
(2020) 12 SHI CK 0088
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 679 Of 2019

Rakesh And Others

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 16-12-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 154, 173, 313, 374(II)

Citation : (2020) 12 SHI CK 0088

Hon'ble Judges : Anoop Chitkara, J

Bench : Single Bench

Advocate : Anjali Soni Verma, Amar Deep Singh, Nand Lal Thakur, Divya Sood

Final Decision : Allowed

Judgement

A1

Rakesh

A2

Sheetal",S. 120-B/376 IPC,Convicted,"Sentence of rigorous imprisonment for seven years and

fine of Rs. 10,000/- each, and in default of payment of

fine, further rigorous imprisonment for 5 months each.

A3 Pooja,,,

,S. 354 IPC,Acquitted,.

,S. 120-B/342 IPC,Convicted,"Sentence of rigorous imprisonment for one year and

fine of Rs. 5,000/- each, and in default of payment of

fine, further rigorous imprisonment for 1 month each.

, "S. 5 of Immoral

Traffic Act, 1956", Convicted, "Sentence of rigorous imprisonment for five years and

fine of Rs. 5,000/- each, and in default of payment of

fine, further rigorous imprisonment for 6 months each.

, "S. 6 of Immoral

Traffic Act, 1956", Convicted, "Sentence of rigorous imprisonment for seven years and

fine of Rs. 5,000/- each, and in default of payment of

fine, further rigorous imprisonment for 6 months each.

per record the date of birth of victim is 5.3.1997, and based on this, he had issued school leaving certificate Ex PW 13/N. In cross-examination, PW-" ,,,

17 Ravi Gujral admitted that the school used to take the record as birth certificate for making entry in the admission register. However, in some cases" ,,,

where no such record was available, the school used to take affidavits of the parents with respect to the date of birth of the ward. He further stated" ,,,

that he did not bring any birth certificate or affidavit with respect to the victim. ,,,

5. PW7- Dr. Neerja Gupta, consequent upon the finding of chemical analyst, which did not detect any trace of semen, deposed that after the clinical" ,,,

examination, as mentioned in MLC Ex.PW7/B, she did not notice any injury marks anywhere including perineal region, vagina, breasts, arms, legs," ,,,

abdomen back etc., which ruled out forcible sexual assault. She found the victim to be habitual of sexual intercourse. However, the Doctor, did not" ,,,

find any evidence of recent sexual intercourse. ,,,

6. PW-15, mother of the prosecutrix stated in her cross-examination that the victim had left the home without her knowledge and as such, after two" ,,,

days of her gone missing, she had lodged a missing person report. However, she did not tender any such report in evidence." ,,,

7. The victim reiterated her allegations, as mentioned in FIR, but explained in her examination-in-chief, that initially she remained in the hotel for 4-5" ,,,

days, and then she managed to escape. Rakesh accused called her on the cell phone and told her to obey his commands otherwise, he would defame" ,,,

her. Thus, she returned to the hotel on the next day. She also stated that she was sent back by accused Rakesh with two persons, who dropped her" ,,,

somewhere in Himachal. After that roamed here and there for 2 days, when PW-1, Lady Pradhan, Suman Bala, rescued her and brought her to her",,,

home.,,,

8. PW-4, Sh. Desh Raj, owner of the hotel Royal Dream, testified that he had employed A-1 Rakesh Kumar, as the Manager of the hotel, and he was",,,

the care taker. He tendered in evidence the Hotel Visitor Entry Registers as Ex.P-1, and Ext. P-2.",,,

9. PW-13 Shri Hari Pal Saini (Retired Inspector) who was the investigating officer, admitted it to be correct that the persons, who had sexual",,,

intercourse with the prosecutrix were never arrested in the present case.,,,

10. After the completion of prosecution evidence, the incriminating evidence appearing against the accused was put to them under Section 313 CrPC.",,,

One such evidence was put vide question no. 13, which stated that after being dropped from vehicle, the prosecutrix after 2-3 days of her having no",,,

clear idea where she was, met a Lady Pradhan of that Village and revealed her plight. In answers to incriminating evidence put to them under section",,,

313 CrPC, all the accused took the stand of simple denial and pleaded innocence. However, none of the accused led any evidence in defence.",,,

11. Ld. Trial Court found all the accused guilty of all offences, except 354 IPC and convicted and sentenced, as mentioned above. Challenging the",,,

judgment of conviction, all the convicts, who are in custody, came up before this Court through this common appeal.",,,

ANALYSIS OF EVIDENCE AND APPLICATION OF LAW:,,,

12. Although the victim admitted in her cross-examination that Rakesh (A-1) did not commit rape upon her, but the case of the prosecution is not of",,,

rape but forcing a minor girl into flesh trade, against her will and consent.",,,

13. The evidence against Pooja (A-3) lacks identification. On the date of examination of the victim in Court, Pooja (A-3) was absent being exempted",,,

on her application. The victim identified other two accused namely Rakesh (A-1) and Sheetal (A-2). However, she said that how could she identify",,,

Pooja in her absence. The Investigator had not opted for Test Identification Parade of the accused after their arrest.,,,

14. The incidence is of year 2011, when the age of consent for sexual intercourse was 16 years. The Police procured her school leaving certificate",,,

(Ex PW 13/N) issued by Principal Ravi Gujral (PW-17), which revealed that as per

the record of the school, the date of birth of the victim was",,,

5.3.1997. However, the school authorities could neither give copy of date of birth certificate nor the copy of school admission form. To the contrary,",,

on 28th May 2011, at the time of her medical examination, while disclosing her medical history to the Doctor, the victim had told her age as 17 years.",,

15. The Doctor, who examined the victim, found her to be habitual to sexual intercourse. She mentioned her age as 17 years, not only in her statement",,,

under section 154 CrPC, but also to the Doctor while giving history, as well as in her testimony on oath during Trial. The ossification test also points",,,

towards same age. In Vishnu @ Undrya v. State of Maharashtra, 2006(1) SCC 283, Supreme Court holds,",,

22. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the",,,

mother - PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents,",,

as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert",,,

opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will",,,

prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age,",,

the age varies.,,,

16. The focus while analyzing the entire evidence is to find out the credibility of the victim and further to arrive at a conclusion that would it be safe",,,

and justifiable to base conviction on her testimony. The victim consistently stated that she had gone to house of her sister-in-law (Bhabhi) named",,,

Jaswinder Kaur, at Sultanpur, in Panjab. Accused Sheetal and Pooja knew her because both of them were on visiting terms. Accused Sheetal and",,,

Pooja allured her that they would admit her in a dance class, to which she agreed. After that Sheetal, Pooja and Pooja's husband took her to a",,,

hotel in Himachal Pradesh, where she was forced into flesh trade. As per the victim, the convicts (A-2) Sheetal and (A-3) Pooja, had allured her",,,

when she was in the house of their sister-in-law Jaswinder Kaur at Sultanpur, Panjab. PW-15, the victim's mother testified that the victim had",,,

gone to the house of her elder sister Kulvinder Kaur, and had left home without

informing her or Kulvinder Kaur, and when she did not return by the",,,
evening, then she had lodged a missing person report. In social settings to which the victim belonged, it was not normal for an unmarried young girl to",,,
leave her home for no rhyme or reason, without even informing her mother or the person in whose home she was staying at that time, be it her sister",,,
or sister-in-law. Why did she not inform her mother or Bhabhi or sister? She did not inform them probably because they would not have let her go.,,,
Thus, the conduct of an unmarried young victim in leaving her home without informing her mother, impacts her credibility.",,,

17. A glaring contradiction is the improvement in her testimony regarding her leaving hotel after 4-5 days, and then returning on receiving a call from",,,
Rakesh on his threat of blackmailing her. She stated in her examination in chief that after her escape from hotel, Rakesh called her and she returned",,,
to the same hotel on the second day. In her testimony, the victim stated that Rakesh called her on her cell phone and threatened to show her obscene",,,
video to her family members. It made her surrender to Rakesh and she returned and told him that she would do whatever he would ask her to do. This,,,
is a drastic change of her initial stand, taken in FIR, when she did not state any such thing. The most significant aspect is that once the victim had run",,,
away from hotel, and she had mobile phone, then instead of calling her relatives, or friends, or returning to her home, she kept on roaming and in",,,
between Rakesh called her to return. Now, once she had a cell phone, she could have spoken to some of her relatives or friends who had phone",,,
especially when she had to roam without shelter, and eventually Rakesh called her and she returned to the hotel on the second day. She is silent that",,,
where did she stay for the night, and also during the day. Where did she recharged the battery of her mobile? There are so many missing links in her",,,
statement. This contradiction goes to the root of the case, because for a young girl to stay in open for a night would be so horrific that its scars would",,,
always remain in her mind. Thus, the victim intentionally not revealing this fact in FIR is shady, eclipsing her truthfulness.",,,

18. Subsequently, after her return, Rakesh sent her with two males, who pressed her breasts and left her on the roadside. In her testimony, she stated",,,
that after the said two persons, with whom Rakesh had sent her, dropped her near village, then she again roamed here and there for two days, till the",,,

lady Pradhan took her to her home. Again, the gaps in her story are so improbable that it creates a serious doubt about her credibility to such an extent",,,

that it is difficult to cull out what actually happened with her, and what she concealed, and facts she concocted.",,,

19. The incident pertains to year 2011, when the age of consent was 16 years. The trend of cross-examination of the victim by Defence Counsel is to",,,

impute her involvement, by suggesting that she had voluntarily visited the hotel. For what purpose did she visit hotel? She did not visit hotel to take rest",,,

or to find shelter. Her version is that in the said hotel, the accused made her do sex with visitors, from whom Sheetal (A-2) took money, which these",,,

three distributed amongst themselves. Contrary to the suggestions put on behalf of the accused to the victim during her cross-examination, the stand of",,,

the accused in 313 CrPC is of denial simplicitor.,,,

20. The purpose of cross-examination is to impeach the credibility of the witness. It is not the job of the Defence Counsel to confess on behalf of his",,,

client. Cross-examination is the most important tool available with the accused to defend his liberty, and while doing so, the Defence Counsel is under",,,

an obligation not to breach the Lakshaman Rekha and in other words, not to exceed her brief. A Division Bench of this Court had also taken a similar",,,

view in State of Himachal Pradesh v. Sunil Kumar @ Sonu & another, Cr. Appeal No. 13 of 2011, Para 63.",,,

21. The victim was not a runaway child of a tender age. She left home without even informing her mother and sister-in-law. After two days of her",,,

gone missing, her mother registered a missing person report. The prosecution withheld such report and the only presumption is that it either did not",,,

favour the prosecution or contradicted her version.,,,

22. PW-7 Dr. Neerja Gupta, who had clinically examined the victim testified in her examination in chief that victim had sexual assault on multiple",,,

times. However, in her cross-examination she clarified that as per clinical examination, the victim was habitual of sexual intercourse. The FSL also did",,,

not detect any semen from the vaginal slides and the vaginal swabs. PW-7 Dr. Neeraj Gupta did not notice any injury, anywhere on her person,",,

including her privates. To the contrary, the victim stated that she had shown the bruises/injuries on her neck and breasts to the Doctor. However,",,

Doctor who clinically examined neither noticed such injuries nor mention these in MLC, but found the victim to be habitual of sexual intercourse.",,,

23. In Dilip v. State of M.P., 2001 (9) SCC 452, Supreme Court observed,",,,

14. The age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered",,,

herself to a forced sexual assault without offering any resistance whatsoever.,,,

24. The Police had seized two visitors/Guest registers of Hotel Royal Dream, to prove the presence of victim during the time period. However, a",,,

perusal of these registers proves nothing. The prosecution examined Sh. Desh Raj (PW-4), the proprietor of the hotel, who tendered in evidence the",,,

visitor/guest register as Ex. P1 and Ex. P2. He testified that Rakesh Kumar (A-1) was the Manager, who was caretaker and maintained these",,,

registers. A perusal of the Register of Guest/Tourist/Visitor register of Hotel Royal Dream, Nurpur, Ex. P1, reveals that it had no entries from 21st",,,

June 2011 onwards till the Police had taken it in possession on 28th June 2011. However, the entries of 21st June 2011 disclose that a total of 18",,,

person had arrived or left the hotel. After that although half the pages of register Ex. P-1 were blank, but the Police had seized another register Ex. P-",,,

2, which started from 21st June 2011. A bare look at this register reveals as if it was filled in a haste. Even otherwise, in the normal course, any",,,

person would start a new register only after the old runs out of empty pages, or at the start of a new financial year, or new year, or Deepawali. None",,,

of the above existed on 21st June 2011. The apparent reason for absence of entries may be either to save taxes or to conceal the presence of the",,,

victim. However, the Police did not investigate this aspect and there is no evidence to form any opinion.",,,

25. In Narender Kumar v. State (NCT of Delhi), 2012(7) SCC 171, Court holds as follows:",,,

28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a",,,

case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.,,,

30. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be",,,

proper legal evidence and material on record to record the conviction of the

accused. The conviction can be based on sole testimony of the prosecutrix,,, provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may",,, look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix",,, case becomes liable to be rejected.,,,

26. An analysis of the above evidence dents the credibility of the prosecutrix. The irrationality in the conduct of the victim is writ large. Per MLC, she",,, was habitual of sexual intercourse. She would certainly know what coitus means. She neither resisted nor sought help from any person. It impeaches,, her credibility. Therefore, appreciation of the evidence and application of law cited herein above take this Court to the only conclusion that the",,, prosecution has failed to prove its case beyond reasonable doubts.,,,

27. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, C.I.S Number 1142013, C.N.R No.",,,

HPKA01-001027-2011; Instituted on 23.9.2011, Decided on 16.12.2019 by Additional Sessions Judge (II) Kangra at Dharamshala, (HP), is set aside",,,

and all the convicts are acquitted of the charged offence. The Appellants are undergoing the sentence and are confined in prison, as such they be set",,,

at liberty forthwith, if not required in any other case, and subject to S. 437-A of CrPC. Amount of fine, if deposited by the appellant, be refunded to",,,

them. Release warrants be prepared accordingly. All pending applications, if any, are also closed.",,,