

**(2017) 12 SHI CK 0003**  
**In the High Court Of Himachal Pradesh**  
**Case No : 493 of 2016**

Kishori Lal

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

---

**Date of Decision :** 02-12-2017

**Acts Referred:**

[Code of Criminal Procedure, 1973](#), [Section 173](#), [Section 164](#) - Report of police officer on completion of Investigation - Recording of confessions and statements  
[Indian Penal Code, 1860](#), [Section 376](#), [Section 323](#), [Section 506](#), [Section 341](#) - Punishment for rape - Punishment for voluntarily causing hurt - Punishment for criminal intimidation - Punishment for wrongful restraint

**Citation :** (2017) 12 SHI CK 0003

**Hon'ble Judges :** Dharam Chand Chaudhary

**Bench :** Single Bench

**Advocate :** Virender Singh Rathore, Parmod Thakur

---

## Judgement

1. Appellant Kishori Lal (hereinafter referred to as the accused) was booked by the police of Police Station Tissa, District Chamba for the commission of offence punishable under Sections 323, 341, 376 & 506 IPC vide FIR No. 24/2014 with the allegation that on 21.2.2014 around 11:00 AM at a place, namely, Village Dogru, he restrained the prosecutrix (name withheld) from going to her house at Village Birmohi, Tehsil Churah, District Chamba on way back from the shop of PW-5 Chuhdu Ram situated at Village Bahnota and dragged her inside the bushes where she was subjected to sexual intercourse against her will and without her consent. In this process, she also received multiple injuries on her person. On the completion of the investigation and filing report under Section 173 Cr.P.C., learned trial Judge has proceeded to frame charge for the offence punishable under Sections 323, 341, 376 & 506 IPC against him. The accused was tried for the offence he allegedly committed in the Court of learned Addl. Sessions Judge, Chamba and convicted for the commission of offence under Sections 323, 341 & 376 IPC, however, no case under Section 506 IPC was found to be made out

against him, hence acquitted of the charge so framed against him. Consequently, he has been sentenced to undergo rigorous imprisonment for 7 years under Section 376 IPC with fine in the sum of Rs. 5,000/-, simple imprisonment for a period of 3 months under Section 323 IPC and simple imprisonment for a period of one month under Section 341 IPC vide impugned judgment dated 28.7.2016. Presently, he is lodged in jail and undergoing the sentence.

2. Aggrieved by the impugned judgment, the accused has questioned the legality and validity thereof on the grounds, inter alia that for want of cogent and reliable evidence, no findings of conviction could have been recorded against him. The sole testimony of the prosecutrix relied upon against him is not reliable and rather false which in the given facts and circumstances of this case could have not been made basis to record findings of conviction against him. The prosecutrix had relations with him which were known to each and everyone in the village. There was no question of she having been subjected to sexual intercourse by him without her consent and against her will. PW-2 Jagdei has categorically deposed that the prosecutrix was having relations with the accused. Her testimony has erroneously been brushed aside. The alleged place of occurrence is 2 km. from the house of the prosecutrix and as such she could have not been taken to such a distance forcibly by dragging. The prosecutrix was consenting party to sexual intercourse with him and the matter was reported by her to the police falsely when her husband came to know about it. The version of the prosecutrix that after purchasing household articles from the shop of PW-5 Chuhdu Ram she was on the way to her house, hardly inspire any confidence as the I.O. while in the witness box has stated that she was subjected to sexual intercourse at a place 2 km. away, that too in opposite direction from the house of the prosecutrix. The prosecution is stated to have failed to prove cogent and reliable evidence to connect the accused with the commission of the offence and the findings to the contrary have been recorded on the basis of conjectures and surmises.

3. The grouse of the accused, therefore, in a nut shell, is that learned trial Court has erroneously relied upon the sole testimony of the prosecutrix which hardly inspire any confidence. The findings of conviction recorded against the accused are stated to be perverse, hence not legally sustainable.

4. The nature of the offence the accused allegedly committed is not only heinous but also grievous because he has not only restrained the prosecutrix from going to her house but also dragged her inside the bushes where she was subjected to sexual intercourse against her will and without her consent. The sexual assault has been committed upon the prosecutrix in the manner as claimed by the prosecution or not is, however, a question which need adjudication on appreciation of the facts and circumstances of this case and also the evidence available on record.

5. Before coming to the factual matrix and also the evidence produced by the prosecution, it is desirable to take note as to under what circumstances the offence punishable under Sections 323, 341 & 376 IPC can be said to be made

out against an offender. An offence punishable under Section 323 IPC can be said to be made out if it is pleaded & proved that the accused has voluntarily caused hurt, simple in nature, on the person of the victim of the occurrence. An offence punishable under Section 341 IPC can be said to be made out if it is proved that someone restrained any person wrongfully in such a manner so as to prevent that person from proceeding beyond certain circumscribed limits.

6. Now, if coming to the commission of an offence punishable under Section 376 IPC since the prosecutrix herein is major, therefore, the prosecution was required to plead and prove beyond all reasonable doubt that alleged sexual act with her was committed by the accused against her will and without her consent.

7. Now if coming to the legal principles attracted in a case of this nature, in *State of Punjab Vs. Gurmeet Singh and others*, AIR 1996 SC 1393, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in *Gurmeet Singh's* case supra has however diluted the ratio thereof in *Ranjit Hazarika Vs. State of Assam*, (1998) 8 SCC 635 and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in *Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another*, (2003) 3 SCC 175 . While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in Criminal Appeal No. 481 of 2009 titled *State of Himachal Pradesh V. Negi Ram*, decided on 27th May, 2016 has held as under: "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not get swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

8. Now, if coming to the factual matrix, while the prosecutrix belongs to village Birmohi, the accused is resident of Village Padhar. Their area, however, falls under the same Tehsil i.e. Churah and even the police station i.e. Tissa is also the same. The prosecutrix in her statement Ext. PW-1/B recorded by Judicial Magistrate Ist Class, Chamba under Section 164 Cr.P.C. has disclosed two instances when she allegedly was subjected to sexual intercourse by the accused against her will and without her consent. One of the incident as she disclosed pertains to 5-6 months prior to recording of her statement Ext. PW-1/B, on 9.4.2014 when one Jagdei (PW-2) called the prosecutrix to her house in the same village for night stay as her husband was out of station. The prosecutrix

acceded to the request of said Jagdei. After having meal she came outside the house along with Jagdei to answer the call of nature in open. Outside the house, they allegedly went towards different directions to answer the call of nature. The place where she had been urinating, the accused allegedly hiding inside the bushes came out and caught hold of her from back. She picked up a stone, however, the accused twisted her arm and as a result thereof, the stone fell down. He gagged her mouth and forcibly subjected her to sexual intercourse. She was threatened not to disclose the incident to anyone and if she did so, would be done away with. Thereafter, he fled away from the spot. She also came inside the house and asked Jagdei as to why she ran away. Jagdei told that "I bind you in the name of your kids, if you disclose anything about the incident to anyone". Accordingly, she had not disclosed the incident to anyone.

9. It has also come on record in Ext. PW-1/B that about 1-1/2-2 months of the first incident, around 11-12:00 noon, on way back from the shop of PW-5 Chuhdu Ram situated at village Bahnota. When she reached at Bahnota Nallah, the accused appeared all of a sudden and restrained her from moving ahead. He asked her to sit with him. When she denied, he caught hold of her arm and took her inside the bushes by dragging from the path. She reminded him about the earlier incident and also that she pardoned him at that time and warned him not to indulge in any unlawful activity with her again. When she tried to contact her husband over cell phone, accused allegedly snatched her cell phone and threw the same. He threatened her and also administered beatings. In this process her clothes were torn and lost "koka" (nose pin) which fell there. She was forcibly subjected to sexual intercourse by him again. On the advise of former Pradhan, namely, Khem Singh (PW-7), she accompanied by her husband reported the matter to the police.

10. In her statement the first occurrence according to her was in "Bhado" i.e. in the month of July. The occurrence with her on the second occasion was on 10th day of "Falgun" which corresponds to February- March. Therefore, as per her testimony, she firstly was subjected to sexual intercourse in the month of July, 2010 and thereafter in the month of February, 2011. The date of occurrence in the FIR Ext. PW-1/A is 21.2.2014. Anyhow, in her statement under Section 164 Cr.P.C., Ext. PW- 1/B, she has neither disclosed that firstly she was subjected to sexual intercourse in the month of "Bhado" and on the second occasion in the month of "Falgun" and her version to this effect for the first time came in her statement recorded by learned trial Court.

11. As rightly argued by Mr. V.S.Rathore, Advocate, learned counsel representing the accused, it is only the own statement of the prosecutrix which has been relied upon by the prosecution and taken into consideration by learned trial Court while recording the findings of conviction against the accused. In the considered opinion of this Court, the same hardly inspires any confidence, hence on the basis thereof no findings of conviction could have been recorded against the accused for the reason that Jagdei (PW-2) has not at all supported the

prosecution case to the effect that she was with her during that night and subjected to sexual intercourse by the accused at such a stage when went outside for urination in open. Therefore, the manner in which the prosecutrix was subjected to sexual intercourse on the first occasion in the manner as claimed by the prosecution is not at all proved on record. On the other hand, the version of Jagdei while in the witness box as PW-2 that the prosecutrix had affair with the accused has not been considered by learned trial Judge and rather brushed aside without recording any reason therefor. As per further version of PW-2 the affair of the prosecutrix and accused was known to everyone in the village. Not only this, but the accused used to visit the house of the prosecutrix in the absence of her husband during night time. She admitted that her house is surrounded by houses of Mohan Lal, Madho and Naklu Ram. Therefore, the prosecution story that the prosecutrix had gone to the house of PW-2 Jagdei during that night when subjected to sexual intercourse by the accused for the first time cannot be believed to be true by any stretch of imagination.

12. Interestingly enough, not only the house of Jagdei is surrounded by the houses of Mohan Lal, Madho and Naklu Ram but as per own version of the prosecutrix her daughter was also present in the house who was cooking food. Therefore, when the daughter of Jagdei was present in the house, it can reasonably be believed that she was not in need of company of the prosecutrix in the so called absence of her husband from the house. As per the own admission of the prosecutrix in village Birmohi, there exists 7-8 residential houses and the population is 40-50 persons. She admits that there exists street lights, absolutely in order at village Birmohi. The house of Jagdei is adjacent to the road. Though, she denied the existence of toilet and bath room inside the house of Jagdei, however, the later while in the witness box as PW-2 has stated that the toilet and bath rooms are inside the house itself. The prosecutrix also volunteered that the toilet is down the house of Jagdei. The possibility of the toilet was available in the house itself cannot therefore be ruled out and as such, there was no occasion to the prosecutrix or Jagdei to have gone out to answer the call of nature in open.

13. The accused in support of his defence that prosecutrix having affairs with him used to give missed calls over his cell phone and in February, 2014, she gave 36 missed calls which includes 9 on the day of alleged occurrence i.e. 21.2.2014, questioned her in the cross-examination that her cell number is 82630 36816. The said question was answered by her in affirmative. She, however, expressed her ignorance that the cell number of the accused was 98178 71144. Anyhow, since the record pertaining to calls so made has not been produced and proved in accordance with law, therefore, her cross-examination to this effect is not of much help to the defence. However, in view of own conduct of the prosecutrix that the first instance was not reported by her to anyone, when allegedly subjected to sexual intercourse by the accused forcibly lead to the only conclusion that she had affair with the accused and therefore, the possibility of she had been giving missed calls to him also cannot be ruled out. Though, it is denied that in the village each and every one was well aware about their illicit

relations, however, the plea so raised by the accused in his defence find corroboration from the testimony of PW-2 Jagdei. The evidence as has come on record reveals that she was subjected to sexual intercourse at a distance of 2 kms from her house which is in different direction from that of the shop of PW-5 Chuhdu Ram. It is so stated by the I.O. PW-14 Insp. Sharif Mohd. Even PW-5 Chuhdu Ram, the shop keeper has admitted that while coming from village Birmohi to his shop one has to take a turn from Suli mor. The other turn from Suli mor leads to village Dogru (the place of alleged sexual assault) which is situated 2-1/2 km. from Suli mor. If it is so and the prosecutrix was coming back to her house from the shop, she could have not been dragged by the accused to Dogru from Suli mor nor she had any occasion to take that other turn which otherwise would have not taken her to the house and rather to village Dogru (the place of occurrence) in different direction. Therefore, the possibility of she having accompanied the accused to have sexual intercourse with him at that place cannot be ruled out. It is proved that Police post is at Nakrod, which is nearer to the house of the prosecutrix than Tissa. It is not known as to why the information was not given to Police of police post Nakrod.

14. According to the prosecutrix, the injuries were received by her on foot and legs. The doctor while in the witness box as PW-3 has, however, noticed the injuries in the nature of abrasions over lower back region at level L-1 and L-2, Sacro illiact joint and 1 to 2 abrasions present over coxyc; single abrasion was there over her right knee, therefore, the medical evidence belies the version of the prosecutrix that she had received injuries on her legs and feet. The doctor in her cross-examination has rather stated that no injuries were there on the foot of the prosecutrix. Though, as per her version blood was oozing out of the injuries she received, however, in the opinion of the doctor, the injuries were in the shape of abrasions, bluish in colour.

15. Now, if coming to the medical evidence, as has come on record by way of the testimony of PW-3, in her opinion the prosecutrix was subjected to sexual intercourse. There is no dispute about it because the accused has also admitted the same to be true and correct, however, according to him, the prosecutrix was a consenting party to such an arrangement. This witness in her cross-examination conducted on behalf of the accused has admitted that as per the history disclosed to her by the prosecutrix she herself was involved in sexual intercourse with the accused and it was not forcible sexual intercourse. True it is that as per the MLC Ext. PW-3/B, the prosecutrix has disclosed the history of forcible sexual intercourse with her by the accused. However, in the above referred statement PW-3 Dr. Suruchi Chauhan, in her cross-examination, has belied such recitals in the MLC. Therefore, the medical evidence is also not suggestive of that the present is a case of commission of forcible sexual intercourse with the prosecutrix.

16. True it is that Chuhdu Ram PW-5 and his wife Smt. Sito, both tells us that on 21.2.2014, during day time, the prosecutrix came to their shop and purchased

household articles. Since Chuhdu Ram was not present in the shop and he was informed by his wife about the visit of prosecutrix to the shop, therefore, his evidence is hearsay. Interestingly enough, as per the version of the prosecutrix she had purchased pulses etc. from the shop whereas PW-6 Sito in her cross-examination has stated that the prosecutrix had purchased Ghee and sugar (gur). Otherwise also, even if it is believed to be true that the prosecutrix had visited the shop of PW-5 and purchased household articles, the same could have not been believed to arrive at a conclusion that on the way, accused prevented her from moving ahead and rather dragged her inside the bushes and subjected her to sexual intercourse.

17. The another material witness is PW-7 Khem Raj Ex-Pradhan of Gram Panchayat Lahsui. Though, he tells us that when on 21.2.2014 around 2:30 PM, the prosecutrix came to him and disclosed that the accused committed wrong act, torn her shirt. However, any such statement was made by him before the police, he expressed his ignorance about it in his cross-examination. Also that in his cross-examination, he avoided to answer the suggestions put to him by simply expressing his ignorance. His reply should have been either in "Yes" or "No". Ignorance to the suggestions put to him shown by him lead to the only conclusion that he avoided to answer the suggestions so put to him intentionally and deliberately to the reasons best known to him. Therefore, the possibility of he having deposed falsely for some extraneous consideration cannot be ruled out.

18. The remaining prosecution witnesses i.e. PW-8 Pritam Singh, Secretary Gram Panchayat, PW-9 LC Nirmala Kumari, PW-10 HC Hakam Singh, PW-11 Const. Jamshed Beg, PW-12 HC Ashwani Kumar, PW-13 ASI Jagdish Chand and PW-14 Insp. SHO Sharif Mohd., are formal as their testimony would have provided link evidence had the prosecution otherwise been able to bring guilt home to the accused beyond all reasonable doubt. Being so, elaboration of the evidence as has come on record by way of their testimony would be nothing but overloading of the judgment unnecessarily.

19. In view of the reappraisal of given facts and circumstances of this case and also the evidence available on record, in the considered opinion of this Court, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Learned trial Court has misread, misconstrued and misappreciated the sole testimony of the prosecutrix while recording the findings of conviction against the accused. The impugned judgment has rather been based upon conjectures, hypothesis and surmises, hence perverse. The accused in the given facts and circumstances and the evidence available on record could have not been convicted for the commission of the alleged offence.

20. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, no case against the accused is made out under Sections 323, 341 & 376 IPC. He, therefore, is acquitted of the charge under Sections 323, 341 & 376 IPC. He is in jail and serving out the sentence. He be set free forthwith, if not required in any other case.