

## **Devinder Singh And Ors. vs State Of Himachal Pradesh on 17 September, 2003**

**Equivalent citations: AIR2003SC3365, 2003CRILJ4976, JT2003(SUPPL1)SC244, 2003(7)SCALE580, (2003)11SCC488, AIR 2003 SUPREME COURT 3365, 2003 AIR SCW 4779, 2003 (10) SRJ 120, 2003 CRILR(SC MAH GUJ) 916, 2004 SCC(CRI) 185, 2003 (7) SCALE 580, 2003 CRIAPPR(SC) 564, 2003 (5) SLT 561, 2003 ALL MR(CRI) 2367, 2003 (11) SCC 488, 2003 CRILR(SC&MP) 916, (2003) 11 ALLINDCAS 58 (SC), 2003 (11) ALLINDCAS 58, (2004) 1 RECCRIR 14, (2004) 1 ALLCRILR 778, 2004 CHANDLR(CIV&CRI) 362, (2003) 6 SUPREME 768, (2004) 1 ALLCRIR 95, (2004) SC CR R 886, 2003 CHANDLR(CIV&CRI) 705, (2003) 4 ALLCRILR 84, (2004) 1 EASTCRIC 156, (2003) 26 OCR 753, (2004) 2 RAJ CRI C 464, (2003) 4 RECCRIR 363, (2003) 4 CURCRIR 81, (2003) 2 SIM LC 422, (2003) 7 SCALE 580, (2004) 1 UC 249, (2003) 12 INDLD 89, (2003) 47 ALLCRIC 1062, (2003) 3 CHANDCRIC 24, (2003) 4 CRIMES 120, (2004) 1 CURLJ(CCR) 286, 2004 (1) ANDHLT(CRI) 46 SC, (2004) 1 ANDHLT(CRI) 46**

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**Bench: N. Santosh Hegde, B.P. Singh**

JUDGMENT

B.P. Singh, J.

1. In those five appeals by Special leave the five appellants have impugned the common judgment and order of the High Court of Himachal Pradesh, Shimla dated August 3, 2001 in Criminal Appeal Nos. 94, 95, 98, 111 and 112 of 1997 whereby the High Court dismissed the appeals preferred by the appellants affirming the judgment and order of the Sessions Judge, Kinnaur Sessions Division, Rampur in Sessions Trial No. 10-R/7 of 1995 dated 20th February, 1997. All the appellants were found guilty of the offences under Sections 457, 376 and 380 IPC and were sentenced to two years rigorous imprisonment and a fine of Rs. 1000/- each under Section 457 IPC; seven years rigorous imprisonment and a fine of Rs. 2000/- each under Section 376 IPC and one year rigorous imprisonment and a fine of Rs. 1000/- each under Section 380 IPC. They were also sentenced to various terms of imprisonment for default in payment of fine. It was further directed that a sum of Rs.10.000/- be paid to the victim, in case fines were recovered.

2. The charge against the appellants mainly is that on February 20, 1994 they forcibly entered the room occupied by the prosecutrix, PW.1. and each one of them raped her. They also carried away a torch belonging to the prosecutrix.

3. Though the occurrence is said to have taken place on February 20, 1994 at about 12 in the night, the prosecutrix lodged a report at Police Post Moorang on February 26, 1994 at about 11.00 a.m. on the basis of which a formal First Information Report was drawn up at Police Station, Pooh. In her report to the police the prosecutrix Smt. Sanam Devi. PW.1 slated that she was working as a labourer on daily wages in the DGBR. For the last four years she was living separately from her husband who resided at Karsog. After separation from her husband, she resided at Skiba where she had taken one room and a kitchen on rent from one Dharam Singh. On February 20, 1994 at about 12 O' clock in the night when she was sleeping in the room some unknown persons knocked at her door. She questioned those persons as to who they were and when they did not respond to her query, she did not open the door. She heard those persons talking to each other and planning to break the glass window and to enter the room. Thereafter inspite of her protest that they should not break the glass window, they forcibly broke the glass window and after opening the latch of the window came inside the room. They asked her to switch on the light to which she responded by saying that there was no light. They then lighted a match-stick, took out her torch kept in the almirah and after putting the cells in the torch they started seeing each other in the torch light. That is how she was able to recognize them. She named four of the persons who entered her room, namely - Ajay Pal, Gopi Chand, Rabindra, and Rajan but she did not know the name of the fifth person. They then switched off the torch and two of them made her lie forcibly on the floor. They took off her salwar and threw it in the room and thereafter two of the boys forcibly raped her. Thereafter she was put on the cot and the three remaining boys also raped her. Since it was dark, she could not see which persons had forcibly put her on the floor and who amongst them had raped her first. After the incident all of them went away through the window and also took away her torch. While going away they also threatened her not to report the matter to anyone. According to the prosecutrix, she remained in the room till the morning and then went to work at 9.00 a.m. She did not report the matter to anyone. She did not come to lodge a report at the police station because there was snow fall and the roads were closed.

4. On the basis of the First Information Report lodged by the prosecutrix, ASI Prem Chand, PW.9 inspected the place of occurrence on 27th February, 1994. He prepared the spot map, seized certain articles such as the clothes of the prosecutrix and a wooden 'danda' lying there etc etc. In the course of investigation, on the basis of the disclosure statement made by Jai Kumar, the torch was recovered and was marked as Ext. P.4. After investigation, charge sheet was submitted against the appellants and they were put up for trial, charged of the offences under Sections 457, 376 and 380 IPC.

5. The case of the prosecution rests mainly on the testimony of the prosecutrix, PW.1, though some other witnesses had also been examined. The prosecutrix was got medically examined at Moorang Hospital by Dr. Lalita Negi, PW.2. Before advertng to the deposition of PW.1, we may notice the evidence of Dr. Lalita Negi, who had examined the prosecutrix on February 26, 1994. A perusal of her report shows that there was no injury on any part of the body. There was no matting of public

hair with discharge. There were no injuries, or tenderness on genital areas. Hymen was ruptured and the old scars were present. No fresh scars or tenderness were found. There was no tenderness in vaginal organ or the cervical area. In her opinion there was no evidence of recent sexual intercourse and there was no sign of struggle. The prosecutrix was used to sexual intercourse. There was no evidence of sexual assault of the prosecutrix within a week of her examination. Dr. Negi was examined as PW.1 and she fully supported the report submitted by her. Surprisingly this witness was declared hostile and cross-examined by the prosecution. In her cross-examination she stated that she did not mention about struggle in her certificate but she had mentioned that there was no injury on the person of the prosecutrix. She, however, explained that in the case of sexual assault on a lady, if she is put under fear, there may or may not be injuries and if the concerned lady is habituated to sexual intercourse there may not be any injury. She, however, asserted that there was no evidence of recent sexual intercourse with the prosecutrix.

6. It would thus appear from the medical evidence on record that no evidence could be found by the medical officer to prove that she had been subjected to sexual assault by five persons. Having regard to the facts and circumstances of the case, particularly in view of the fact that the prosecutrix was habituated to sexual intercourse and was examined six days after the occurrence, the fact that no injury was found on her body only goes to show that she did not put up any resistance. That may be on account of the fact that she was overpowered by five persons and as described by her, they kept her legs and hands pressed. The medical evidence on record, however, does not affirmatively support the case of the prosecution and the prosecution can, therefore, derive no support from the medical evidence on record.

7. The evidence of PW. 1 was recorded about two years after the occurrence. We may observe that the appellants were not put up for identification in a last identification parade and were for the first time identified by the prosecutrix at the trial. According to the prosecutrix, PW.1, about two years ago when she was sleeping in her room on February 20, 1994, some persons knocked at her door but she did not open the door. She heard those persons planning to break open the glass window and in fact they did so and entered the room after breaking the glass pane and opening the latch. There were five persons who entered the room and out of them two caught her and made her lie on the floor. Those two persons who had caught her were present in court. The accused thereafter took off her clothes and made her lie on the floor. Two of them raped her while she was lying on the floor and thereafter she was put on the cot and the remaining accused raped her while she was on the cot. Thereafter they lighted a match stick and took out her torch lying in the almirah and put cells in it, When they lighted the torch she saw all of them and identified them. She also told them that she had identified them but they went away through the window.

8. She remained in the room till 9.00 a.m. in the morning. At first she thought of not telling about the incident to anyone, including her employer. Later, on the third day, she decided to report the matter to the police and she thereafter lodged a report. She identified the daily diary entry dated 26.2.1994 recorded at the Police Post at Moorang, as the report lodged by her. According to her, she was examined at the Moorang Hospital and the police seized her clothes etc. She identified the clothes shown to her as those which were seized from her. According to her, the accused had thrown away her salwar in the room itself when they were raping her. After the arrest of the accused, the

torch was recovered.

9. At the time when she was being subjected to sexual assault she had wept and raised alarm but no one had come to the spot. While going away the appellants threatened her. She admitted that the room adjacent to the room occupied by her was occupied by three Gorkhas whom she named. She also named Roshan Lal who resided in the same building on the third floor. The ground floor of the house was not occupied by any one since the landlord had kept that portion for his own use. Moorang is 6-7 Kms. away from the place of incident and buses were not plying on that day on account of snow fall. Even the buses of her employer DGDR were not plying. In fact on the next day there was a bus accident and the traffic had come to a standstill. According to her, for ten days she did not go for work. But she stated that she had told some labourers on the third day of the incident about what had happened on the fateful night. She first stated that she had given the torch Ext. P.4 to the police, but then corrected herself saying that the police had recovered the torch from the accused. She admitted that the three Gorkhas named by her were present in their room on the date and time of occurrence. Rajvir and Baldev made statements before the police officer in her presence. She denied that the witnesses had signed on blank papers. She also denied that the accused were not on good terms with her landlord. She, however, admitted that if someone were to talk in her room that would be audible in the adjacent room, but on that day no one had heard her cries.

10. She stated that appellant Jai Kumar was a resident of Skiba but he originally belonged to Moorang. She knew him from before the occurrence but had not talked to him after the occurrence. She denied the suggestion that a false case had been lodged by her at the instance of her landlord Dharam Singh and in fact the appellants had never raped her.

11. Rajvir Singh, PW.3 was examined to prove the seizure of the torch and the disclosure statements said to have, been made by two of the appellants, namely - Ajay Pal and Jai Kumar. This witness resides on the second floor of the building in which the prosecutrix resided. He admitted that he was associated with the investigation of the case and that in his presence the prosecutrix had handed over a shirt, woolen blanket, broken string etc. to the investigating officer in the presence of Baldev Singh, another witness. However, he categorically stated that the torch Ext. P.4 was taken into possession by the police from the room of the prosecutrix vide Memo Ext.PW-3/B. This witness was also declared hostile and cross-examined by the prosecution. So far as 'danda' Ext. P.5 is concerned, he stated that it was recovered at the instance of appellant Ajay Pal but he asserted that the torch was not handed over to the police by appellant Jai Kumar and that the same was found lying in the room of the prosecutrix. He also denied that appellants Ajay Pal and Jai Kumar made any statement in his presence. According to this witness the police had done nothing except preparing the memos in the verandah of the prosecutrix. He as well as Baldev Singh had appended their signatures on the memos. According to this witness, though he was residing in the same building on the second floor, he had not heard any noise on the night of February 20, 1994.

12. Roshan Lal, another resident of the same building was examined as PW.4. According to him, on the date of occurrence it was snowing heavily during night and he had gone to sleep after taking his meal at about 11.00 p.m. He had heard the voice of some people talking from outside and a lady responding from inside but he did not hear anything else. He had made enquiry from Sanam, the

prosecutrix but she did not tell him anything in the morning.

13. ASI Prem Chand, the investigating officer, was examined as PW.9. According to him he visited the place of occurrence on February 27, 1994 and after preparing the site plan he took possession of the woolen blanket in presence of the witnesses. On March 1, 1994 he took possession of one torch, which was produced by appellant Jai Kumar. Appellant Ajay Pal made a disclosure statement, pursuant to which a 'danda' Ext. P.5 was recovered and taken into possession. He denied the suggestion that the torch had been handed over to him by the prosecutrix and that appellants Jai Kumar and Ajay Pal had not made any disclosure statement under Section 27 of the Evidence Act. He also denied the suggestion that all the papers relating to recoveries etc. were prepared in the police station.

14. The defence also examined a witness namely, Surender Paul as DW.1 who was 'Adda' Incharge of the H.P.R.T.C. According to him, on 21st February, 1994 the bus of HPRTC went upto Rita Khan and then returned. Between 22nd and 24th February, 1994 there was no bus service due to snow-fall. On 25th also the bus returned from Reta-Khan.

15. The courts below have primarily relied upon the testimony of the prosecutrix to convict the appellants. It was strenuously urged before us that the courts below have gravely erred in not noticing certain features of the prosecution case and the evidence produced in support thereof which makes the case completely unreliable and incredible. It was urged that though the occurrence took place on the night of February 20, 1994, the prosecutrix lodged the report for the first time before the police on February 26, 1994 i.e. six days later. Though some evidence was laid to prove that buses were not plying between the place of occurrence and Moorang during this period, it was submitted that not only that no attempt was made by the prosecutrix to go to the police station, she did not even talk about the incident to anyone else.

16. We have carefully perused the evidence on record. The prosecutrix claimed that she lodged the report on the third day of the incident. This apparently is not correct because the report identified by her as the report lodged by her was lodged on February 26, 1994. She deposed that on the third day she had talked to some labourers and narrated to them the incident. None of those labourers has been examined as a witness. In fact evidence of the residents of the building in which she was residing, who appeared as witnesses, is not that the prosecutrix, either in the morning following the incident or on any other day, mentioned to them about the incident which took place on the night of February 20, 1994. The evidence on record, therefore, does establish that for six days after the occurrence, the prosecutrix did not narrate the incident to anyone.

17. The medical evidence on record, as we have noticed earlier, does not support the case of the prosecution since on the basis of medical evidence, it cannot be held affirmatively that the prosecutrix was subjected to sexual assault as alleged.

18. There are certain features of the evidence of the prosecutrix, which cast a serious doubt on her truthfulness. In the First Information Report, she had named four of the persons who entered her room on the night in question. Of the four persons named by her in the First Information Report,

only two are the appellants before us and the other two named persons are not the appellants and in their place two others have been prosecuted. Obviously she had mentioned certain names at someone behest. This is further fortified by the fact that in the course of her deposition she had made a positive statement that appellant Jai Kumar was a resident of village Skiba and was known to her from before the occurrence. Surprisingly the prosecutrix had not named him in the report to the police as one of the persons who entered her room on the date of occurrence. The fifth boy whom she had not named was one whose name was not known to her as stated in the First Information Report. Obviously that could not be Jai Kumar. It is, therefore, obvious that she is not corroborated in this regard by the First Information Report lodged by her.

19. There is another aspect of the matter. In the First Information Report the prosecutrix had named atleast four persons, two of whom are appellants before us. However, in the course of her deposition she did not name any of those persons, and she only identified them in Court by face. This creates a serious doubt as to whether she knew the appellants at all, or atleast some of them, by name.

20. There is another reason for suspecting the case of the prosecution. Though the appellants were arrested within a few days of the incident, they were never put up for identification in a test identification parade. While it is true that in every case the holding of a test identification parade may not be necessary, but that depends on the facts and circumstances of each case. In the instant case the prosecutrix had not said in the course of her deposition that she had personally known all the appellants by name or otherwise. She also does not claim that she had other reasons to know them so as to be able to identify them. In her First Information Report, she had stated that some unknown persons were knocking at her door, but she identified the appellants in Court after about two years of the incident. The question is whether in the facts and circumstances of this case, holding of a test identification parade was necessary. Since there is no evidence to show that the prosecutrix was acquainted with the appellants, or had reasons to know them from before the occurrence, it must be held that the prosecutrix had only a fleeting glimpse of the culprits on the night of the occurrence. Even this appears to be doubtful because of the very unconvincing story narrated by the prosecutrix about her having an opportunity to identify the appellants. In the First Information Report she stated that after the appellants entered the room they asked her to switch on the light but when she said there was no light, they lighted a match stick and took out a torch from her almirah, put cells in it and then lighted the same and started seeing each other. This gave her an opportunity to identify them by face. Thereafter they switched off the torch. In her deposition also she has deposed to the same effect, except that lighting of the match-stick and torch took place after she was raped by them, and just before they departed. The story appears to be highly improbable and unworthy of belief. In the first instance it is difficult to believe that the appellants knew that the prosecutrix had kept a torch in her almirah. Moreover after discovering the torch they also found cells to be put into the torch and thereafter they switched on the torch. The lighting of the torch and flashing it on the faces of the appellants was, as if only to give an opportunity to the prosecutrix to see their faces. Thereafter the torch was switched off. Thus, according to the First Information Report, the prosecutrix had only a glimpse of the appellants when they lighted the torch with a view to see each others face.

21. In the course of her deposition though the prosecutrix stated that she had seen their faces in the torch light after they had raped her, and had narrated the manner in which they discovered the torch and the battery cells, more or less in the same manner as in the First Information Report, from her deposition it appears that the torch was lighted only for a short duration. In the course of her cross-examination she admitted that for want of light she could not give particulars of the persons who put her on the cot or the person who raped her first. Reading of the deposition of this witness leaves no room for doubt that while the appellants committed the offence, there was no light in the room. In view of these circumstances even if it is accepted that the prosecutrix had a fleeting glimpse of the appellants when they lighted the torch in her room, in the absence of any other evidence to show that the prosecutrix had occasion to see the appellants earlier, or to know them, it was incumbent on the prosecution to hold a test identification parade. This is not a case where an occurrence took place in broad day light and the prosecutrix had ample opportunity of noticing the features of the appellants. This apart, her naming some of the accused persons in the First Information Report and not naming them in the course of deposition casts a serious doubt on the veracity of this witness. Further, she named two other persons, and not two of the accused, in her report, and failed to name the accused whom she claimed to know from before as stated in her deposition.

22. Even the recovery of torch at the instance of Jai Kumar is not free from doubt, PW.3 denies the fact that a torch was recovered pursuant to a disclosure statement made by appellant Jai Kumar. He asserted that the torch was recovered from the room of the prosecutrix. Moreover the prosecutrix herself admitted that such torches are sold in the market. In the absence of any identifying mark on the torch, it is difficult to place much reliance on the recovery of the torch, which is said to have been produced by appellant Jai Kumar. Moreover, as noticed earlier, though the prosecutrix claimed to know Jai Kumar, he had not been named in the First Information Report by her, even though she named four of the culprits, two of whom are admittedly not accused in the case.

23. Taking into account these features of the prosecution case we are of the view that it is not safe to rely upon the testimony of PW.1. We, therefore, allow these appeals and acquit the appellants of the charges leveled against them. This Court by its order dated 20th January, 2003 had admitted the appellants to bail. Their bail bonds are discharged.