
(2011) 06 SHI CK 0261
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 388 of 2010

Kishan Chand

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 02-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428
Penal Code, 1860 (IPC) — Section 342, 363, 366, 376, 506

Citation : (2011) 3 ShimLC 515

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Surinder Singh, J.—The present jail appeal has been received from the Superintendent of District Jail Chamba, which has been directed by the appellant (hereinafter to be called as accused) being aggrieved by the judgment of conviction and sentence passed by the learned Sessions Judge in Sessions trial No. 20 of 2010, decided on 6.7.2010/24.7.2010 whereby he was sentenced to undergo imprisonment under the following different Sections as hereunder:

Sl. No.

Offence under Section

Sentence

1.

376 IPC

Rigorous imprisonment for seven years and fine of Rs. 50,000/- and in default of payment of fine, simple imprisonment for one year.

2.

363 IPC

Simple Imprisonment for three years and fine of Rs. 5,000/- and in default of payment of fine, simple imprisonment for one year.

3.

366 IPC

Simple imprisonment for five years and fine of Rs. 20,000/- and in default of payment of fine, simple imprisonment for one year.

4.

342, IPC

To pay fine of Rs. 1,000/- and in default of payment of fine, simple imprisonment for one month.

5.

506 IPC

Simple imprisonment for one year and fine of Rs. 5,000/- and in default of payment of fine, simple imprisonment for one year.

All the sentences were ordered to run concurrently, The period of detention during investigation and trial is ordered to be set off as per the provisions of Section 428 of Code of Criminal Procedure.

2. Since, the accused was unrepresented as such vide order dated 17.9.2010 Ms. Sheweta Julka, Advocate was appointed as legal aid Counsel for him.

3. The facts giving rise to the present appeal can be stated thus.

(i) In the year 2009 the prosecutrix (16) was studying in plus one in Government Senior Secondary School, Jajjakothi. The accused (19) was her uncle in village relation, residing in a separate house and distance of about 400/500 meters away from the house of the complainant. It is alleged that while the prosecutrix going to school, the accused used to tease her.

(ii) On 26.12.2009 the prosecutrix put on her school dress and was ready for the school. In the meantime, she felt to go out and ease herself. She went near the water source and after easing herself, when she came out from the bushes, she was caught hold by the accused from her arms and took her to his house, bolted the door of the room from inside and committed rape on her. When she tried to escape, the appellant hurled threats to her and kept her confined in the room for five days. During this time, he is alleged to have committed sexual intercourse five times with her. It is also alleged that the accused told her that he would solemnize marriage with her.

(iii) On 30.12.2009, the accused while taking her to Chamba for solemnizing marriage with her adopted short cut, they were apprehended by the police accompanied by her parents and cousin Nar Singh who met them on the way

near village Chilli. She revealed about all the facts to her parents. The prosecutrix was wearing some other cloths. The accused was arrested by the police.

(iv) The school dress i.e. shirt Ex.P1, salwar Ex.P2, Panjama Ex.P3, which was kept in the house of the accused was taken into possession along with bed sheet, Ex. P4, over which the accused is alleged to have committed rape with her. The aforesaid items were sealed.

(v) On 31.12.2009 at about 11.30 a.m. she was medically examined at Chamba by PW3 Dr. Arti Sharma on the police request. The doctor did not find any injury on her body. Her LMP was 23.12.2009. On local examination, the doctor did not find any injury on her private parts, although, hymen was absent. No redness and discharge was found as per the vaginal examination. However, it admitted only one finger. The prosecutrix was referred for ossification examination but was not conducted. Her cloths which were sealed alongwith vaginal swabs were sent for forensic examination. Forensic expert found human blood on the cloths of the prosecutrix and also in the vaginal swab (probably menstrual blood) but the semen was not detected on the aforesaid articles. In the opinion of the doctor (PW3), it was not possible to say that the rape was committed or not. However, she issued medico legal certificate Ex.PW1/C under her signature.

(vi) The police also visited the spot and prepared site plan Ex.PW8/ A. The accused was also got medically examined, Ex.PW8/B is his MLC. He was found fit to perform sexual intercourse.

(vii) During the investigation of the case, PW8 SI Shayam Prasad obtained the copies of birth certificate of the prosecutrix along with school admission form Ex.PW2/C and Ex.PW2/D respectively from her father who was a class IV employee of the same school.

4. After completing investigation, the challan was presented against the accused for his trial in the Court. Accordingly the accused was charge-sheeted for the aforesaid offences to which he pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined its witnesses and also recorded the statement of the accused u/s 313 of the Code of Criminal Procedure. He denied the circumstances which were found attendant upon him and his case was denial simplicitor. But, however, alleged his false implication in the case. When called upon to enter in his defence, he did not lead any evidence in defence.

6. The learned trial Court believing the statement of the prosecutrix in the light of the other evidence, convicted and sentenced the accused, as aforesaid. Hence, the present appeal.

7. Ms. Sheweta Julka, learned Counsel for the appellant vehemently argued that the burden to prove the offence is always on the prosecution and it never shifts to the accused to prove his innocence. It is argued that there was no injury on the person of the prosecutrix. The was living in his house alongwith his married

brothers and parents but surprisingly, this fact was not known to them and she did not raise any hue and cry rather obediently follow the accused to Chamba and on the way they were apprehended by the police and her parents that too while they had allegedly crossed 2/3 villages is suggestive of consent, more specifically when she is proved to be of the age of discretion and no criminal liability can be fastened upon the accused. Further her testimony is not worth inspiring confidence.

8. On the other hand, Mr. A.K. Bansal, learned Additional Advocate General supported the impugned judgment of conviction and sentence and submitted that the accused was so closely related to the prosecutrix that there was no question of marriage, the consent as alleged is not made out as she was under the fear of the accused and also that there are other material particulars existing in the evidence on record corroborates her statement. Therefore, impugned judgment is legally and factually correct.

9. I have given my thoughtful consideration to the rival contentions of the parties and closely and cautiously scanned the evidence.

10. It is well settled that in a case of rape, the onus is always upon the prosecutrix to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. Further, it is no part of the duty of the defence to explain as to how and why in a rape case the victim has falsely implicated the accused. The evidence of the prosecution witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him. However, great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. It is also equally settled that the statement of the prosecutrix has to be weighed and examined as that of an injured witness. If, it inspires confidence it has to be acted upon without any corroboration.

11. In the instant case, prosecutrix stated that in the month of December, 2009 while proceeding to school she went to answer the call of nature in her school uniform, near Panihar (local water source) leaving behind the school bag in her house. After easing herself she came out from the bushes, the accused came there from his house, caught hold her from her arms, took her to his house and bolted the door from inside and committed rape. Thereafter she was kept confined for five days in the house. During this time he committed rape five times and she was also criminally intimidated. She also stated that accused intended to marry her. Thus on 30.12.2009 while taking her to Chamba through a short cut, they came across the police accompanied by her parents and cousin Nar Singh near village Chilli. The police apprehended the accused and she made

statement to the police narrating the entire incident, thereafter she was got medically examined from the doctor at Chamba. In cross-examination she stated that the accused used to behave indecently with her for the last one month prior to the alleged occurrence, but she did not disclose this fact to her parents out of fear. She further stated that the house of the accused is adjoining to the house of her parents and the water source where she had gone to ease herself is at a distance of one minute walk from her house. She also stated that the accused had been residing with his three brothers and their family members including his father in the same house where she was kept confined. She stated that when she was taken by the accused to his house, her mouth was gagged with hands by the accused. She further stated that the blood oozed out on the bed sheet after rape, which got blood stained and her cloths were also smeared with blood. According to her, for the second time she was rapped on 27.12.2009. Whenever she cried, the accused used to administer threat to her life. During these five days the accused used to accompany her while going out for easing herself. She further stated that to reach village Chilli they crossed 2-3 villages on the way. They also came across few people while going to Chamba but they were not known to her. She denied that the accused had not committed forcible intercourse with her and also that no threats for her life were given to her.

12. PW2 Chaman Singh is the father of the prosecutrix. According to him, on 26.12.2009 he was out of the village in connection with some work. On return, he came to know that prosecutrix had not returned from the school. He contacted his relatives telephonically believing that he had gone to the house of the relatives. Next day, he started searching for her, but it was of no avail. On 28.12.2009 when he was near village Sundla, searching for the prosecutrix, he received telephonic message from his son that the prosecutrix was seen in the house of the accused. Next day, he reported the matter to the police in terms of FIR Ex.PW2/A, thereafter accompanied the police in the search of her daughter. On 30.12.2009, they came across the accused and the prosecutrix near village Chilli. He identified his daughter. At that time his wife, sister and his nephew Nar Sigh were with him. He also proved seizure memo Ex.PW2/B. He produced the copies of date of birth certificate and school admission form with respect to her daughter (Ex.PW2/C and Ex.PW2/D) which were obtained from the school wherein he was posted as Class-IV employee. In cross-examination he admitted that the admission form remained attached with the record which was not brought by him and admitted that Secretary, Gram Panchayat maintained the records of birth and deaths. He denied that once his daughter had failed in the class. He further stated that the distance between the house of the accused and his house is 400-500 meters from each other.

13. PW3 Dr. Arti Sharma medically examined the prosecutrix, but did not find any marks of injury on her body except that the hymen was absent. She also noticed the human blood probably that of menstrual blood on the cloths of the prosecutrix and as per the report of the FSL, EX.PA the blood found on the cloths and also on vaginal swab was probably menstrual blood but the semen was not

detected. It was not possible to her to say that whether rape was committed or not. But in cross-examination she has stated that it is not essential that in case of rape, injury on the private part of the victim is to be caused.

14. PW5 Nar Singh also corroborated the version of the prosecutrix to the effect that the prosecutrix as well as accused were found by them near village Chilli and the custody of the prosecutrix was handed over to her father vide memo Ex.PW2/B. He admitted that there are 10-15 shops at village Chilli. He stated that Chaman Singh, the father of the prosecutrix did not disclose that the prosecutrix was noticed at the house of the accused.

15. On the critical examination of the aforesaid evidence, it is apparent that the skeletal age of the prosecutrix was not ascertained. The prosecutrix stated her date of birth to be 19.1.1994 and at the time of alleged incident she was studying in Plus one. This stands corroborated by the documentary evidence produced by her father during the investigation having obtained from the school concerned which consists of copy of admission form Ex.PW2/ Designed by him, duly accompanied by the copy of birth certificate obtained from the school where she was initially admitted by him. It is a relevant evidence and has to be believed in view of the aforesaid un-assailed sworn testimony of the prosecutrix. Thus, on the date of alleged incident she comes out almost to be 16 years of age i.e. the age of discretion. At the time of alleged incident, the accused was 19 years of age. The circumstances, in the instant case go to show that the prosecutrix and the accused had incest relationship between them. Although, in a rape case it is not necessary that the victim would sustain injuries on her body, if she has not offered the resistance. But in the instant case, there is absolutely nothing on record to show that she had offered the resistance. Rather she has stated that she succumbed to the threats of the accused, but it makes her testimony doubtful that the water source where she had gone to ease herself is only at a distance of one minute walk from her house and accused is stated to be residing in the house adjacent to their house at a distance of about 400/500 meters along with his other brothers, three sister-in-laws, his father and two children of his brothers and in the same house where she was allegedly kept confined by him. She also stated about having raised hue and cries, but the accused is alleged to have gagged her mouth with his hands. She stated that whenever she has to go to answer the call of nature, the accused used to accompany her. Surprisingly, she did not make any complaint to any of the member of the family of the accused, nor any of them had asked about the presence of the prosecutrix in the house, more specifically, when the house of the prosecutrix is also nearby and she was reported to be missing. Further, the doubt is aggravated by the fact that when the accused allegedly committed rape, the blood oozed out and the cloths along with bed sheet were stated to have smeared with blood and those cloths along with bed sheet were handed over to the doctor and which were sealed and sent for forensic examination, but none of these items contained blood stains whereas the forensic expert opined that it may be menstrual blood. Even it is evident from the statement of Dr. Arti Sharma, (PW3) that the prosecutrix had

history of menstruation on 23.12.2009.

16. The another factor which makes the prosecution case doubtful is the statement of PW2 Chaman Singh, the father of the prosecutrix. He has stated that on 28.12.2009 he was in the search of her daughter at Sundla when he received the telephonic message from his son that the victim was seen in the house of the accused, thereafter he lodged the report Ex.PW2/ A with the police on 29.12.2009. But even then the house of the accused was not got searched to recover the prosecutrix, rather the alleged recovery of the prosecutrix was made on 30.12.2009 near village Chilli while they were going to Chamba on foot. Even at that time she was not wearing school dress which was allegedly later on recovered from the house of the accused. But there is nothing on record to show that the cloths worn by the prosecutrix did not belong to her, meaning thereby, she herself managed to bring a spare pair of cloths when she joined the company of the accused. The allegation of rape as propounded by the prosecutrix has also not made out from the testimony of the doctor. According to doctor, the hymen was found absent but there was no redness and discharge on the vagina. Though, incest relationship may be morally wrong, but the offence charged has to be proved in accordance with the well settled principles of law. The factors which have surfaced in the evidence discussed above exclude the commission of rape by accused and mitigate against the truthfulness of the prosecutrix also for the reason that she happened to meet many persons on the way while she was being taken to Chamba as alleged, but did not raise any hue and cry nor made any complaint to any of the persons who met them on the way. Even at village Chilli there are 10-15 shops and to reach village Chilli they had to cross 2-3 villages but she remained silent, also creates doubt on the probity of the prosecution case.

17. There is no absolute rule that the corroboration of the woman rapped must be looked for. If, the Court is completely satisfied with her evidence, it is open to it to convict the accused even on uncorroborated testimony. But in the instant case, the testimony of the prosecutrix to my mind, does not inspire confidence and it also relegates the material corroboration from the evidence on record. Therefore, the conviction and sentence imposed upon the accused are unsustainable.

18. On the totality of the facts and circumstances of this case, it would be unsafe to convict the accused where there are so many infirmities in the prosecution version. The accused is clearly entitled to the benefit of doubt, consequently, the appeal filed by the accused deserves to be allowed. Accordingly, the appeal is allowed and the impugned judgment convicting and sentencing the accused is hereby set aside. The accused is ordered to be released forthwith, if not required in any other process of law. The Registry is directed to send the warrant of release of the accused/appellant forthwith. The fine amount, if any, deposited be refunded to him.

Send down the records.