

(2018) 07 SHI CK 0021
In the High Court Of Himachal Pradesh
Case No : Cr. Appeal No.286 of 2014

Kashmir Singh Alias Kashmiru

APPELLANT

Vs

State Of H.P

RESPONDENT

Date of Decision : 02-07-2018

Acts Referred:

Protection of Children from Sexual Offences Act, 2012 — Section 4, 24, 24(3), 36
Indian Penal Code, 1860 — Section 452, 506
Code of Criminal Procedure, 1973 — Section 154
Indian Evidence Act, 1872 — Section 27

Citation : (2018) 3 CriCC 706 : (2018) LatestHLJ 1011 (HP) : (2018) 3 RCRCriminal 733

Hon'ble Judges : SANDEEP SHARMA, J

Bench : Single Bench

Advocate : O.C. Sharma, S.C. Sharma, Dinesh Thakur, Amit Kumar Dhumal

Final Decision : Disposed off

Judgement

Sandeep Sharma, J.

1. Instant criminal appeal having been filed by the appellant-accused, is directed against the judgment of conviction and sentence dated 4.3.2014,

passed by the learned Special Judge, Kangra at Dharamshala, H.P. in Session case No. 11-B/VII/2013, whereby learned court below while holding

the accused guilty of having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and

Sections 452 & 506 of IPC, convicted and sentenced the accused as under:-

Under Section 4 of the Protection of Children from Sexual Offences Act, 2012, convicted and sentenced the accused to undergo rigorous

imprisonment for a period of seven years and to pay fine of Rs. 5,000/-, In default of fine of payment, to undergo simple imprisonment for three

months. Under Section 452 IPC, accused is sentenced to rigorous imprisonment for a period of six months and to pay fine of Rs. 2000/-. In default, of

payment of fine, to undergo simple imprisonment for a period of one month. Whether reporters of the Local papers are allowed to see the judgment?

The accused is further sentenced to undergo rigorous imprisonment for a period of three months for the offence punishable under Section 506 IPC.â??

2. Precisely the facts as emerge from the record are that on 26.1.2013, complainant (PW3) got his statement recorded under Section 154 Cr.PC.,

alleging therein that on 25.1.2013, his minor daughter, who is studying in class 9th after having meals, had gone to sleep alongwith her grandmother, in

a room on the first floor of the house, whereas he (PW3) and his two sons, had gone to sleep in the ground floor. Grandmother of the prosecutrix

woke him up at about 12:30 am and disclosed that accused had intruded into the house and had run out of the house. PW3/complainant though made

an attempt to chase the accused, but in vain. Subsequently, prosecutrix (PW2) informed her father (PW3) that accused person had committed

penetrative sexual assault with her without her consent and will. She also disclosed that accused was having knife with him and he had gagged her

mouth, as such, she was unable to resist. Allegedly, accused had left his torch (make Orkia) at the scene of the crime, which was subsequently

handed over to the police. One Shri Vijay Kumar, (brother of PW3) had also gone in the search of the accused on hearing screams of his mother, but

in vain. PW3/complainant narrated the entire incident to Shri Vijay Kumar, who advised him and other family members to take action after dawn.

Allegedly, PW3 and Vijay Kumar went in search of the accused person on the next date, but accused was not found at his house. On the basis of

aforesaid complaint, formal FIR (Ext.PW3/A), came to be lodged against the accused. After lodging of aforesaid FIR, police got the prosecutrix

examined at Civil Hospital at Baijnath. Accused came to be arrested on 27.1.2013. After completion of investigation, police presented the challan in

the competent court of law, who being satisfied that prima-facie case exists, against the accused, charged him for having committed offence

punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC, to which he pleaded not

guilty and claimed trial.

3. Learned trial Court on the basis of evidence collected on record by the prosecution held the accused guilty of having committed offence punishable

under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC and accordingly, convicted and

sentenced him as per the description given herein above. In the aforesaid background, appellant-accused has approached this Court in the instant

proceedings, praying therein for his acquittal after setting aside judgment of conviction recorded by the court below.

4. Mr. O.C. Sharma, learned counsel, representing the appellant-accused while inviting attention of this Court to the impugned judgment of conviction

recorded by the learned trial Court, vehemently contends that same is not based upon proper appreciation of evidence and as such, same cannot be

allowed to sustain. Mr. Sharma, further argues that learned court below has failed to appreciate the evidence in its right perspective, as a consequence

of which, erroneous findings have come on record to the detriment of the accused, who has been falsely implicated in the case. With a view to

substantiate his aforesaid argument, Mr. Sharma, made this Court to peruse the statements of prosecution witnesses to demonstrate that there are

material contradictions and in-consistencies and as such, there was no occasion for the court below to hold the accused guilty of having committed

offence punishable under the said sections. While specifically referring to the Sections 24 and 36 of Protection of Children from Sexual Offence Act,

Mr. Sharma, argues that since Investigating Agency failed to carry out investigation strictly in terms of provision contained in the aforesaid section,

entire investigation has vitiated and court below ought to have not placed any reliance upon the conclusion, if any, drawn by the Investigating Agency

while ascertaining the guilt of the accused. Mr. Sharma, further contends that learned trial Court while holding accused guilty of having committed

offence punishable under the Sections as referred herein above, has solely placed reliance upon the statement of prosecutrix-PW2 and medical

evidence led on record, which has been further substantiated by PW11 Dr. Praveen Thakur, but if the statement of these two material prosecution

witnesses are read in its entirety, it nowhere proves the case of the prosecution, rather creates serious doubt with regard to the correctness and

genuineness of the story put forth by the prosecution. Lastly, Mr. Sharma contends that prosecution, for the reasons best known to it, failed to

examine most important witnesses i.e. grandmother and brother of the complainant namely Vijay Kumar, who allegedly had an occasion to see the accused at the first instance after the alleged incident.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting the aforesaid submissions having been made by Mr. Sharma, contends that

there is no illegality and infirmity in the impugned judgment of conviction recorded by the court below, rather same is based upon proper appreciation

of evidence and as such, same needs to be upheld. Mr. Thakur, further contends that it stands duly proved on record that on the date of alleged

incident, accused entered in the house of the prosecutrix and thereafter, ravished her against her wishes. While inviting attention of this Court to the

seizure memo Ext.PW2/B (knife), Mr. Thakur, contends that accused himself got knife recovered from the tea garden and similarly, torch of the

accused was recovered from the room of the prosecutrix. While referring to the medical evidence adduced on record by the prosecution, Mr. Thakur,

contends that PW11 Dr. Praveen Thakur, has categorically opined that possibility of sexual assault cannot be ruled out and as such, there is no

illegality and infirmity in the impugned judgment of conviction recorded by the court below and as such, same deserves to be upheld.

6. Having heard learned counsel for the parties and gone through the record vis-à-vis impugned judgment of conviction recorded by the Court below,

it is quite apparent that the learned court below has placed heavy reliance upon the statement of prosecutrix (PW2) and (PW11) Dr. Praveen Thakur,

to hold accused guilty of having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and

Sections 452 & 506 of IPC. But if the statement of prosecutrix is read in its entirety, it does not inspire confidence and version put forth by her is

wholly un-believable and untrustworthy and as such, raises serious doubt with regard to the correctness of the story put forth by the prosecution.

Though prosecutrix in her statement has stated that she after having meals had gone to room at first floor alongwith grandmother, but she also

categorically stated that her father and brothers were sleeping in a room on the ground floor. She has further stated that a person entered the room in

midnight and lifted her blanket, but interestingly, this witness in her cross-examination has categorically admitted that she resides in two story building

and there is one door plank in the ground floor, which was bolted from inside on the date of alleged incident. Though, she qualified her statement by stating that door usually gets opened with mere push, but version put forth by the prosecutrix (PW2), does not appear to be trustworthy at all. It is unbelievable that accused after having opened door succeeded in climbing to the first floor because as per own statement of prosecutrix, her father and two brothers were sleeping in the ground floor. Had accused opened the door by pushing the same, father and brothers of the prosecutrix would have definitely heard the noise and sound of opening of the door. Similarly, though prosecutrix has claimed that her grandmother, who at that relevant time, was sleeping in room of the prosecutrix, is hard of hearing, but still it cannot be believed that she did not hear the screams of the prosecutrix, who was allegedly threatened by the accused by showing knife. Prosecutrix stated before the court below that she was sexually assaulted by the accused and she was unable to raise alarm as her mouth was gagged, but aforesaid version of her is not corroborated by the medical evidence adduced on record. Though medical evidence adduced on record shall be discussed in the later part of the judgment, but at this stage, if for limited purpose, it is taken into consideration to test the correctness of version put forth by the prosecutrix that she was threatened and gagged by the accused, same does not corroborate the version put forth by the prosecutrix because it has nowhere come in the medical evidence that injury, if any, was found on the mouth or any part of the body of the prosecutrix. As per prosecutrix, when she raised the alarm, her grandmother woke up and made an attempt to catch hold of the accused. She also stated that her grandmother made an attempt to light a match box, but she was unsuccessful. She further stated that accused while leaving room switched on the light, which version of her appears to be totally improbable because in such like situation, no person would switch on the light, rather he would make all efforts to hide his identity. Interestingly, it has nowhere come in the statement of prosecutrix that how in the dark room, she was able to identify the accused, because as per her own version, she had no prior acquaintance with the accused. As per the prosecutrix, her grandmother was the first person to see the accused on the spot, but unfortunately, she has not been examined for the reasons best known to the prosecution.

7. PW3 complainant, who happened to be father of the prosecutrix narrated altogether different story while deposing before the court below. He stated before the court below that he after having heard screams of his mother went to the first floor, where he saw the accused running out of the room, but this statement of him is in total contradiction of his statement recorded under Section 154 of Cr.PC, wherein he categorically reported that at around 12:30 am, his mother woke him up and informed that accused person had entered into the house and ran out of the house. If aforesaid statement recorded under Section 154 Cr.PC, is presumed to be correct, it is not understood that where was the occasion for the complainant (PW3) to see the accused running from the room on the date of alleged incident. Very interestingly, this witness in his statement recorded under Section 154 Cr.PC, reported that after having heard screams, his brother namely Vijay Kumar, came to the spot, who advised them to wait till dawn, but for the reasons best know to the prosecution, he has not been also cited as witness. PW3 deposed that he has two sons and one daughter. On 25.1.2018, he alongwith his two sons had gone to sleep in a room in ground floor, whereas victim-prosecutrix alongwith her grandmother had gone to sleep in the first floor. He also stated that his mother at about 12:30 am, came to his room and told him that the accused person has been noticed by her in the room, who had fled away. He also stated that his brother Vijay was also woke up and he disclosed the incident to him. It also came in his statement that he noticed that accused had left his torch in the room. If the statements of complainant (PW3) and prosecutrix (PW2) are read in conjunction juxtaposing each other, it certainly persuades this Court to agree with the contention of Mr. O.C. Sharma, learned counsel representing the petitioner that no much reliance could be placed upon their version being contradictory and in-consistent. There are material contradictions in the statements of aforesaid material prosecution witnesses with regard to entry of the accused in the house and thereafter, his presence in the room, when alleged incident occurred. The Honâ??ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that â??no man is guilty until proved soâ??, utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, the Honâ??ble Apex Court has held that

there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the

witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. Reliance is placed on

Judgment passed by the Honâ??ble Apex Court in C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645, wherein it has been held as under:-

â??45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to

emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj

Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)

14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is

held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental

aspect of criminal jurisprudence rests upon the stated principle that ""no man is guilty until proven so"", hence utmost caution is required to be exercised

in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a

string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses.â??

8. As has been noticed above, prosecution has omitted to cite two material spot witnesses i.e. grandmother and Sh. Vijay uncle of the prosecutrix,

who could be the best persons to corroborate the version put forth by the prosecutrix, which otherwise does not appear to be trustworthy. Though in

the instant case, prosecution has examined as many as 12 witnesses, but learned court blow has placed heavy reliance upon the statements of

prosecutrix (PW2) and PW11. But if the statement of PW11 is read in its entirety, it nowhere proves commission of offence, if any, under Section 4

of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC. PW11 namely Dr. Praveen Thakur, who medically

examined the prosecutrix opined as under:

â??Alleged history of sexual assault around 12.30 a.m. On 26.01.2013. On

examination well built average height, vital stable. Well conscious/oriented to time/place and person, breast well developed. Axillary hair present. Menarche occurred at the age of 11 years. Complaining of bleeding per vaginally since morning 5.30 a.m. on 26.01.2013. Local Examination Pubic hair present) No injury present on breast, Patient menstruating) abdomen inner aspect of)forearm thighs, wrist, face)legs and pelvic region. Perspeculam Examination Bleeding per vaginal was present. No laceration injury was present. Cervix was healthy. Pervaginal examination Bleeding per vaginal was present. Vagina was healthy. Two fingers loose, non-tender. No other external injury was present. Systemic examination-NAD. As per my opinion, there are no injuries/abrasion present on the body and near internal organs and she is not unfit for sexual intercourse. She was referred to dental and X-rays examination for age verification. I handed over to the police the following articles:-

1. Vaginal swab,
2. Kameez, Salwar, bra, undergarment with pad
3. Pubic hair sealed in separate parcel with hospital seal and application to Chemical Analyzer through lady constable Vanita.

The victim was 14 years and she was examined with the consent of her mother. Per endorsement on MLC. The final opinion was to be given after

chemical analyses report. I issued MLC Ex.PW11/A which is in my hand and bears my signatures. Per chemical analyses report is Ext.PW11/B.

Blood and semen could not be detected on the shirt of the victim. Human blood was detected on her Salwar, underwear, pad, bra and pubic hair, but

semen was not detected. Blood was also detected on vaginal swab of the victim, but semen was not detected. In my final opinion, chances of sexual

activity cannot be ruled out and my opinion in this context is Ex.PW11/C which is in my hand and bears my signatures. Ex.P-3 parcel sealed with

court seal has been shown to me and it contains Salwar, shirt, undershirt and undergarment. Packet was allowed to be opened. On opening the parcel,

one shirt, one Salwar, one undergarment and one undershirt have been taken out. Salwar Ext.P-4, shirt Ext.P-5, undershirt Ext.P-6 underwear with pad

Ext.P-7 are the same. The victim was wearing all these cloths at the time of her examination. xxxxx by Sh. Sudhir Samyal, Adv for accused.

I cannot rule out sexual penetrating assault in this case. It is correct to suggest

that on victim being subjected to sexual penetrating assault for the first time she is likely to suffer injury on vabla labia majora. There is no such injury. I cannot say that the victim was habitual to intercourse voluntarily that she had been subject to intercourse earlier. It is incorrect that since the secondary character of the victim was well developed, she was more than 16 years. The dental and radiological reports were not shown to me. It is incorrect that the police told me the age of the victim. Self-stated that the victim herself and her grand mother apprised me about her age. It is incorrect that the victim did not tell me her age. It is incorrect that in the present case there is no evidence about commission of sexual penetrating assault.â??

Careful perusal of aforesaid statement given by the doctor PW11 as well as MLC adduced on record clearly suggests that on the date of alleged

incident, prosecutrix was menstruating and no injury on any part of the body of the prosecutrix was noticed/found at the time of medical examination.

Doctor has categorically stated that â??as per my opinion, there are no injuries/abrasion present on the body and near internal organs and she is not unfit for sexual intercourse.â??

9. Doctor in his report has simply stated that he cannot rule out the chances of sexual intercourse. But if her statement is examined and perused in

light of report submitted by the RFSL, this Court is persuaded to agree with the contention of Mr. O.C. Sharma that no case, if any, is made out

against the accused under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC. RFSL,

Dharamshala has categorically reported that no blood and semen could be detected on the cloths and pubic hair of the accused. No doubt as per

report of FSL, some human blood was found on the Salwar of the prosecutrix, but that could not be a ground to conclude that blood was on account of

sexual assault, if any, committed by the accused, rather it has come in the report of the doctor that at the time of medical examination, victim was

menstruating and as such, possibility of her own blood on her cloths cannot be ruled out, especially when there is no definite opinion of FSL with

regard to the human blood present on the clothing of the prosecutrix. There is no definite opinion given by the PW11 or by FSL that human blood

detected on the Salwar of the prosecutrix was of the accused. Similarly, human semen was detected on the underwear of the accused, but as per

report no human semen was found on the undergarments of the prosecutrix as well as her pubic hair.

10. Having carefully examined/analyzed evidence led on record vis-à-vis story put forth by the prosecution, this Court has no hesitation to conclude

that story put forth by the prosecution is wholly unbelievable and untrustworthy. Version put forth by the prosecutrix with regard to the entry of the

accused in the room and thereafter, her being ravished by the accused that too in the presence of the grandmother, is highly improbable and cannot be

accepted in the absence of any piece of corroborative evidence, if any, led on record by the prosecution. In the case at hand, though prosecution with

a view to prove the version put forth by the prosecutrix has made an attempt to introduce grandmother by stating that she was able to identify the

accused while he was leaving the room, but unfortunately, she has not been cited as prosecution witness. There is no cogent and convincing evidence

led on record to prove its case by the prosecution and as such, no conviction, if any, could be recorded on highly improbable and unbelievable version

put forth by the prosecutrix. There is another aspect of the matter that there is no explanation available on record that how accused could identify the

prosecutrix in a dark room because admittedly two persons i.e. grandmother and prosecutrix were sleeping in the room, meaning thereby, accused

could go to any room including the ground floor, where PW3 and his sons were sleeping. There is no evidence that at the first instance, accused after

entering the room made efforts, if any, to ascertain or verify the identity of the victim, to whom the accused wanted to ravish and as such, story being

highly improbable, deserves to be rejected outrightly. Reliance is placed on judgment passed by the co-ordinate Bench of this Court in case titled State

of HP v. Sohan Lal, Latest HLJ 2016(HP) 1585, relevant para whereof is reproduced herein below:

14. Version of PW-1, PW-6 and PW-10 that accused has committed offence in a room where his mother and other two daughters were sleeping

is unbelievable, more particularly, for the reason that allegations of violation of person of victim by accused either for three months or 2-3 times is not

corroborated by medical evidence but has been falsified. PW-7 Dr. Sangeeta Uppal has opined that possibility of sexual assault cannot be ruled out.

However, she has admitted that as per MLC PW7/A issued by her, there was no sign of mark of injury to show that the child was sexually assaulted

by accused. Opinion of Medical Board consisting of Chairperson Professor OBJ, Members Assistant Professor OBJ, Assistant Professor Forensic

Medicine and Medical officer on emergency duty I.G.M.C. Shimla does not lend support to case of prosecution. As per opinion of Medical Board,

there was nothing to suggest about recent or remote complete sexual intercourse as also in absence of any evidence in Microbiological and Chemical

analysis. PW-1 Kanta Devi and PW-10 victim has specifically alleged that accused has committed sexual intercourse which had resulted into

immense pain and bleeding in private part. Opinion and reports of Medical experts are contrary to the said version.â??

11. After having carefully perused medical evidence adduced on record and statement of prosecutrix, this Court has no hesitation to conclude that

court below has fallen in grave error while concluding that prosecution successfully proved on record that the prosecutrix was subjected to sexual

assault against her wishes. Though, this Court having discussed and analyzed the statement of PW3 and PW11, sees no need to elaborate the matter

any further, however, even if statement of PW12 i.e. Inspector Rajinder Sharma, SHO, police station, Baijnath, is perused, it further casts serious

doubt with regard to the correctness of the story put forth by the prosecution. He admitted in his cross-examination that house of the prosecutrix is

duplex and there is only one door to enter in the house, which is situated in the ground floor. Most importantly, it has come in the cross-examination of

this witness that father and brothers of the prosecutrix used to sleep in the ground floor and door of the ground floor was not found to be broken. He

also admitted in his cross-examination that no independent witness was associated at the time of recording of disclosure statement of the accused

under Section 27 of the Indian Evidence Act, which also raises serious doubt with regard to the recovery, if any, made by the prosecution of the

alleged knife from the tea garden.

12. As per Section 24 of the Act, statement of victim/child is to be recorded either at his or her residence or at a place where he she resides or at

place of his/her choice.

â??24. Recording of statement of a child.-

1. The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as

far as practicable by a woman police officer not below the rank of sub-inspector.

2. The police officer while recording the statement of the child shall not be in uniform.

3. The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

4. No child shall be detained in the police station in the night for any reason.

5. The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.â??

Aforesaid provision further provides that as far as practicable, statement of child should be recorded by a woman police officer not below the rank of

sub-inspector. However, in the case at hand there appears to be total non-compliance of aforesaid provision of law, because admittedly, statement

was recorded by PW12, SHO Rajinder Pal, and there is no explanation rendered on record that why statement was not recorded by a woman police

officer. Similarly, statement of victim has not been recorded at her residence; rather same has been recorded at the police station. Section 24(3)

further provides that police officer, while making the investigation shall ensure that while examining the child, child at no point of time should come into

the contact in any way with the accused. If the Ext.PW12/C is perused carefully it clearly suggests that recovery was effected in the presence of the

prosecutrix from the tea garden, meaning thereby, police failed to protect the identity of the child from the public/accused as envisaged under Section

24(3) of the Act.

13. Similarly perusal of Section 36 of the Act, suggests that at the time of recording statement of child, Special court should ensure that child is not exposed to the accused in any way at the time of recording of the evidence.

â??36. Child not to see accused at the time of testifying.-

1. The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

2. For the purposes of sub-section (1), the Special Court may record the

statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.â??

14. It has been further provided that the Court may record the statement of a child through video conferencing or by utilizing single visibility mirrors or curtains or any other device. But in the instant case, if the statement of prosecutrix is read in its entirety, it clearly suggests that no such precaution was taken because prosecutrix specifically stated that accused person in Court is the same person, who had entered her room on the date of alleged incident.

15. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Honâ??ble Apex Court, this Court is of the view that court below has failed to appreciate the evidence as well as law on the point in its right perspective as a consequence of which erroneous findings have come on record. Accordingly, the appeal is allowed and judgment of conviction recorded by the learned court below is quashed and set aside. Accused is acquitted of the charges so framed against him. Bail bonds discharged. Release warrants be prepared accordingly. Appeal stands disposed of, so also pending applications, if any.