
(1996) 09 SHI CK 0016
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 133 of 1991

Chintu alias Chint Ram

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 16-09-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 366, 375, 376

Citation : (1997) 2 ShimLC 294

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

Advocate : Dharamvir Sharma, for the Appellant; M.L. Chauhan, Asstt. A.G., for the Respondent

Final Decision : Allowed

Judgement

Arun Kumar Goel, J.—Appellant Chintu alias Chint Ram has been convicted and sentenced to undergo five years rigorous imprisonment and also to pay a fine of Rs. 1,000 for having committed offence u/s 376 of the Indian Penal Code. In default of payment of fine, it has been ordered that the Appellant shall undergo rigorous imprisonment for a further period of one year Appellant was tried in the court of Shri Surjeet Singh, Sessions Judge, Mandi, Kullu and Lahaul-Spiti Districts at Mandi in Sessions Trial No. 15 of 1990 and was convicted to undergo aforesaid sentence vide judgment dated 8-8-1991.

2. Brief facts giving rise to this appeal are that the Appellant is stated to have enticed Neela Devi (PW-3) daughter of Himat Ram resident of village Siwa Badar, Tehsil Sadar, District Mandi who at that time is stated to be about 15 years of age and was married to one Talba Ram about one and half years prior to 1989. Further case against the Appellant was that between 9th to 13th October, 1989, prosecutrix visited her mother's place in Village Siwa Badar in connection with Dussehra festival, she went to see the fair in village Sewa accompanied by a girl named Soma Devi aged 13-14 years. From the site of fair both these girls are

stated to have gone to jungle to answer the call of nature when the Appellant met them and forcibly dragged the prosecutrix towards the cave in the forest where he is stated to have kept her for the night and having committed intercourse twice against the wish of the prosecutrix. Next morning in the early hours of the day, Appellant is stated to have taken the prosecutrix to a place called Panjgai in Kullu District in a truck and kept her for 7 days in the house of his father's sister. From this place Appellant is further stated to have taken the prosecutrix to Slapper and there he kept her for 3-4 days when again he took her to Rehardhar and kept her in her sister's house for about 15 days. Finally according to prosecution, the Appellant took the prosecutrix to a water mill in village Pandoh where he left her and went away on the pretext of getting some Biddis from the Bazar Appellant is stated to have subjected the girl to sexual intercourse at Panjgai, Slapper and Rehardhar almost every night. Mother of the Appellant is stated to have come to know about the presence of her daughter in the Water Mill at Pandoh through the owner of the water mill. It appears that the mother of the prosecutrix was trying to contact the Appellant but was unsuccessful as he was not available. At such point of time, the mother of the prosecutrix is stated to have contacted the sister of the Appellant and having asked her to keep the girl at her father's place because the Appellant had been treating and using the prosecutrix as his wife and to settle the matter in accordance with the local custom by talking to her husband and the sister of the Appellant arranged to provide shelter to the girl at the house of an old lady in village Jhiri. It was thereafter that the complaint was lodged by the mother of the prosecutrix with Superintendent of Police, which was forwarded by him to the S. H. O. Mandi for registration of case u/s 376, I.P.C. against the Appellant. It was in the aforesaid background, circumstances and facts as per prosecution that the F.I.R. 397/89 dated 11-12-1989 came to be registered at Police Station Sadar, Mandi. During the course of investigation, the prosecution is stated to have collected the evidence and got the prosecutrix examined from PW-1 Dr. Vanita Kapoor, Medical Officer, District Hospital, Mandi who after examination issued medico legal certificate Ex. PA. PW-1 filed in her X-ray form Ex. PB and referred the case to the Radiologist for ascertaining her skeletal age. Prosecutrix was examined by Dr. S.K. Malhotra, Radiologist District Hospital, Mandi on a reference by Dr. Vanita Kapoor (PW-1) epiphyses of the presecutrix were X-rayed under the supervision of Dr. S.K. Malhotra (PW-16). X-ray films were produced by him as Ex. PC/1 and Ex PC/2. On the basis of the X-ray and other facts detailed in his statement he made observations in his report Ex. PB which was written and signed by him and in his opinion age of the prosecutrix was between 15 to 17 years.

3. Appellant pleaded not guilty to the charge and claimed trial. In order to sustain the guilt against the Appellant, prosecution examined 18 witnesses, whereafter the Appellant was examined u/s 313, Code of Criminal Procedure. The Appellant stated that the prosecution case is false and the witnesses examined have told lies. Besides this, in response to question No. 24, he has stated that

the girl had been deserted by her husband and her mother wanted Appellant should adopt her as his wife and demanded money from him and when he refused the matter was reported to the police and accordingly he was falsely implicated.

4. Material witnesses in this case are PW-1 Dr. Vanita Kapoor, Medical Officer, District Hospital Mandi, who after examination of the prosecutrix (PW-3) gave her certificate Ex. PA and further opined that the skeletal age of the prosecutrix was 15 to 17 years. This PW-1 Dr. Vanita Kapoor stated on the basis of X-ray films Ex. PC/1 and Ex. PC/2. She further opined that the prosecutrix was exposed to sexual intercourse. PW-2 is Durgl Devi mother of the prosecutrix, who states that she lodged complaint vide Ex. PD when on the basis whereof F.I.R. Ex. PE was registered Vide memo Ex. PE the shirt and salwar of the prosecutrix marked as Ex. P1 and Ex. P2 were taken into possession. Such clothes were produced by this witness. PW-3 is Neela Devi, who has given the details of her having been enticed by the Appellant and thus having been taken from place to place and finally left at Water Mill at Pandoh, she further states that the Appellant had committed sexual intercourse with her against her wish and consent throughout this period. PW-4 is Bhajni Devi sister of the prosecutrix, who states that the Appellant had brought the prosecutrix to her house at village Rehardhar where they stayed for 15 days. PW-5 is Talbu Ram husband of the prosecutrix. PW-6 Soma Devi is stated to have accompanied the prosecutrix to see the fair of the Goddess, which fair used to take place at night time. This witness was declared hostile and permitted to be cross-examined by the Public Prosecutor. PW-7 is Moti Ram, Secretary, Gram Panchayat, Pandoh who has placed on record the birth entry pertaining to the prosecutrix Neela Devi vide Ex. PG and also copy of entry Ex. PH made in the family register of Hemant Ram. Other material witnesses in this case are PW-16 Dr. S.K. Malhotra. Radiologist, who X-rayed the prosecutrix on a reference of PW-1 and he after examination opined that the skeletal age of the prosecutrix was 15 to 17 years. This is the material evidence produced by the prosecution on record in order to sustain its case against the Appellant, besides other witnesses.

The Appellant was sent to trial for having committed offence under Sections 366 and 376 of the I.P.C. But after conclusion of trial, the court below acquitted him of the offence u/s 366, I.P.C. But convicted him u/s 376 I.P.C. and sentenced him as detailed here-in-above. It is this conviction that stands assailed by the Appellant in the present appeal.

5. Shri Dharamvir Sharma, learned Counsel appearing for the Appellant has raised two submissions in respect of his appeal (a) that the prosecution has failed to prove that the prosecutrix was below 16 years of age and on the other hand there is ample material to establish the age of the prosecutrix to be more than 16 years and (b) that the prosecution has failed to bring the guilt against the Appellant. According to Shri Dharamvir Sharma the trial Court has fallen into error by completely misreading the evidence produced by the prosecution. He

further pointed out that the prosecutrix being more than 16 years of age was a consenting party and as such in the event of the prosecution succeeding in establishing that the Appellant had committed sexual intercourse on her, the Appellant has committed no offence. In support of his this submission he referred to the provisions of Section 375 sixthly of Indian Penal Code. Mr. Dharamvir Sharma further referred to the statements of PW-1 Dr. Vanita Kapoor, PW-16 Dr. S.K. Malhotra. Radiologist, both of District Hospital, Mandi, PW 3 Neela Devi, PW-4 Bhajni Devi sister of the prosecutrix as well as the statement of owner of water mill PW-9 Gawainu. At the same time learned Counsel for the Appellant attacked the statement of PW-7 Moti Ram, Secretary Gram Panchayat, Pandoh as well as the entries in the record of the Gram Panchayat, Pandoh i.e. Panchayat Pariwar Register. According to Mr. Dharamvir Sharma these entries are not proved in accordance with law and alternatively these are not connected with the prosecutrix in any manner whatsoever and thus he has prayed for the acquittal of the Appellant.

6. On the other hand, Shri M.L. Chauhan, learned Assistant Advocate General on behalf of the State refuted all the submissions of the learned Counsel for the Appellant and further pointed out that the prosecution has successfully brought home the guilt against the Appellant, therefore, he has prayed for dismissal of the appeal.

7. After considering the respective submissions of both the learned Counsel for the parties, it appears that the Appellant is entitled to acquittal. It is the case of the prosecution that the prosecutrix was being taken from place to place by the Appellant and she had been travelling in bus also and at such places she was subjected to sexual intercourse against her wish as well as consent. This part of the statement of the prosecutrix seems to be un-reliable and un-trustworthy. The prosecutrix had a number of opportunities to have raised hue and cry and to have made an attempt to escape from the clutches of the Appellant. Not only this, it is admitted case of the prosecution that the Appellant took the prosecutrix to her sister's house at Rehardhar. In case she was taken against her consent at least she could have made grievance to either before PW-4 Bhajni Devi her own sister or PW-17 Pratap Singh husband of PW-4 Bhajni Devi. This fact coupled with other circumstances which have come on record, it is clear that the prosecutrix was a consenting party not only for the purpose going from place to place, but also for sexual intercourse. In these circumstances, the theory putforth by the prosecution that the prosecutrix was enticed away and/or was raped by the Appellant is hereby rejected.

8. The only question that now needs to be considered in the present case is whether the age of the prosecutrix at the relevant time was 16 years or below. Reply to this question is also in favour of the Appellant and against the prosecution. In this behalf reference may be made to the statement of PW-1. Vanita Kapoor as well as to that of PW-16 Dr. S.K. Malhotra, both these doctors have given the skeletal age of the prosecutrix to be between 15 to 17 years. In

this behalf, it may be appropriate to point out that in case of such test the margin of error on either side varies from 1-1/2 years to 2 years and in case of present nature the benefit of such margin of error has to go to the Appellant. That being the position the Appellant cannot be said to have committed rape upon the prosecutrix without her consent that too when she was under the age of 16 years. In the face of the evidence on record, the prosecution has failed to prove the age of prosecutrix (PW-3) below 16 years by any cogent and trustworthy much less the reliable evidence Shri M.L. Chauhan, learned Assistant Advocate General tried to refer to the statements of PWs 2 and 7 in support of his contention that the age of the prosecutrix has been proved to be below 16 years. So far the statement of PW-7 is concerned, suffice to say that he is not the author of the Register from where extract Ex. PG and PH were produced, who made the relevant report and how the child named in Ex. PH is shown to be the prosecutrix alone and none else is not made out at all. That being the position, no reliance can be placed upon the evidence of PW-7 and similarly Ex. PH cannot also be made the basis to connect the prosecutrix with the entry Ex. PG. So far statement of PW-2 Durgi Devi mother of the prosecutrix is concerned, from her conduct and other attending circumstances, it is clear that she was interested in getting her daughter settled as a wife of the Appellant. It appears that when she found that the Appellant is not either agreeable or is not towing in line with the designs of PW-2 the complainant, then after a long lapse, the present case appears to have been lodged by her.

9. It may not be out of place to mention that in the given situation and depending upon the facts of the case, the statement of prosecutrix is enough to convict the Appellant if it otherwise inspires confidence in the natural course of things. In such a case no other evidence is required and the court would not hesitate in convicting the accused on the basis of such statement of the prosecutrix. However, as observed herein this judgment no case is made out from the statement of PW-2 and other evidence does not support the case of the prosecution. Therefore, in taking in view that the age of the prosecutrix is more than 16 years. I am supported by a judgment of the Hon'ble Apex Court reported in *Lalta Prasad Vs. State of M.P.*, and a judgment of this Court reported in *Paramjit Singh Vs. State of Himachal Pradesh*, In the context of the opinion on the doctor as to the age of the person on radiological test, margin of error in age ascertained by such examination is two years on either side. In *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, it was so held and relevant extract therefore is to the following effect:

...However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side

Applying the ratio of these judgments, to the facts of the present case and giving benefit of margin of error of two years, it would neither be safe to hold that the age of the prosecutrix on the date when she is stated to have been subjected

sexual intercourse is less than 16 years or that such sexual acts were performed against her will and consent. On the other hand, there is enough material to hold that the prosecutrix was moving of her own free will and volition without any inducement or promise of any sort on the prosecutrix. No other point has been urged by the learned Counsel appearing for the parties, though learned Assistant Advocate General made a fervent appeal that it is a fit case for maintaining the conviction and sentence of the Appellant on the materials on record. As discussed hereinabove this contention appears to have been raised for the sake of argument and the same is hereby rejected.

10. As a result of the aforesaid discussion, the appeal deserves to be allowed and consequently the impugned judgment passed by the Sessions Judge, Mandi in Sessions Trial No. 15 of 1990 dated 8-8-1991, in case titled State of H.P. v. Chintu alias Chint Ramis hereby quashed and set aside and consequently the Appellant is acquitted of the charge u/s 376, I.P.C. It is further directed that the fine if deposited shall be refunded to the Appellant and the bail bonds furnished by him are also discharged.