
(2007) 06 SHI CK 0029
In the High Court Of Himachal Pradesh

Safi Mohamad

APPELLANT

Vs

State of Himachal Pradesh and Another

RESPONDENT

Date of Decision : 21-06-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 506

Citation : (2007) CriLJ 4546 : (2007) 2 ShimLC 387

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Judgement

Surinder Singh, J.—The appellant was put on trial, under Sections 376 and 506 of the Indian Penal Code, in the Court of Additional Sessions Judge, Ghumarwin, District Bilaspur in Sessions Trial No. 60/7 of 2005/2004, for committing rape on his daughter-in-law, continuously for about three months against her wishes. On the conclusion of the trial the Additional Sessions Judge held him guilty and passed the sentence as under:

----- Under To suffer rigorous imprisonment Section for seven years and to pay a fine 376 IPC of Rs. 10,000/- and in default of payment of fine he shall further undergo imprisonment for three months ----- Under To suffer rigorous imprisonment Section for one year and to pay a fine of 506 IPC Rs. 2,000/- and in default of payment of fine he shall further undergo imprisonment for one month.

2. The factual matrix of the case is that:

Shaukat Ali the husband of the prosecutrix (name withheld) was an employee in a hotel at Manali. The prosecutrix was residing with her two minor children, aged about 8 and 6 years in village Kuthera Malangan in Nalagarh with father-in-law, the appellant. Her mother-in-law had expired long back. It was alleged that about a month prior to lodging of FIR (Ex. PW-10/A) dated 9-8-2004 the

appellant had been committing rape upon her for the last about three months and she had been put under threats and was not allowed to move out of her matrimonial house. Though she had informed her husband telephonically about the incident but of no avail. She contacted Smt. Bago Devi, her sister-in-law who in turn informed the fact to Noordeen (PW), father of the prosecutrix. He obtained search warrants from S.D.M. Nalagarh pursuant to which she along with the children was produced before the SDM aforesaid on 10-7-2004. Her statement was recorded wherein she alleged rape having been committed by the appellant upon her for the last about three months, though no action was taken by the SDM, on her statement, which he was required to do, yet she was allowed to join the company of her parents.

3. When the police had just started investigation, on lodging the FIR on 9-8-2004 Shaukat Ali, husband of the prosecutrix, also obtained search warrants from the SDM Ghumarwin, pursuant to which she was produced before the SDM Ghumarwin and she refused to go to the house of her in-laws to this effect her statement (Ex. DW-4/C) was recorded. The police got the prosecutrix medically examined on 10-8-2004. Her wearing apparels were taken into possession and sent for forensic examination to FSL Junga. The (sic) had recorded the statement of the prosecutrix and other witnesses, u/s 161 Cr. P.C. The accused was arrested on 16-8-2004. On getting the report from FSL Junga (Ex. PX-1), the police had presented the challan before the learned Additional Chief Judicial Magistrate, Ghumarwin, who committed the case to the Court of Sessions Judge for trial.

4. The Sessions Judge, Bilaspur, assigned the case to the Court of Additional Sessions Judge, Ghumarwin. On going through the challan and documents appended thereto, the Additional Sessions Judge, Ghumarwin, found a prima-facie case against the appellant, u/s 376 and 506 IPC, accordingly he was charge-sheeted.

5. The appellant had pleaded not guilty to the charges and claimed trial.

6. The prosecution examined Dr. Resharn Singh (PW-1), Bago Devi (PW-2), Sadique Mohammad (PW-3), Constable Pradeep Kumar (PW-4), Ram Gopal (PW-5), Constable Chander Kant (PW-6), SI Balbir Singh (PW-7), H. C. Vijay Kumar (PW-8), S.I. Purshotam Chand (PW-9), Smt. Jamila (PW-10) and ASI Ram Dass (PW-11).

7. The appellant was examined u/s 313 Cr. P.C. The circumstances which were found attended upon him were also put to the appellant. The appellant denied all the allegations. According to him, he was innocent and false case was foisted against him. According to him, he has been residing with his family, consisting of his elder son Ajij Mohammad and his wife along with their children in a joint house. Further that on 24-5-2005 Shaukat Ali and his wife (prosecutrix) had gone to Ghumarwin for doing some purchases. They had also taken lunch at Ghumarwin. In the evening, the prosecutrix reached back but her husband was

not with her. He was informed that Shaukat Ali was admitted in the District Hospital, Bilaspur, on account of having taken some poison. He visited District Hospital, Bilaspur and found Shaukat Ali unconscious and after about 3-4 days he disclosed that the poison was administered by the prosecutrix, while taking lunch at Ghumarwin. Thus, the parents of the prosecutrix were called and were informed that he would get a case registered against her but all of them requested not to do so. He took Shaukat Ali to his house but the prosecutrix did not join them. It is stated, that the prosecutrix had suspected that her husband had kept some lady at Manali and prosecutrix Was compelling him to get divorce from Shaukat Ali and also to give land in lieu of maintenance. On his refusal, she and her parents manipulated a false case against him. It is further stated that on 1.5-6-2004 !the prosecutrix and her father visited his village in order to reconcile the matter between Shaukat Ali and the prosecutrix, but Shaukat Ali was annoyed with her on account of earlier incident of giving poison to him.

8. The Additional Sessions Judge on the perusal of the evidence having found that it was not a case of no evidence against the appellant, called upon the appellant to enter into defence.

9. The appellant in support of his case had examined his elder Son Ajij Mohammad (DW-1), Dr. Bhupinder Singh (PW-2), Dr. B. K. Pandey (DW-3), his son Shaukat Ali (DW-4), son-in-law Samsudeen Chaudhary (DW-5), H. C. Vijay Pal (DW-6) and Ashwani Kumar (DW-7).

10. After hearing the arguments addressed by the learned Counsel for the parties, the appellant was found guilty of the offences charged, accordingly he was convicted and sentenced as aforesaid.

11. Having felt aggrieved and dissatisfied by the impugned judgment of conviction and sentence, the instant appeal has been filed, precisely on the ground that the statement of the prosecutrix did not inspire confidence as it is full of contradictions and replete. It is also contended that the appellant had not used any weapon of force to threaten or terrorize the prosecutrix. The story as propounded is palpably false which is even evident from the preliminary evidence recorded before the SDM Nalagarh recorded before the issuance of warrants. She had stated before the SDM of her own volition that she wanted to live in her parental house.

12. In nut-shell it is contended that it is a concocted case, the appellant was living in a joint family and there was no question of causing any, harassment of committing rape as alleged. The prosecution case is alleged to be self destructive and contradictory as such prayed for setting aside the judgment of conviction and sentence.

13. I have heard Shri Bhupinder Ahuja, learned Counsel appearing for the appellant convict and Shri V. K. Verma, Additional Advocate General for the respondent State and have carefully scanned the evidence on record.

14. Sh. Ahuja learned Counsel for the appellant has taken various points to attack the impugned judgment of conviction and sentence. Firstly, that the testimony of the prosecutrix is full of contradictions and does not inspire confidence. It stands not corroborated on the material placed on record and further that the prosecutrix had only alleged the act of "Durachar" as recorded in the Hindi version of her statement and not "rape" as translated in English version of her statement. Secondly, from the evidence on record she appears to be a consenting party. Thirdly, there has been a delay in lodging the FIR which gave time for deliberations to fabricate a false case. Lastly, the Doctor who had examined the prosecutrix was not produced in evidence, therefore, an adverse inference should have been drawn. It is further ventilated that the evidence was not appreciated in the right perspective which has resulted in causing the material prejudice to the appellant. Therefore, the above factors were enough to acquit the appellant. It is also submitted that in any case the conviction is upheld; keeping in view the old age of the appellant and the fact of his long illness, the sentence may be reduced.

15. Contra. Sh. Verma, learned Additional Advocate General has supported the findings and conclusions of the impugned judgment and further ventilated that the statement of the prosecutrix is enough to sustain the conviction as it inspires confidence. It was rightly believed and relied upon by the trial Court along with the other material, therefore, the appeal merits dismissal. The learned Counsel also took me through the evidence on record and submitted that the appeal merits dismissal as there is no infirmity in the impugned judgment.

16. It is now well settled that testimony of victim in sexual offences is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict the accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. In *State of Punjab Vs. Gurmit Singh and Others*, , the Supreme Court on raising the query "why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? has answered it that the Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. It has been further held that the evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative"

component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

17. In *State of Himachal Pradesh Vs. Shree Kant Shekari*, the Apex Court held that the testimony of a prosecutrix can be acted without corroboration in material particulars. However, if the Court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice. (Also see *State of Himachal Pradesh Vs. Lekh Raj and Another*,

18. On the above touchstone of the principle of law laid down by the Apex Court the testimony of the prosecutrix is required to be appreciated. In the instant case the victim is the daughter-in-law of the appellant living in his house in the absence of her husband. Therefore, this violence has also to be seen from a different angle more specifically when the honour of the family is at stake. Before jumping to any conclusion, it shall be relevant to discuss the evidence available on record with reference to the law discussed above. During the trial, the statement of the prosecutrix was recorded in camera. She deposed that after marriage she had been living with her husband in his house where the appellant convict was also residing. Her husband was doing a private job in a Hotel at Manali and has been visiting home after 5-6 months. She has categorically stated that the appellant started committing rape on her about 2-3 months prior to lodging of the FIR; he used to threaten her and had confined her in the house. The prosecutrix has very categorically stated that one day when the appellant convict was sleeping, she contacted telephonically her parents and informed about the rape committed upon her by the appellant. She also spoke to her sister-in-law and informed her about the rape. On 3-7-2004 her father and brother visited her house and asked what had happened, they were threatened by the appellant as to why they had come to his house and he told that he would keep the prosecutrix as his wife, as they had been doing so from the very beginning. Thereafter, the parents of the prosecutrix went away and she along with the children was taken by the police on 9-7-2004 and produced before the SDM Nalagarh pursuant to search warrants on 10-7-2004, where her statement Ex. PW-5/C was recorded and she was handed over to her parents, since then

she had been living in her parents house. Thereafter, she informed her husband telephonically who in turn insisted upon her to reside with his father, whereas her husband had already arranged a lady for himself. He also told her not to lodge report with the police, as he would himself do something. When he did not take any action against the appellant, she went to the police station on 9-8-2004 along with her brother and sister in law and lodged a report Ex. PW-10/A, which was thumb marked by her. The police took into possession her wearing apparels vide memo Ex. PW-3/B.

19. In her cross-examination she has stated that when her husband had gone to Manali, he told her that he had kept another wife there. On coming to know this fact, she had also informed telephonically Smt. Bago (PW) at Nalagarh. She had disclosed about the incident to her husband as well as to Smt. Bago and not to any other person except the police. Further according to her she did not remember the date and time and also how many times the appellant had committed rape upon her. The prosecutrix has categorically stated that the appellant started committing sexual intercourse with her about three months back only, but prior to it he had been behaving with her like his daughter and used to call her "Betti". She has also specifically stated that elder brother of her husband Ajij had been living separately at a distance of 2-3 kms from the house of the appellant. But she denied specifically that he was living joint with the appellant. The prosecutrix has admitted that the appellant had been pursuing the criminal case of her brother Nassardeen. She denied that on 24-5-2004 her husband consumed poison but according to her he was hospitalized. After discharge from the hospital, her husband stayed for 20-25 days at his sister's house in village Malangan, which is nearer to the house of the appellant. She admitted that she never met her husband during this time. She has denied that she administered poison in the food to her husband. The witness has admitted the fact of search warrants having been obtained by her husband from SDM Ghumarwin. She has also stated that she had made a statement regarding the rape to the SDM. She was also confronted with her statement Ex. PW-10/A. However, she had denied that it was a false case.

20. To lend strength to her statement, PW-2 Bago Devi was also examined and in her statement she categorically stated that the prosecutrix informed her telephonically that she was threatened and that she was being raped by the appellant for the last about three months. PW-2 informed this fact to her husband Sadique (PW-3). On 3-7-2004 she along with her husband went to the house of the appellant to advise him but in turn the appellant threatened them that he would keep the prosecutrix as his wife and his son had arranged some other lady at Manali as his wife. Thereafter, they told Shaukat Ali about this fact who in turn told not to report the matter to the police and he would advise his father himself. When nothing was heard from Shaukat Ali, they obtained search warrants of the prosecutrix from the Court of SDM Nalagarh pursuant to which the prosecutrix along with the children was produced. Shaukat Ali again informed telephonically the prosecutrix that the matter be not reported to the police, he

would come and settle the matter himself. Shaukat Ali did not turn up for about 20-25 days and thereafter the matter was reported to the police and on 12-7-2004 the appellant brought members of the Panchayat to Nalagarh where 50-60 persons were present and the appellant apologized but the prosecutrix refused to go to the house of the appellant. Thereafter, the Panchayat members disbursed away.

21. In the cross-examination nothing material could be extracted rather she stood well. PW-3 Sadique Mohammad had also made a similar statement.

22. Dr. Reshma Singh (PW1), Medical Officer had found the appellant capable of performing sexual intercourse, to this effect MLC is Ex PA. The prosecutrix was also medically examined and her medico-legal certificate is mark-A and the Doctor opined that "from the above findings & history the possibility of rape cannot be ruled out." As per the certificate aforesaid she was produced before the Doctor with the history of sexual assault committed by her father-in-law one month back but exact date not known. Nothing incriminating material was found from the wearing apparels of the prosecutrix. However, the doctor who examined her was not produced.

23. It is pertinent to note from the statement Ex. PW-5/C recorded before the SDM Nalagarh, when she was produced before him pursuant to the search warrant. She has made a clear allegation of rape against the appellant in so many words but it is not understandable as to why the SDM did not order for registration of the case without any delay at that time.

24. To rebut the aforesaid allegation, the appellant has examined his elder son Aji Mohammad to show that he was residing with his father in a joint family. Copy of the parivar Register was relied upon by him, according to him there was no occasion to commit rape in the presence of other members of the family. If this version is accepted then he should have known about the issuance of the search warrants as aforesaid; whereas in the cross-examination he has expressed his ignorance regarding issuance thereof, this goes to show that he was not living with his father. Even DW-4 at no point of time had stated about the alleged rape. He has stated that when he was under treatment in the District Hospital Bilaspur, prosecutrix did not come to see him. Further according to him, he was apprehending danger to his life from the prosecutrix.

25. Samsudeen Chaudhary (DW-5) has stated that the prosecutrix never complained about rape by the appellant. In the cross-examination the witness has stated that he visited his native place about 4-5 times though he came to know about the registration of the case but the police had not asked anything from him.

26. Ashwani Kumar, (DW-7), was posted as SDM Ghumarwin at the relevant time, he has stated about the issuance of the search warrants at the instance of Shaukat Ali husband of the prosecutrix.

27. On the critical examination of the above evidence, in my considered opinion the cross examination conducted by the appellant and also the examination of the defence witnesses could not cause any dent to the case of the prosecution. In the facts and circumstances above, the statement of the prosecutrix also inspires confidence and there is enough corroboration of her statement lent by the other witness viz.; PW2 and 3 and also her statement Ex. PW-5/C, which was made earlier by her before the SDM Nalagarh.

28. The statement, of the prosecutrix does not suffer from any embellishment nor there are material contradictions which goes to the root of the case, thus it is worth inspiring confidence. As stated by the Id. Counsel for the appellant that she only alleged "Durachar" as recorded in the Hindi version which was wrongly translated as "rape" in the English version of her statement, is worth rejecting for the reason that her statement was recorded in the presence of the appellant and his counsel. No one had raised objection to the English version, dictated in the Court even also not thereafter during the trial. Further in the statement Ex. PW-5/C, which she made pursuant to the search warrants before the SDM Nalagarh, she has categorically stated that the appellant had been forcibly committing the acts of immorality with her. Therefore, the word "Durachar" has to be understood in the context it has been used in the totality of the circumstances. In my opinion the prosecutrix has in so many words stated about the act of rape against her, committed by the appellant.

29. The argument that the prosecutrix was a consenting party is also worth rejecting because the prosecutrix has alleged that for the last about 2/3 months she was being raped by the appellant and was kept under surveillance in his house. The moment she got an opportunity she informed about the aforesaid illegal act of rape to Smt. Bago and further when she was produced before the SDM Nalagarh, she made a statement Ex. PW-5/C regarding the rape, these facts nowhere suggest that she was a consenting party.

30. Regarding the delay in lodging the FIR the matter stands clinched by the law laid down by the Apex Court. It has been held in State of Rajasthan Vs. N.K.-The Accused, that "a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court, it cannot be counted against the prosecution". In the instant case, the delay has been amply explained as discussed above. (PI. also see State of M.P. Vs. Dayal Sahu, . Therefore, this argument of the learned Counsel for the appellant does not hold any water.

31. The next rung of the learned Counsel is that the Doctor who had examined the prosecutrix on 10-8-2004 was not produced by the prosecution, therefore, an adverse inference has to be drawn. The facts are that she is a married woman and was living with her father-in-law alone. Before the FIR and medical examination she was residing with her parents for the last, about 10 days,"

during this period she was alleged to have taken bath so many times and changed the clothes, on the top of it no injury was said to have been sustained by her in the alleged rape, therefore, in these circumstances non-examination of the Doctor becomes quite immaterial.

32. Thus, looking to the case from every angle and duly tested on the touchstone of the law discussed above I do not find any contradiction in the statement made before the Court by the prosecutrix. On the other hand there is enough corroboration in material particulars on record, like the statements PWs-2 and 3 and Ex. PW-5/C.

33. Therefore in these circumstances I am not inclined to disturb the findings of guilt of the appellant, recorded by the trial Court. However, as far as the sentence is concerned, it is worth noticing from the record that the appellant is about 64 years of age. He is suffering from Asthma and has a history of long illness and even now he is under treatment as stated by Dr. B. K. Pandey (DW-3), that the appellant is suffering from Chest pain for the last one and half year. He has a history of tuberculosis. The Doctor has placed on record Ex. DW-3/A detailed record of treatment of the appellant consisting of 27 pages; therefore, in these circumstances a lenient view is desirable and can be taken.

34. I have considered this aspect of the matter and examined the statement of DW-3 coupled with the statement of the appellant u/s 313 Cr. P.C. It is true that the case against the appellant convict stands proved and the minimum sentence was imposed by the learned trial Court, which in my opinion can be reduced in view of the special reasons and circumstances stated above.

35. The appellant convict is in custody since 16-8-2004. While taking a lenient view in the matter, interest of justice will be met if substantive sentence is reduced to four years from seven years u/s 376 of the Indian Penal Code. Therefore, I order accordingly and the sentence stands modified to the above extent. Rest of the sentence and fine under the aforesaid section and 506 IPC shall remain undisturbed. THE NECESSARY ACTION BE TAKEN BY THE LEARNED SESSIONS Judge.

36. The appellant convict shall be entitled for set off u/s 428 IPC. The appeal is accordingly disposed of.