
(1992) 04 SHI CK 0010
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 119 of 1991

Kumbh Dass and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 08-04-1992

Acts Referred:

Penal Code, 1860 (IPC) — Section 360, 366, 376

Citation : (1993) 1 ShimLC 452

Hon'ble Judges : D.P. Sood, J; Bhawani Singh, J

Bench : Division Bench

Advocate : Bhupinder Gupta, for the Appellant; H.K. Paul, Assistant A.G., for the Respondent

Final Decision : Allowed

Judgement

Bhawani Singh, J.—Accused Kimsu alias Fimsu and Mangat Ram have been convicted u/s 360 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000 each and in default of payment of fine, to undergo further rigorous imprisonment for six months. Accused Kumbh Dass has been convicted u/s 376 of the Indian Penal Code. He has been sentenced to rigorous imprisonment for ten years and to pay a fine of Rs. 2,000 in default of payment of fine, to undergo further rigorous imprisonment for one year. Their conviction and sentence has been recorded by the trial Judge in Sessions trial No. 8-S/7 of 1988, dated 5-7-1991, in appeal before us, at the Instance of the accused.

2. The prosecution case, briefly, is that prosecutrix Durga Devi (PW 9), was living with her "Mausa" Molu Ram (PW 6) since her parents had died at the age of six and she has no brother or sister. On 30-3-1987, daughter of Molu Ram (PW 6), namely, Chinta Devi, went to her in-laws from her parents bouse and the prosecutrix accompanied her. After staying there for the night, she started coming to her house. While on the way, she was way-laid by accused Kimsu and Mangat Ram at "Dimnu". Accused Kimsu gripped her forcibly by the arms and

dragged her to his house nearby. He also asked her to marry accused Kumbh Dass. She was also offered and promised that in case she married Kumbh Dass, she would be given gold and silver. Co-accused Mangat Ram also supported accused Kimsu and gave similar allurements to her. He also gripped her tightly and both of them took her to the house of accused Kumbh Dass forcibly.

3. When they reached at the house of accused Kumbh Dass, although his father was available, but accused Kumbh Dass was not there. Accordingly, she was kept there for three days by both the accused and accused Kumbh Dass also joined them. Accused Kumbh Dass started committing sexual intercourse with her. He used to sleep with her and subject her to repeated sexual intercourse during all the three days. She was taken to the house of accused Kimsu and they stayed there for the night, though without committing sexual intercourse. Thereafter, accused Kumbh Dass took her to village "Chatti" where they stayed in the house of one Shrimati Sheela Devi for 6/7 days. During this time also, accused Kumbh Dass committed sexual intercourse with the prosecutrix. From the house of Shrimati Sheela Devi, the prosecutrix was taken to Rampur by accused Kumbh Dass and the co-accused also joined him there. Some document was got executed from her forcibly giving an impression to her that she was married to accused Kumbh Dass. She was brought to the house of Kumbh Dass in village "Gwah". In the meantime, her cousin Nohia Ram (PW 5) had started searching for her and it had been noticed that the prosecutrix had been forcibly confined by the accused. The matter had already been reported to the police vide First Information Report (Ex. PW 5/A). The police, with Nohia Ram (PW 5), came to the house of Kumbh Dass and arrested the accused and recovered the prosecutrix. According to the prosecution, the age of the prosecutrix was 13/14 years only.

4. During the course of investigation, Shalwar (Es. P-I) and Pyjama of the accused was taken into possession. The prosecutrix was handed over to Nohia Ram (PW 5). After collecting necessary evidence in the case, the police initiated prosecution against the accused.

5. The accused have denied the prosecution case. They say that they have been involved in the present case since one Mohanu entertained ill-will against them on account of inimical relations.

6. The trial Court found that the age of the prosecutrix was between 12\$ to 15 years at the time of occurrence and that accused Kumbh Dass had committed an offence u/s 376 of the Indian Penal Code while the other two had committed an offence u/s 366 of the Indian Penal Code. Accordingly, all the three accused were punished as above.

7. Through the present appeal, the accused have assailed the impugned decision on various grounds. We proceed to take these grounds one after the other.

8. The first contention of Shri Bhupinder Gupta, learned Counsel for the accused, was that there is inordinate delay in the lodging of the First Information Report

and in the absence of satisfactory explanation, the prosecution case is of doubtful character and may not be accepted as such. We see no force in this submission for the reason that the prosecutrix had gone to the house of Chinta Devi at Kharkoti. When she did not return for 4/5 days, an inquiry was made. The prosecutrix could have reasonably stayed with her cousin Chinta Devi for a reasonable period and there could be no suspicion about it for sometime, but when the period increased, as a normal course, inquiry was made and it was found that the prosecutrix had left Chinta Devi's house on the very next morning. Inquiries were made from other relatives, but she was not traceable. A report (Ex. PW 5/A) was lodged on 15-4-1987. The relations had been making inquiries during all this time and they came to know about the whereabouts of the accused and it was on their information that the prosecutrix was ultimately recovered from the house of accused Kumbh Dass. Inquiries made by the relations before the lodging of the First Information Report cannot be doubted and from the evidence collected on the record, it cannot be said that they manipulated the story against the accused. The delay in the recording of the First Information Report is not, therefore, assailable in view of the satisfactory evidence relating to circumstances preceding the recording of it.

9. Shri Bhupinder Gupta then contended that the evidence as to the age of the prosecutrix is not at all dependable. According to him, her age was between 17-1/2 to 19 years since there is variation of 2 to 3 years in the radiological examination of a person. In order to sustain the plea, strong reliance was placed on Medical Jurisprudence for India by Lyon, tenth edition, at page 109.

10. Shrimati Suman Gupta (PW 1) is a Radiologist in Ripon Hospital, Shimla, since 1984. She got application (Ex. PW 1/A) through Chief Medical Officer on 30-11-1987 for giving opinion about the age of the prosecutrix. She says that she received X-ray films (Ex. PW 1/B) (seven films) which were referred from Rampur Hospital. She noticed the following observations and gave her opinion:

Epiphyses that have fused are (1) Medial epicondylar. 2. Head of femur.

The Epiphyses that have not fused:

1. Head of humerus (2) Acromion (3) Greater trochanter (4) Distal Radius (5) Distal Ulna (6) Iliac crest (7) Distal Femur (8) Proximal Tibia (9) Proximal Fibula (10) Distal Tibia (11) Distal Fibula.

Opinion:

The skeletal age of this girl is between 12-1/2 years to 15 years. I have issued my opinions and report which is Ex. PW 1/C.

11. She has stated that the process of ossification is slower in hilly and cold areas than in plain and warmer areas and that for Himachal Pradesh, no uniform table for ossification has been prescribed and Punjab pattern is followed. She agrees with Modi that the range of error may be upto plus, minus three years in the opinion regarding the age based on skiographic examination. She denies that

the test of ossification by itself is not conclusive. She disagrees with the common table for boys and girls prepared by Modi and says that the table prepared by Dr. M.L. Aggarwal, Professor, Medical College, Amritsar is followed. She disagrees with Modi's table for Punjabis that head of femur fuses in between the age of 15-1/2 to 17 years. She denies the suggestion that the patient to whom Ex. PW I/ C relates was aged 18 years.

12. According to Dr. Nirmal Vaish (PW 2) the prosecutrix had stated her age as 14 years. According to Nohia Ram (PW 5), the prosecutrix was 16 years of age on the day his statement was recorded and her age was disclosed as 14/15 years while the report was lodged with the police and denies that it was 15/16 years as recorded in Ex PW 5/A. Further, according to Molu Ram (PW 6) also, the age of the prosecutrix was 15/16 years on the day his statement was recorded in the court. It is in evidence that no entry of birth has been incorporated in the Panchayat record. Similarly, there is no horoscope available. Dr. Suman Gupta, (PW 1) has supported her opinion by reasons before saying that the skeletal age of the prosecutrix was between 12 years to 15 years while guardian Molu Ram (PW 6) fixes it at 14 years like Dr. Nirmal Vaish (PW 2). The relevant date is between 30-3-1987 to 4/5th April, 1987 and 20-3-1990 when she was taken away from the guardianship of Molu Ram (PW 6), subjected to rape and Molu Ram was examined in the court. In view of this kind of evidence, much reliance cannot be placed on the table brought to our notice by Shri Bhupinder Gupta and it can safely be said that the trial Court has correctly fixed her age between 12-1/2 to 15 years and, therefore, the prosecutrix was minor on the relevant date.

13. The next point of Shri Bhupinder Gupta was that the prosecutrix was a consenting party to the whole episode He explained that the prosecutrix, according to the prosecution, was taken from place to place. But she did not complain to anyone that she was being kidnapped and subjected to harassment and rape by the accused although she came across number of persons and remained at the house of the accused and with him for number of days. She had been moving voluntarily and the case has been foisted on the accused unnecessarily.

14. It has been noticed that the prosecutrix is a scheduled caste girl of tender age and living with her "Mausa" Molu Ram (PW 6) after the age of six years since her parents had died. She is completely rustic and illiterate. She was way-laid by the accused and carried away to face an unwarranted situation. Temptation and force was applied to carry her away and ultimately she found herself at the house of accused Kumbh Dass. Put in such a situation, surrounded by the accused and in a different village and atmosphere, it was hardly possible for her to complain to anyone. There is no evidence pointing out that during these moments someone known to her or related to her met her but she did not complain. It is obvious that she was being carried by the accused according to their own will and she was not a party to it. Otherwise, she would not have said

anything against the highhandedness of the accused.

15. If we look at her medical examination, by Dr. (Smt) Nirmal Vaish (PW 2) it is beyond doubt that the prosecutrix was not habitual to sexual intercourse and was subjected to intercourse between 10 to 15 days before 22-4-1987. In view of the sufficient clinching evidence on the record, the version of the accused that they have been implicated on account of enmity, is falsified. They have been connected with the commission of the crime beyond doubt. The trial judge has dealt with each aspect of the matter quite satisfactorily before recording the conviction of the accused. We see no reason to disturb this finding in face of cogent and convincing evidence against the accused.

16. No other point was argued by the learned Counsel appearing in this case.

17. Now, we deal with the sentence part of the case. Shri Bhupinder Gupta submitted that the accused belong to poor families and in case the sentences imposed by the trial court are maintained, their families are bound to suffer especially when the accused have small children and very little holdings to bank upon since they also belong to scheduled caste. We have given serious consideration to these compassionate pleas. In addition to the factors stated above, there is no evidence of any past conviction against the accused. We, therefore, feel that the interest of justice would not suffer in case the sentences imposed upon the accused are reduced to some extent. Accordingly, the sentence part of the impugned judgment is modified to the extent that accused Kimsu and Mangat Ram will suffer rigorous imprisonment for two years and pay a fine of Rs. 1000 each and in default of the payment of the same, to undergo further rigorous imprisonment for three months, while accused Kumbh Dass will suffer rigorous imprisonment for five years and pay a fine of Rs. 2000 and in default of the payment of fine, to undergo further rigorous imprisonment for six months. The accused shall be entitled to set off as already allowed by the trial Judge.

18. The appeal is, therefore, disallowed except as to the sentence as aforesaid.