describe as to which part/portion of the clothes of the prosecutrix she was wearing at the time of the alleged rape was/were torn. Therein it has been mentioned that she showed the condition of her clothes to PW-3 Lal Chand on the spot and that she had kept the clothes which were torn by the accused and could produce them at the 'Mauka', i.e. spot. It is not mentioned in the First Information Report that at the time of lodging the First Information Report the prosecutrix was in possession of such clothes. She states about production on the spot whereas after recording the F.I.R., the Police took her to the hospital for medical examination where such clothes were taken in possession by the Medical Officer who examined her. The description of the torn condition of these clothes has not been given by the prosecutrix or by PW-2 Devki who claims to have seen them on return of the prosecutrix to her parents' house. PW-3 Lal Chand also does not describe the torn condition of the clothes. PW-11 Dr. Supriya Atwal, the Medical Officer who took these clothes in possession, has mentioned in the Medicolegal Certificate Ext. PH that the 'Kameej' was torn near flow of neck and one-side and the 'Salwar' from the front and one-side. What the State Forensic Science Laboratory received was a dirty old shirt the arms whereof were unsewed and one dirty old 'Salwar' which was unsewed at the upper middle portion. Apparently, the descriptions do not tally. To be unsewed and to be torn are two different conditions of the clothes and it cannot be presumed that this difference is not. known to the concerned experts. The clothes particularly old one belonging to a village woman who was doing hard labour like carrying grass etc. despite pregnancy of eight months, can be unsewed because of a variety of causes. The possibility of tearing the clothes to create evidence can also not be ruled out in the facts and circumstances of the case particularly the lack of fairness in conducting the investigation.

28. The place where the prosecutrix was allegedly raped is of stones, earth and grass was also growing there. Some straw/earth etc. therefrom were admittedly taken in possession by PW-12 Mangal Singh, ASI. Contents of the recovery memo. Ext. PF contain that from the ground showing signs of struggle, earth-grass-straw were taken in possession. However, the clothes of the prosecutrix did not contain any small tears or remnants of grass or earth which ought to have

been there in the case of forcible sexual act.

29. As per the report Ext. P-14, semen stains were found in the 'Salwar' of the prosecutrix. She is a married woman. She was in her matrimonial house till August 20, 1997'. It is admitted by her in the cross-examination that on August 23, 1997 when she left for the Police Station, her husband was already in village Ohla, a fact which has otherwise not been disclosed in the entire prosecution version. Thus the semen strains in the 'Salwar' of the prosecutrix as a result of copulation by the husband and wife, is a strong possibility. Thus, this circumstance is also of no help to the prosecution.

30. The prosecution claims that some hair were found at the place of occurrence and were taken in possession vide memo. Ext. PF. At the same time the Investigating Officer took 15 hairs from the head of the prosecutrix. At the time of medical examination of the accused a few hairs from his scalp were taken by PW-4 as mentioned in the Medicolegal Certificate Ext. PD and as stated by PW-4. On analysis, it was found that the hairs collected from the spot was a mixture of the hairs of the prosecutrix and the accused. Primarily, it would have been but proper for the Investigating Officer that the hair sample of the prsoecutrix would have been got taken by some female, preferably a doctor. This would have served the dual purpose of avoiding handling of a woman by a male while taking the hair sample and such a course would have lent credibility to the version. It is unfortunate that such a course was not adopted. The sample of the hair of the accused appears to have been taken without his consent. The Medicolegal Certificate Ext. PD does not show that this sample was sealed by the doctor taking it, before handing it over to the police.

31. In fact what renders this part of the investigation a farce are the circumstances under which the mixed hairs of the prosecutrix and the accused were detected and collected. It is stated by the Investigating Officer (PW-12) that the hairs were recovered from the spot on August 24, 1997 where he reached at 8.00 p.m., the prosecutrix, Devki, Jai Dayal and Man Singh had also been called there. Then within 15 to 20 minutes these hairs were detected and collected with the help of a magnifying glass. The place of occurrence is a village path. There is no house in

the near vicinity. It is past 8.00 p.m. and thus night. There is nothing to suggest that the police was equipped with search-light or there was any other arrangement for sufficient light to detect hair in the midst of the stones and grass which, admittedly, were there. How these hairs were detected by the Investigating Officer there, is an unexplained mystery. No wonder that PW-5 Jai Dayal and PW-6 Chaman Lal, both related to the prosecutrix, have not supported this recovery. They have been cross-examined by the prosecution but in view of the time of the alleged recovery they cannot be said to have intentionally and falsely denied the recovery as alleged. This recovery, therefore, appears another unfair attempt by the Investigating agency to establish involvement of the accused in the charged offence.

32. The accused is stated to have been arrested on August 26, 1997 at Chamba, i.e. on the 5th day of the occurrence. According to the Investigating Officer, the accused had gone to Chamba to file application for anticipatory bail. The accused has denied that he was arrested on August 26, 1997. He has stated that he was arrested on August 24, 1997. Even if the accused was arrested on August 26, 1997 at Chamba where, according to the Investigating Officer, he had gone to apply for anticipatory bail, it cannot be said that the accused had absconded. To go to a Court of law to file an application for bail is a lawful manner of surrendering to the Court and not absconding. Moreover, it has not been put to the accused in his statement under Section 313 of the Criminal Procedure Code and thus having been deprived of an opportunity to explain the imputed conduct, the alleged circumstance of his having absconded cannot be lawfully taken into account against the accused. There is no other conduct imputed to the accused which conduct could lend any assurance or corroboration to the prosecution version.

33. There are certain well-settled principles of administration of criminal justice. These are (i) an accused person is presumed to be innocent unless proved to be guilty, (ii) the charge against the accused is to be proved by the prosecution and it has to stand on its own legs to prove such charge, and (iii) accused may take more than one defences in a charge against him and the prosecution cannot take advantage of the weakness of the defence. Therefore, even if it is assumed that the accused has not been able to prove the plea(s) in defence, it cannot be taken

as a circumstance lending corroboration to the prosecution case. As already seen hereinabove, the evidence led by the prosecution to prove the charge against the accused is untrustworthy, unreliable and undependable. Therefore, the charge cannot be said to be proved merely because the plea(s) raised in defence has not been established or proved. Even otherwise, it is not necessary to the accused to prove his defence to the hilt but only to make it probable. Thus, the prosecution could not be given any benefit of the weakness of the defence.

34. In conclusion it can be safely said that in this case the statement of the prosecutrix does not inspire confidence and is, therefore, unreliable nor it is corroborated by the other evidence to assure credence to it. Therefore, the prosecution has failed to prove the charge against the accused, thus the impugned judgment is not sustainable.

35. As a result, this appeal is allowed. The conviction of and sentence awarded to the accused are set aside and he is acquitted of the charge against him.

36. The accused, who is in custody, be set at liberty forthwith. The fine, if recovered, be refunded to him.

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