

(1999) 04 SHI CK 0010
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 404 of 1998

Prem Chand

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 08-04-1999

Acts Referred:

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

Citation : (2000) CriLJ 951

Hon'ble Judges : R.I. Khurana, J

Bench : Single Bench

Advocate : Rama Mehta, for the Appellant; Ashok Sharma and Vivek Thakur, Asstt. A.G.s, for the Respondent

Final Decision : Allowed

Judgement

R.I. Khurana, J.—The appellant, hereinafter referred to as the accused, stands convicted by the learned Sessions Judge, Chamba, in Sessions Case No. 39 of 1997 for the offence under Sections 376 and 506, Indian Penal Code. He has been sentenced to rigorous imprisonment for seven years and to pay a fine of Rs. 5,000/- for the offence u/s 376, Indian Penal Code. Insofar as the offence u/s 506, Indian Penal Code, is concerned, the accused has been sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 1,000/-. It was directed that out of the amounts of fine, if realised, a sum of Rs. 4,000/- shall be paid as compensation to the prosecutrix Kumari Seema. The two substantive sentences of imprisonment was ordered to run concurrently.

2. Briefly stated, the prosecution story is this. In the year 1997, the prosecutrix Kumari Seema was working as a maid servant in the house of one Shri Dhani Ram of village Chamuhi. At that time, the accused was also working as a servant in the house of said Dhani Ram. During the period 10-4-1997 to 4-6-1997 whenever the accused used to go to the jungle to graze the cattle, he used to take the prosecutrix with him and there in the jungle he used to commit rape on

her. The accused used to threaten the prosecutrix that in case she dared to tell anyone about the sexual acts, she would be killed.

3. The prosecutrix one day told Smt. Suno wife of Shri Dhani Ram about the sexual assaults being committed by the accused. Smt. Suno after rebuking the prosecutrix, sent her to the house of Smt. Taro, maternal grandmother of the prosecutrix. The accused escorted the prosecutrix to the house of her grandmother. The prosecutrix on reaching the house of her grandmother, narrated the incidents of rape to Smt. Taro, her grandmother, and Munshi, her maternal uncle. Smt. Taro then on 11-6-1997 took the prosecutrix to the police station and on the basis of the report made, a case under Sections 376 and 506, Indian Penal Code, came to be registered vide FIR No. 42/97 (Ex. PH).

4. The prosecutrix, during the course of investigation was subjected to medical examination. Such medical examination was carried out by PW-8 Dr. Brij Bala Sharma, at District Hospital, Chamba, on 12-6-1997 at about 12.15 p.m. It was observed by PW-8 as under:--

Menstrual History:

Menarche not started.

General Physical Examination:

1. Mentally alert, sound and fully conscious.
2. Seemed to be very intelligent and active.

Systematic Examination:

1. Heart, Lungs, Per abdomen and CNS -NAD.
2. Moderate built, weight 27 Kgs. Height 132 cms.
3. Breasts -- Small undeveloped, nipples surrounded by an undeveloped pink areola.
4. Axillary hairs-Scanty, brownish black smoothy.
5. No marks of violence and injury (No scratches, abrasions, bruises over her person).

Local examination of genitals and per vaginal examination:

1. No seminal stains and blood found on thighs and genitals.
2. Pubic hairs not matted.
3. Labia Majora thick, firm and well rounded. No bruising, no redness, no inflammation or laceration.
4. Vestibules normal.
5. Forchette and posterior commissure intact.

6. Hymen was semilunar in shape with interior opening, its free margins had numerous tears looking like old granular tissues. These did not bleed on touch and were not tender, swollen and not inflamed.

7. Vaginal orifice was easily dispensible and admitted two fingers easily.

8. Vaginal swab taken from the posterior fornix had been duly preserved, packed and sealed for chemical examination.

9. Victim had taken bath several times after returning from village Lahal and had changed her clothes.

10. For age verification, referred to Dr. V. K. Pathak, Radiologist and Dr. L. Badotra, Dental Surgeon.

5. PW-8 opined that the prosecutrix was subjected to sexual intercourse frequently.

6. PW-6, Dr. L. Badotra, Dental Surgeon on 16-6-1997, carried out dental examination of the prosecutrix and opined that she was of about 13 years of age. The ossification test was carried out by PW-7, Dr. V. K. Pathak, Radiologist. According to him, the age of the prosecutrix was between 11 to 13 years.

7. The accused was also subjected to medical examination. PW-5, Dr. Kapil Sharma found him capable of performing sexual intercourse. No marks of injury were found on his person.

8. The clothes of the prosecutrix taken into possession by the police as well as the vaginal swab were sent for chemical examination. No blood and semen stains were found.

9. On having been put to trial for the offences under Sections 376 and 506, Indian Penal Code, the accused pleaded not guilty. His case is that of denial and false implication. The accused in his statement recorded u/s 313, Code of Criminal Procedure, has stated that he has been falsely implicated at the instance of Munshi Ram, the maternal uncle of the prosecutrix, since he had refused to marry Smt. Sahni, mother of the prosecutrix in spite of having been persuaded therefor.

10. The prosecution in support of its case in order to bring home the offences against the accused examined fourteen witnesses in all. No defence was led by the accused.

11. The learned Sessions Judge, upon consideration of the material placed before him convicted and sentenced the accused as aforesaid.

12. I have heard the learned counsel for the parties and have also gone through the record of the case,

13. The first question falling for determination is the age of the prosecutrix at the relevant time. The learned Sessions Judge by placing reliance on the medical,

documentary and oral evidence has come to the conclusion that the prosecutrix Km. Seema at the relevant time was not more than 13 years of age.

14. At the very outset, it may be stated that the conclusions of the learned Sessions Judge, as to the age of the prosecutrix are wrong and cannot be sustained.

15. The oral evidence as to the age of the prosecutrix consists of the statement of the prosecutrix herself as PVV-12 and that of her mother Smt. Salmi as PW-13.

16. The prosecutrix Km. Seema, while appearing as PW-12 has deposed.

We are four sisters and one brother. The eldest my sister is Nirmala who is 23 years of age. The next is Mahinder who is aged 21 years. The third is Krishna whose age is 18 years and the fourth is myself and I am 13 years old. The youngest is Uma who is 8 years.

17. The mother of the prosecutrix as PW-13 has stated:--

I have got five children out of which two are sons and three daughters. The eldest daughter is Nirmala who is 23 years, the second is Mahinder who is 21 years and the third is Krishna who is 18 years old and fourth is Seema who is 13 years old and the fifth is Uma who is 8 years old.

18. PW-13 has gone to admit that the birth of her children is not recorded in the Panchayat records. She is illiterate, does not know even counting and that she does not know the correct age of her children. Therefore, it can be safely inferred that PW-13 has given the age of her children only as guess work.

19. Insofar as the prosecutrix Km. Seema is concerned, she has also admitted that she is illiterate and has not gone to any school. Though in her examination-in-chief, she has stated that she was 13 years of age, she has the following to state during her cross-examination:

I started working as domestic servant at the age of eleven years. I worked as domestic servant for two years at Jallandhar and three years at the house of Dhani Ram at Chamba.

20. A plain reading of the above statement goes to show that the prosecutrix was of about 16 years at the relevant time.

21. As per the statements made by PW-12 and PW-13 in the Court, the prosecutrix is the fourth child of her parents. The second child being a son. However, a perusal of the FIR Ex. PH shows that the prosecutrix is recorded as the fifth child, that is, the youngest child of her parents. The brother of the prosecutrix is shown as the third child instead of the second child as stated in Court by PW-12 and PW-13.

22. Thus, the oral evidence led by the prosecution in respect of the age of the prosecutrix is not trustworthy and can be safely discarded.

23. Next comes the medical evidence. Both PW-6 and PW-7 have, after dental and ossification examination of the prosecutrix, opined that she was of about 13 years of age.

24. It is well settled that the medical evidence in the form of ossification test as to the determination of age is not conclusive. [See: Shree Kant Shekhari v. State of Himachal Pradesh 1999 (1) SLJ 470.

25. Insofar as the school certificate, Ex. PG is concerned, no reliance can be placed thereon. In this certificate the date of birth of Km. Seema is recorded as 15-7-1987. In other words, she was of about ten years of age at the relevant time. This certificate has been proved in evidence by P.W. 9, Smt. Rattni Devi, In-charge Gujjar Ashram School. P.W. 9 has stated that the date of birth of Km. Seema was given to her by Smt. Nirmala, the sister of Km. Seema. She has admitted that such date of birth was given by Smt. Nirmala orally and no document as to the date of birth was produced. Smt. Nirmala, at whose instance the date of birth was recorded, has not been examined in the present case to show and prove the source of information as to date of birth of the prosecutrix. Moreover, the certificate Ex. PG has not been identified with the prosecutrix. There is nothing on record to show that Km. Seema daughter of Dittu Ram recorded in Ex. PG is the prosecutrix. As stated above, Km. Seema, while appearing as PW-12 has categorically stated that she is illiterate and has never attended any school. Therefore, it cannot be said that Ex. PG pertains to the prosecutrix. Besides, there is no evidence to show that Gujjar Ashram School is a Government School. No credibility can be attached to such certificate of a private school. In *Lalta Prasad Vs. State of M.P.*, the Supreme Court had not relied upon and accepted the certificate, regarding date of birth, issued by a private school.

26. The Apex Court in *Ram Murti Vs. State of Haryana*, has held that the question of age of the prosecutrix in case under Sections 366 and 376, Indian Penal Code, is always of importance. It is particularly so where the medical evidence shows that the prosecutrix was used to sexual intercourse and the rupture of the hymen was old.

27. In the present case as well the prosecutrix Km. Seema was found by PW-8 Dr. Brij Bala Sharma to be used to sexual intercourse and rupture of the hymen was old. Therefore, the question of age of the prosecutrix assumes significance.

28. The High Court of Calcutta in *Purna Chandra Ghosh Vs. Chief Secretary, Government of West Bengal*, has held that in a criminal trial the accused must get the benefit of doubt and there can be no conviction unless it can be clearly and unequivocally stated that the age of the prosecutrix was below 16.

29. It cannot be clearly and unequivocally said in the present case that the prosecutrix was below the age of 16. The evidence led by the prosecution is highly unreliable and, therefore, has to be discarded. On the other hand, the evidence of the prosecutrix herself goes to show that she was of about 16 years of age at the relevant time. In the absence of cogent and reliable evidence as to

the age of the prosecutrix, benefit of doubt has to go in favour of the accused.

30. Even on merits, the prosecution has not been able to prove and establish the case against the accused beyond a reasonable doubt. According to the prosecution, during the relevant period, the prosecutrix as well as the accused were working as servants in the house of one Shri Dhani Ram. Significantly, neither Dhani Ram nor his wife Smt. Suno has been examined in the present case to prove that the prosecutrix and the accused were infact working with them as servants. Smt. Suno though summoned as a witness and was present in Court on 3-3-1998, was not examined and she was given up as having been won over. There is no other evidence on the record with the exception of the prosecutrix and her mother, to show that the prosecutrix and accused were working as servants in the house of Shri Dhani Ram. PW-2, Smt. Champa, who admittedly is working as a servant in the house of Shri Dhani Ram, has very categorically stated that neither the prosecutrix nor the accused had ever worked as servants in the house of Dhani Ram. Though, PW-2 was declared hostile at the request of the prosecution, nothing could be elicited from her to show that either she was suppressing the truth or was in any way interested in the accused.

31. The prosecution story goes to show that the prosecutrix had informed Smt. Suno wife of Dhani Ram about the sexual assaults committed upon her by the accused whereupon Smt. Suno after having rebuked the prosecutrix, had despatched her to the house of her maternal grand-mother in the company of the accused. PW-1 Munshi Ram has also admitted that the prosecutrix was brought to his house by the accused. It can hardly be believed that had the factum of rape by the accused been brought to the notice of Smt. Suno, she would have asked the accused to escort the prosecutrix to the house of her maternal grand-mother or that the accused would have been willing or ready to do so.

32. There is also a delay in making the report to the police. It is in the statement of PW-2 (PW-12) the prosecutrix that the report to the police was made after about five days of her reaching the house of her maternal grand-mother. If the incidents of rape were narrated by prosecutrix to her maternal grand-mother and her maternal uncle immediately on reaching the house of her maternal grand-mother, nothing has come on the record to show as to why the report to the police was not made immediately thereafter.

33. There is yet another significant aspect of the case. PW-13, Smt. Sahni, the mother of the prosecutrix, has stated that while she was working as a domestic servant in the house of Dhani Ram, the accused also had sexual act with her. There is nothing in her statement that she was subjected to sexual intercourse by the accused forcibly against her will and consent. She, thus, appeared to be a consenting party to the sexual intercourse committed with her, if any, by the accused. The husband of PW-13 is dead. Therefore, it was possible and probable that she might have been interested in marrying the accused.

34. If the very story of rape is disbelieved, the story with regard to the threats having been advanced by the accused also fails.

35. Though ordinarily unless there are compelling reasons necessitating corroboration, testimony of the prosecutrix alone is sufficient to convict the accused where her testimony inspires confidence and is found to be reliable, in the present case it would not be safe to convict the accused solely on the statement of the prosecutrix. Keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened or otherwise induced for sexual intercourse, some corroboration from some independent source is required in the present case. [See: Ram Murti Vs. State of Haryana,

36. For the foregoing reasons, the appeal is allowed. The conviction and sentence imposed upon the accused by the learned Sessions Judge, vide his impugned judgment dated 16-10-1998 are set aside and the accused is acquitted of the offences under Sections 376 and 506, Indian Penal Code. The accused, who is in jail undergoing sentence as imposed upon him by the learned trial Court, shall be set at liberty forthwith, if not required in any other case. The amount of fine, if already deposited, shall also be refunded to him. The case property be dealt with as per the directions of the learned trial Court.