

Hussaln Alam Vs. the State

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Court : Jammu and Kashmir

Decided On : Feb-12-1998

Reported in : 1999CriLJ880

Judge : Arun Kumar Goel, J.

Acts : Ranbir Penal Code (IPC), 1989 - Section 366; ;Code of Criminal Procedure (CrPC) - Sections 100 and 342

Appeal No. : Criminal First Appeal No. 4 of 1983

Appellant : Hussaln Alam

Respondent : The State

Advocate for Def. : Omkar Seth, Govt. Adv.

Advocate for Pet/Ap. : Anil Sethi, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

Arun Kumar Goel, J.

1. This appeal is directed against the judgment passed by Sessions Judge Rajouri, on 25-10-1982/30-3-1983, whereby appellant has been held guilty of having

committed offence under Section 366, Ranbir Penal Code and has been ordered to undergo rigorous imprisonment for a period of two years and also to pay a fine of Rs. 500/-, in default of payment where of he has been ordered to undergo further rigorous imprisonment for a period of six months.

2. Brief facts of the case, which have given rise to this appeal, need to be noticed before considering the respective submissions urged by the learned counsel during the hearing of this appeal.

3. As per prosecution case a written complaint (Ex. P-1/1) was made by PW 1 Mohd Ismail (hereinafter referred to as 'the complainant') addressed to S. P. Rajouri. This complaint is undated, however, endorsement on it dated 2-5-1975 shows that it was marked by Superintendent of Police, Rajouri, to S.H.O. P/S Rajouri, for necessary action and report. As per this complaint daughter-in-law of the complainant had been abducted by the appellant when she had gone to her mother's house. As per this complaint, when the daughter-in-law of complainant was abducted she was having certain ornaments, which were not there. On the basis of this complaint, Ex. P-1/1, F.I.R., Ex. P-1/2, was registered at Police Station Rajouri and police machinery was set into motion.

4. Further facts of the case are that Muniz Fatima, (hereinafter referred to as 'the prosecutrix') is stated to be the legally wedded wife of Mohd Salim and both of them were living happily. Prosecutrix is stated to have gone to her mother's place along with her brother at village Nagrota, where she fell ill. On 14-4-1975 prosecutrix accompanied by her mother Hasham Bi-DW, had gone to hospital, which was at a distance of 2/3 miles from the village, was on her return journey. At such time, appellant is stated to have way laid both mother and daughter and on the point of a knife abducted her, the intention behind which was to have marital relations with her. Prosecutrix is stated to have been taken from house to house for the purposes of being concealed and finally she was recovered from the house of Lal Din, in presence of PW, Brij Lal.

5. It has also come on record that appellant had instituted a suit for restoration of conjugal before this incident against the prosecutrix, while seeking declaration that she is his legally wedded wife after completion of investigation challan was filed

against the appellant and on being committed, proceedings commenced before the trial Court. On being satisfied that there is a prima facie case under Section 366, Ranbir Penal Code, against the appellant, charge was framed against - him - to which he pleaded not guilty. After recording prosecution evidence as well as statement of the appellant under Section 342, Criminal Procedure Code, as also the statements of defence witnesses, trial Court has passed the impugned judgment, hence this appeal.

6. In this case consistent defence and stand of the appellant throughout had been that prosecutrix is his legally wedded wife. This marriage was earlier in point of time than that, which is stated to have been performed between her and PW - Mohd Salim, son of the complainant. Since there is no divorce between both of them, i.e. the prosecutrix and the appellant, there is no question of her marriage having been performed with said PW, Mohd Salim.

7. Shri Sethi, learned counsel appearing for the appellant, in support of this appeal, forcefully urged that the judgment of the trial Court suffers from numerous infirmities and to enumerate a few, according to him, his client is the husband of the prosecutrix, and she continues to be so, because the matrimonial bond between them had not been dissolved by a divorce, in accordance with law. So even if, PW, Mohd Salim is able to prove his marriage with the prosecutrix, he cannot derive any benefit. It is further pointed out that this is not a case of abduction, as alleged by the prosecution, rather this is a case of pure and simple harassment and false case having been thrust upon the appellant with a view to deprive him of his wife. Earlier also, complainant-party had made an attempt to unsuccessfully take away the prosecutrix from the lawful custody of the appellant.

8. Reference was made to the discrepancies in the prosecution evidence, which according to Shri Sethi, have not been properly appreciated by the Court below as also the defence evidence, which has not only been misread, but also has been misconstrued, besides not also been properly appreciated. While further advancing his submissions, learned counsel for the appellant, submitted that admittedly prosecutrix was not recovered from the house of the appellant nor was he present at the time of such recovery. Reliance was also placed in support of

this appeal, on the judgment passed by Sessions Judge Rajouri in File No. 61/Sessions, dated 2-3-1981, wherein appellant had been prosecuted under Section 366 Ranbir Penal Code for abduction of the prosecutrix, at the instance of the complainant-party as well as on the 'Fatwa' given by the 'Moulvi' regarding the subsistence of marriage between the parties, on the copy of plaint filed by the appellant in the suit which was earlier in point of time, besides statement of the prosecutrix made before Tehsildar.

9. On the other hand, learned Government Advocate, forcefully controverted all the submissions urged in support of this appeal. He further submitted that the appellant has miserably failed to prove his marriage with the prosecutrix. Evidence having been properly appreciated by the Court below and omission/contradictions, if any, were minor in nature and thus did not affect the credibility or otherwise of the prosecution witnesses. While criticising the defence evidence, it is pointed out by the learned Government Advocate that the entire mischief had been created by DW-Hasham Bi, mother of the prosecutrix, thus, according to him, prosecution has been able to successfully bring home the guilt against the appellant and, therefore, he prayed for upholding the judgment of the trial Court. It was also pointed out that rather the appellant has been lightly dealt with in the matter of sentence by the Court below.

10. As per PW-Mohd Ismail, marriage between his son and the prosecutrix was performed 5/6 months ago and it was thereafter that she had gone to her parental house from where the prosecutrix had been abducted. Nawab Din is stated to have informed him about the abduction of the prosecutrix by the appellant. He admits that a case for restitution of conjugal rights in the Court of Sub-Judge, Rajouri, was filed by the appellant but at the same time, he denied that whether any interim order was obtained by the appellant or that the prosecutrix was not married to his son. DW-Hasham Bi, mother of the prosecutrix, having obtained a warrant under Section 100, Criminal Procedure Code against the witness and his son was admitted by the witness. However, complainant PW-Mohd Salim, in his examination-in-Chief has stated that marriage between him and the prosecutrix was solemnized in the month of Assuj, 4/5 years ago. After having resided with him for 6/7 months, brother of the prosecutrix took her to his house. 4/5 days after

the incident he came to know about the incident in question. He further admits enmity between his father and the appellant and the prosecutrix having been recovered from Kalakote Sailsoi. Similarly, marriage between the prosecutrix and PW-Mohd Salim having been performed 5/6 years ago, has been stated by the prosecutrix in her statement recorded in the Court.

11. It is very strange that the complainant states about the marriage having been solemnized between his son and the prosecutrix 4/5 months ago, whereas PW-Mohd Salim has given the period as 4/5 years and the prosecutrix having given the said period to be 5/6 years. This is the first material contradiction in the statement of the prosecution witnesses.

12. It has come in the statement of prosecution witnesses that when the prosecutrix was abducted, it was a dark night, then the question that needs to be seen is how the prosecution witnesses, particularly PW-Mohd Rafiq and PW-Mohd Gani, could identify the appellant having abducted the prosecutrix. It has come in the statement of PW-Mohd Rafiq that he along with PW-Mohd Gani had gone to Barhalian, as the wife of latter is the real 'Masi' (mother's sister) of the prosecutrix, when both of them saw the appellant accompanied by Nazir Hussain, Mohd. Hussain and Gulab Jan, abducting the prosecutrix. All these persons were identified by both of them from their voice and they followed the appellant and his accomplices up to Badhoni Camp from where they saw the appellant crossing the river. No attempt was made by them to catch the appellant as they apprehended danger to their lives, as also their number being large. In his cross-examination, he has stated that the distance between him and the appellant was ten yards and the witness could identify the voice of the appellant. PW-Mohd Gani, also having identified the appellant from his voice, as per his statement made in the Court. According to him, there were 10/15 persons, who were accompanying the appellant and had gone beyond Dilogda village.

13. The mode of identifying the appellant does not appear to be plausible. Needless to point out that it cannot be said that it is not at all possible to identify a person from his voice, but in order to enable it to do so, it has to be shown that the voice was audible and they were placed in a position to hear the same, there is no

such evidence. Unless there is evidence of the volume of the voice of the person whose voice had been identified, it is not possible to accept such a statement. Admittedly, there is not a word in the statement of both the PWs and, therefore, their word of mouth that it was the appellant who was the person talking and had abducted the prosecutrix cannot be accepted, therefore, it is held that there is no identification of the appellant, once this part of the prosecution case is excluded.

14. Another reason to discard the prosecution evidence is that PW-Mohd Rafiq has specifically named three other persons, besides the appellant who were involved in the abduction of prosecutrix, namely, Nazir Hussain, Mohd Hussain and Ghulam Hussain. When a reference is made to the statement of PW-Mohd Gani, he has specifically stated that the number of persons was 10/ 15. Not only this, but prosecutrix also gives the number of persons to be 10/12, who were accompanying the appellant, when she was abducted. This part of the prosecution case cannot be accepted for the reason that as per PW-Mohd Rafiq, eye-witness, only four persons were involved in the abduction whereas, as per prosecutrix and other eye-witness PW-Mohd. Gani, persons involved were more than ten. It is nobody's case that any person fled away from the spot. This is another circumstance, not to accept the prosecution-case on its face value.

15. Now coming to the question of the marriage between PW-Mohd Salim and the prosecutrix. As already observed, the time when marriage took place as well as the time when abduction took place after marriage, has not come on record, as mentioned above, in view of the wide gap in the statements of PWs. Additional fact, not to accept the prosecution case in this behalf, is that as per prosecutrix 'Maher' fixed was Rs. 10,000/-, whereas, as per PW-Mohd. Salim 'Mahar' fixed was Rs. 30,000/- and as per PW-Mohd. Din, it was Rs. 10,000/-, Rs. 5,000/- was payable immediately and Rupees 5,000/- was deferred. Besides this, as per PW-Mohd. Din, who had participated in the marriage of PW-Mohd. Salim with the prosecutrix, marriage came to be entered in a Register, which was thumb marked by him also, as also by the prosecutrix and this witness had participated in the marriage from girl's side. No such document has been produced on record. In case the marriage had been performed, as claimed by this witness, then the document would have seen the light of the day. For this non-production adverse

inference can simply be drawn to the effect that had it been produced on record, it would not have supported the prosecution case.

16. Another reason for discarding the prosecution case is that it has come on record that there was a camp of GREF near the passage from where the appellants, along with his accomplices, is stated to have taken the prosecutrix along with her mother and having been witnessed by the above named two PWs. May be that both of them, i.e. PW-Mohd. Refiq and PW-Mohd. Gani, were scared of the appellant and his accomplices, but they could have raised hue and cry or could have sought help from the GREF Camp, no such attempt was made by them, this puts a question mark on their conduct, which is highly improbable. Mother of the prosecutrix was accompanying her, when she was recovered in the early hours of the day from the house of Lala Gojar (Lal Din ?), as per statement of the prosecutrix made in Court. However, when a reference is made to the statement of Chaman Lal, Inspector who was Investigating Officer and had recovered the prosecutrix, he has categorically stated that at the time of recovery of the prosecutrix, her mother was not there. In addition to aforesaid circumstances, there is enough defence evidence for not accepting the prosecution case, as held by the trial Court. Mother of the prosecutrix has appeared as DW who while admitting the former to be her daughter, has stated that marriage between the appellant and the prosecutrix was performed and on her having been removed from the custody of the witness, she had applied for issuance of warrant under Section 100, Criminal Procedure Code. After the prosecutrix was recovered, this application was rejected. Sher Mohd. is the other defence witness, who is 'Mama' (maternal uncle) of the prosecutrix and has also supported the case of defence regarding the marriage having been performed between both of them, i.e. prosecutrix and the appellant and other close relation is DW-Mohd. Iqbal, who is the brother of the prosecutrix. No doubt, he states that the prosecutrix was engaged to PW-Mohd. Salim son of the complainant and his sister was married in his absence with the appellant and because the first wife of the appellant was living, therefore, prosecutrix started living with her mother DW-Hasham Bi.

17. So far documents produced by the defence during the course of trial in the Court below, except the judgment dated 2-3-1981 in case titled as State v. Hussain Alam, under Section 366, Ranbir Penal Code passed by Sessions Judge, Rajouri, others cannot be looked into for any purpose whatsoever. It is fairly stated by Shri Sethi that none of the other documents namely, 'Fatwa' given by the 'Moulvi', copy of the plaint in the suit filed by the appellant, statement of the prosecutrix given before Tehsildar etc. having been proved, as such no reliance can be placed on such documents. However, reference to the aforesaid judgment of Sessions Judge, Rajouri, shows that it is the consistent stand of the appellant that Muniz Fatima, prosecutrix, is his legally wedded wife. In these circumstances, possibility of the appellant being deprived of his wife by the complainant, his son and other persons cannot be completely ruled out. In the ordinary course of things, in case what had been alleged by the prosecution was even remotely correct, then there was no reason for the mother of the prosecutrix to have not supported the prosecutrix case, this is an additional factor not to accept the prosecution case on its face value.

18. As an upshot of the aforesaid discussion and for the reasons stated in the preceding paras of this judgment, it is clear that the prosecution has miserably failed to cover the distance between 'might have' and 'must have', in the present case and, therefore, the appeal deserves to be allowed, and it is ordered accordingly.

19. Consequently, the appellant is acquitted of the offence for which he was convicted and sentenced by the trial Court. Fine if deposited is ordered to be refunded to the appellant and bonds furnished by him are ordered to be discharged.