

(2013) 10 SHI CK 0043
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 16 of 2013

Jagat Ram Alias Laxman

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 15-10-2013

Acts Referred:

Citation : (2013) 3 ShimLC 1608

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : Ashwani Sharma, for the Appellant; M.L. Chauhan and Mr. M.A. Khan, Additional Advocate Generals and Mr. Tarun Pathak, D.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—The appellant having been convicted by learned Additional Sessions Judge, Fast Track Court, Solan, on 12.05.2011 in Sessions Trial No. 16FTC/7 of 2009, under Sections 363, 366 and 376 IPC, in FIR No. 20/09 dated 03.05.2009, Police Station, Bagga, has assailed his conviction and sentence in the appeal. The prosecution case, in brief, is that on 03.05.2009, PW-1 Nanda Ram lodged FIR Ex. PW1/A at Police Station, Bagga, stating that he has five daughters and one son. The eldest daughter was married, fourth daughter prosecutrix aged 13 years was studying in Middle School, Siharli. On 26.04.2009 on account of Sunday his children were in the house, he had gone for labour work to village Tareda. PW-2 Kanta Devi, wife of complainant, told PW-4 Shyam Lal, Pradhan, Gram Panchayat, Beral, that on Sunday night, her all children had gone to sleep after meals. In the morning, she found PW-3 prosecutrix missing from her house. She gave this information to PW-4 on 27.04.2009 through her mobile phone. The complainant returned to his house, he and his wife Kanta Devi searched prosecutrix, but she was not traceable.

2. On 30.04.2009, PW-1 lodged the missing report of prosecutrix at Police Station, Bagga. It was noticed during search that accused, who was residing in

the village for the last 2-3 months was also missing from the village. The accused had been talking to prosecutrix and complainant suspected that the accused had enticed prosecutrix from lawful guardianship of complainant. On the statement of complainant, FIR was registered on 03.05.2009.

3. The prosecutrix and accused were recovered from Kandi Tarapur, District Mandi. The accused was arrested on 08.08.2009. On completion of investigation, Section 173 Cr.P.C. report was submitted against accused for offences punishable under Sections 363, 366 and 376 IPC in the Court of Judicial Magistrate Ist Class, Arki. The accused was committed and he was charged for offences punishable under Sections 363, 366 and 376 IPC. The accused pleaded not guilty and claimed trial. The prosecution examined 22 witnesses and produced several documents. The statement of accused was recorded u/s 313 Cr.P.C. He denied the prosecution case. The accused was called upon to lead defence evidence, if any, but he led no defence evidence.

4. On conclusion of trial, learned Additional Sessions Judge convicted the accused for offences punishable under Sections 363, 366 and 376 IPC. He was sentenced to undergo rigorous imprisonment for a period of seven years and fine of Rs. 10,000/- for offence punishable u/s 376 IPC, in default of payment of fine, rigorous imprisonment for six months. The accused was sentenced to undergo rigorous imprisonment for a period of three years and fine of Rs. 5,000/- for offence punishable u/s 363 IPC, in default of payment of fine, rigorous imprisonment for three months. The accused was further sentenced to undergo rigorous imprisonment for a period of three years and fine of Rs. 5,000/- for offence punishable u/s 366 IPC, in default of payment of fine, rigorous imprisonment for three months. All the sentences were ordered to run concurrently. The fine amount, if any, was ordered to be paid to prosecutrix.

5. I have heard learned counsel for the parties and have also gone through the record. The learned counsel for the appellant has submitted that the Court below has misconstrued and misinterpreted the evidence in convicting the appellant for offences punishable under Sections 363, 366 and 376 IPC. The prosecution has miserably failed to prove the case. The sentence imposed is on the higher side. The learned Additional Advocate General has supported the impugned judgment and has submitted that the learned Additional Sessions Judge after proper appreciation of evidence has rightly convicted and sentenced the accused. The Court below has taken a lenient view in sentencing the accused keeping in view nature of offence committed by the accused. He has prayed for dismissal of appeal.

6. In order to appreciate the contentions of the learned counsel for the parties, it will be appropriate to refer to evidence which has come on record. PW-3 prosecutrix has stated that accused was residing in her village for the last 2-3 months. She was alone in her house. The accused caught hold her and had taken her to the bed. The accused told her that he would take her to his house and marry her. The accused committed forcible sexual intercourse with her. She felt

pain. The accused also committed sexual intercourse with her near bamboo cluster.

7. On 26/27.04.2009, accused came to her house and took her to bridge and committed sexual intercourse with her. Thereafter, accused committed sexual intercourse with her near school. The accused took her to Kandi Tarapur. The accused told her to tell others that she was his wife. She was kept in a cowshed at Kandi Tarapur for 20 days, during this period, accused committed sexual intercourse with her 6-7 times. On 06/07.08.2009, accused again committed sexual intercourse with her.

8. She (PW3) was in the cowshed when two Pradhans, her mother and police came there and she was recovered from the cowshed and was handed over to her mother. She did not disclose the incident to anyone as accused used to give beatings and threats to her when she tried to run away from the custody of the accused. She had informed her mother on mobile phone from Kandi Tarapur. She was medically examined at Arki hospital. Her date of birth is 22.02.1996. The accused committed sexual intercourse with her without her consent. In cross-examination, she has stated that incident of laying down her on the bed took place in April, 2009. There is no house adjoining to the cowshed. They travelled from one place to another on foot. They had not travelled in any vehicle.

9. PW-1 Nanda Ram is the father of the prosecutrix. He has stated that at that time age of prosecutrix was 13 years and she was studying in 7th Class. On that date, he had gone to village Tareda for doing work. On information received from his wife regarding missing of prosecutrix, he (PW-1) returned to his house. The prosecutrix was searched, but could not be traced, thereafter he lodged FIR Ex. PW1/A. In cross-examination, he denied that prosecutrix was not 13 years and she was major.

10. PW-2 Kanta Devi is the mother of the prosecutrix. She has stated that age of the prosecutrix was 13 years at that time and prosecutrix was student of 7th Class. She was in the house and her husband had gone for work. On 26th all children slept in the room after meals. On next morning, she found prosecutrix missing. She informed Pradhan Shyam Lal, who intimated her husband. Thereafter, her husband returned to home. The accused was also found missing from the village. They suspected accused for enticing prosecutrix. The prosecutrix informed her on mobile on 06.08.2009. The phone was received from Kandi Tarapur (Gaggal). She, Pradhan Shyam Lal and another Shyam Lal visited village Kandi Tarapur and found prosecutrix sitting in the cowshed of Padam and from there the prosecutrix was recovered. In cross-examination, PW-2 has stated that prosecutrix had taken admission in Class I in Government School, Sakor.

11. PW-4 Shyam Lal has stated that in the year 2009, he was Pradhan, Gram Panchayat, Beral and village Sakor is in Gram Panchayat, Beral. On 27.04.2009, Kanta Devi informed him that prosecutrix was missing from her house. He informed husband of Kanta, who had gone to village Tareda for work. On

30.04.2009, Nanda lodged missing report at Police Station, Bagga. He alongwith Kanta Devi, mother of prosecutrix, police and another Shyam Lal went to Kandi Tarapur and prosecutrix was recovered from the cowshed of Padam Singh at village Kandi Tarapur. PW-4 was declared hostile and was cross-examined by the Prosecutor. He was also cross-examined by the defence.

12. PW-5 Shyam Lal has stated that he, Shyam Lal Pradhan, Kanta Devi and police visited Kandi Tarapur on 08.08.2009. The prosecutrix was sitting in the cowshed of Padam Singh. The village Kandi Tarapur is at a distance of 37 kilometres from Police Station. PW-6 Padam Singh has stated that accused told him that he was to make baskets from bamboos. The accused was accompanying one girl and introduced her to him as his wife. The accused remained in his cowshed along with girl for about 20 days. The police came on 08.08.2009 from where the accused and the girl were recovered. In cross-examination, he has stated that there is no residential accommodation in a distance of one kilometre from his cowshed.

13. PW-7 Tek Chand has stated that on 07.08.2009 accused told him that he wanted to telephone when he was crossing where the accused was staying in the cowshed of Padam Singh. Thereafter, accused and girl talked through his mobile phone and returned the mobile phone to him. The mobile phone was of his son. PW-10 Dhani Ram, Secretary, Gram Panchayat, Beral has stated that as per record date of birth of prosecutrix is 22.02.1996. The information regarding date of birth of prosecutrix was given by her father Nanda Ram on 28.02.1996. He had issued birth certificate Ex. PW10/B of the prosecutrix which bears his signatures. The entries in the register are in the hands of Inder Singh, Secretary, Gram Panchayat, Beral. PW-10 identified the writing in the register as he is familiar with the writing of Inder Singh. In cross-examination, he has admitted that in the original register in column No. 22, there are signatures of Nanda Ram.

14. PW-11 H.C. Rishi Ram has proved FIR Ex. PW1/A. PW-13 Dr. Suresh, M.O., Arki, examined accused and issued M.L.C. Ex. PW13/B with photocopy of M.L.C. Ex. PW13/C and opinion Ex. PW13/D. PW-15 Inspector Varinder Chauhan has partly investigated the case and has proved spot map Ex. PW15/A. PW-16 constable Suresh Kumar has proved application Ex. PW1/B and copy of Rapat No. 5 dated 30.04.2009 Ex. PW16/A and copy of Rapat No. 10 Ex. PW16/B.

15. PW-17 ASI Jagdish Chand has also partly investigated the case. He has prepared the map Ex. PW17/A, another map Ex. PW17/B. PW-18 S.I. Mohar Singh has stated that he along with Shyam Lal Pradhan, another Shyam Lal and Kanta visited village Kandi Tarapur on 08.08.2009. The prosecutrix was recovered from the cowshed of Padam Singh. He prepared spot map Ex. PW18/A. He prepared the challan on completion of investigation. In cross-examination, he has stated that he did not obtain ossification opinion of the prosecutrix from Radiologist.

16. PW-19 Dr. Anjana Verma examined prosecutrix and has deposed as follows:-

On examination, I found right eye congested, laterally to pupil.

Local Examination:-

Hymen ruptured (old)

Vagina permitting one finger insertion easily and two fingers tightly.

Smear from the vaginal fluid taken on the slide for chemical analysis.

Pubic hair taken.

Sealed samples of clothes, public hair, vaginal smear sealed with O letter handed over to police. Under observation till report from the Chemical examination. Primary and secondary sexual character on examination I found that:-

The breast is fully developed.

Auxillary hair not fully developed and are sparse.

Pubic hair sparse and not fully developed.

I remained on leave and came on duty on 3.11.2009 and on the basis of report Ex. PW18/E dated 20.10.2009 I gave the final opinion:-

Blood and semen was not detected on exhibits 1a (Salwar of Devki), exhibits 1b (shirt of Devki) exhibit 1c (Dupatta of Devki) and exhibit 2 (pubic hair of Devki).

Human semen was found on exhibit 3 (Vaginal slides, Devki).

PW-19 has issued M.L.C. Ex. PW19/A and gave her final opinion on the reverse of Ex. PW19/A. She opined that it cannot be said that sexual intercourse with the girl has not been done. In cross-examination by the defence, she has denied that prosecutrix was habitual to sexual intercourse. She has also stated that keeping in view secondary characteristics of the prosecutrix, she may be more than 18 years. In re-examination, she has stated that she has not given the duration of rupture of hymen in the M.L.C., it may be few weeks, few months and few years, she could not ascertain the actual date, time of first rupture of hymen.

17. PW-20 Deep Ram, Primary School Teacher, has proved certificate Ex. PW20/A on the basis of original record. PW-21 Milap Singh has stated that he had issued School Leaving Certificate of the prosecutrix on the basis of school record. The date of birth of prosecutrix is 21.02.1996. He has issued School Leaving Certificate Ex. PW18/C which bears his signatures. The certificate is correct. PW-22 Inder Singh, Secretary, Gram Panchayat, Beral, has stated that the birth register in Beral Panchayat is being maintained by him since 1994. The entries in the relevant birth register since 08.03.1994 to 24.01.2004 are in his hand. Nanda Ram, father of the prosecutrix, came to the Panchayat at Beral on 28.02.1996. He made entry of date of birth of prosecutrix which is 22.02.1996 and Nanda Ram put his signatures in the birth register. The relevant entry is Ex. PW22/A which is in his hand and in red Circle "A", Nanda Ram has put his

signatures. The relevant entry in the birth register is Ex. PW22/A which is an extract of original birth register of Gram Panchayat, Beral. This witness was cross-examined by defence, but nothing favourable to defence could be extracted in cross-examination.

18. Ex. PW1/B dated 30.04.2009 is the missing report lodged by PW-1 Nanda Ram, father of the prosecutrix. Thereupon, rapat No. 5 dated 30.04.2009 Ex. PW16/A was recorded at Police Station, Bagga. Ex. PW16/B is rapat No. 10 dated 03.05.2009 recorded at the instance of PW-1 Nanda Ram. Ex. PW1/A is the FIR dated 03.05.2009. Ex. PW10/B is date of birth certificate of prosecutrix issued by Sub Registrar, Birth and Death, G.P., Beral, showing date of birth of prosecutrix 22.02.1996. Ex. PW13/B is the M.L.C. dated 09.08.2009 of Jagat Ram and during examination of the accused, nothing found which could render him unable to do sexual intercourse. Ex. PW18/A is the spot map from where prosecutrix has been recovered from the cowshed of PW-6 Padam Singh. Ex. PW18/C is the School Leaving Certificate of the prosecutrix showing her date of birth 21.02.1996. Ex. PW18/E is F.S.L. report. Ex. PW19/A is M.L.C. of prosecutrix dated 09.08.2009 on which doctor has given opinion: it cannot be said that sexual intercourse with this girl (prosecutrix) has not been done. Ex. PW20/A is another date of birth certificate of prosecutrix issued by the Headmaster, Government Primary School, Sakor, showing date of birth of prosecutrix 21.02.1996. Ex. PW22/A is the extract from register maintained by the Health and Family Welfare Department showing date of birth of prosecutrix 22.02.1996. At point "A", the entry bears the signatures of Nanda Ram. This entry was made on 28.02.1996. Ex. D1 is the spot map-2. Ex. PX is another extract of register from the Health and Family Welfare Department showing date of birth of different persons, but not of prosecutrix.

19. PW-3 prosecutrix has stated that on 26/27.04.2009 accused took her to bridge and committed sexual intercourse with her. The accused also committed sexual intercourse with her near school. The accused took her to Kandi Tarapur where he committed sexual intercourse with her 6-7 times. On 06/07.08.2009, accused again committed sexual intercourse with her. She was recovered from the cowshed and handed over to her mother. She did not disclose incident to anyone as the accused used to give her beatings and threats. The accused committed sexual intercourse with her without her consent. She gave her date of birth 22.02.1996.

20. PW-1 Nanda Ram, father of the prosecutrix, has stated that at that time age of the prosecutrix was 13 years. PW-2 Kanta Devi has also given the age of the prosecutrix 13 years. At the relevant time, the prosecutrix was student of 7th Class. PW-2 Kanta Devi, PW-4 Shyam Lal, Pradhan, Gram Panchayat, Beral, PW-5 Shyam Lal and PW-6 Padam Singh have stated that accused and prosecutrix were recovered from the cowshed of Padam Singh.

21. The accused has taken the plea of denial. But it has been proved that prosecutrix was missing from her house since 26/27.04.2009 and ultimately she

was recovered along with accused from the cowshed of Padam Singh on 08.08.2009. The prosecution has proved report dated 30.04.2009 Ex. PW1/B of PW-1 Nanda Ram and on that basis rapat No. 5 Ex. PW16/A was entered by the police on 30.04.2009. On 03.05.2009 another rapat No. 10 was entered by the police on the report of PW-1 Nanda Ram and on that basis FIR Ex. PW1/A dated 03.05.2009 came to be registered. The prosecutrix was medically examined by PW-19 Dr. Anjana Verma and she gave opinion on reverse of M.L.C. Ex. PW19/A that it cannot be said that sexual intercourse with the prosecutrix has not been done. The accused was also medically examined by PW-13 Dr. Suresh, who issued M.L.C. Ex. PW13/B and opined that nothing found during examination which could render the person unable to do sexual intercourse. Thus, it has been proved that prosecutrix was taken away by accused from her residence where she was living with her parents and he committed forcible sexual intercourse with the prosecutrix without her consent.

22. The prosecution has also proved School Leaving Certificate Ex. PW18/C of the prosecutrix and birth certificate Ex. PW20/A issued by the Headmaster, Government Primary School, Sakor. In both these certificates, date of birth of the prosecutrix has been shown 21.02.1996. The prosecution has also proved extract from register Ex. PW22/A maintained by the Health and Family Welfare Department in which date of birth of prosecutrix is shown 22.02.1996. This entry was made on 28.02.1996 and bears the signatures of PW-1 Nanda Ram, father of the prosecutrix. There is yet another date of birth certificate Ex. PW10/B of prosecutrix issued by the Sub Registrar, Birth and Death, Gram Panchayat, Beral, showing date of birth of prosecutrix 22.02.1996.

23. It has been submitted on behalf of appellant that date of birth of the prosecutrix recorded at different places is not correct. Ex. PW18/C, Ex. PW20/A, Ex. PW22/A and Ex. PW10/B cannot be relied to record finding on the date of birth of the prosecutrix. PW-19 Dr. Anjana Verma has stated that prosecutrix may be more than 18 years. The ossification test was not conducted. The argument of learned counsel for the appellant on the date of birth of prosecutrix has no force. PW-1 Nanda Ram, father of prosecutrix, and PW-2 Kanta Devi, mother of prosecutrix, have given the age of the prosecutrix 13 years at the relevant time. PW-1 and PW-2 are the most appropriate persons to say about the date of birth of the prosecutrix. PW-19 Dr. Anjana Verma, no doubt, has stated that prosecutrix may be more than 18 years, but she has not categorically stated that prosecutrix was 18 years of age at the relevant time. PW-19 has given opinion regarding the age of the prosecutrix in view of secondary characteristics of the prosecutrix, but those characteristics have not been elaborated. PW-19 in her statement has also stated regarding primary and secondary sexual character of prosecutrix, auxiliary hair not fully developed and are sparse, pubic hair sparse and not fully developed. In these circumstances, it is not safe to rely on the statement of PW-19 that prosecutrix may be more than 18 years. It is admitted case that ossification test of the prosecutrix was not conducted.

24. The appellant cannot draw much advantage from Ex. PW18/C and Ex. PW20/A where the date of birth of the prosecutrix has been shown 21.02.1996, whereas, in Ex. PW22/A and Ex. PW10/B date of birth of the prosecutrix is recorded 22.02.1996. The difference of one day in these documents could be due to human error. In Ex. PW22/A register maintained by Health and Family Welfare Department, date of birth of the prosecutrix is shown 22.02.1996. This entry was made on 28.02.1996 and bears signatures of PW-1 Nanda Ram, father of prosecutrix. This entry was made after six days of the birth of prosecutrix and can be safely held to be correctly showing the date of birth of the prosecutrix. The offence was committed between 26/27.04.2009 to 07.08.2009. In between this period, the prosecutrix was 13 years plus. The prosecution has proved that appellant had taken away prosecutrix from the lawful guardianship of prosecutrix without the consent of lawful guardian and thus committed offence punishable u/s 363 IPC. The prosecution has also proved commission of offence by appellant punishable under Sections 366 and 376 IPC. The Court below has rightly appreciated the evidence. The view taken by learned Additional Sessions Judge is in consonance with the evidence. The sentence imposed is also in accordance with the offence committed by the appellant and cannot be termed excessive. There is no scope for interference in the appeal. In view of above, appeal is dismissed.