

(2008) 05 SHI CK 0025

In the High Court Of Himachal Pradesh

State of Himachal Pradesh

APPELLANT

Vs

Baldev @ Dev

RESPONDENT

Date of Decision : 12-05-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (2008) 2 ShimLC 226

Hon'ble Judges : Surjit Singh, J; Surinder Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Surjit Singh, J.—State is aggrieved by the judgment of Sessions Court, whereby respondent Baldev alias Dev, who at the time of the commission of offence was a lad of 14 years, has been acquitted of the charge of rape, u/s 376 IPC, by setting aside the judgment of Children Court of Himachal Pradesh at Una, by which he was convicted of the offence, u/s 376 IPC and ordered to be kept in Special Home at Una, for a period of three years, as per provision of Section 21(1)(d)(i) of the Juvenile Justice Act, 1986.

2. Respondent was initially challaned in the Court of Judicial Magistrate, Mandi, for allegedly committing the offence of rape on a girl of 6-7 years. The Magistrate committed the case to the Sessions Court. Additional Sessions Judge to whom the case was assigned framed the charge and recorded the evidence of the prosecution. When the statement of the respondent was being recorded, it came to notice that he was a juvenile. So, the matter was sent to the Children Court of Himachal Pradesh at Una, which alone had the jurisdiction in the matter, in view of the provisions of the Juvenile Justice Act, 1986.

3. Report was lodged against the respondent by PW-2 Smt. Bimla Devi, the mother of the prosecutrix. As per that report, on 19th July, 1989, around 6 P.M., respondent committed rape on a girl child aged about 6-7 years, in the courtyard of her house, on a heap of Bajri, after pulling her down from a plum tree, which

the prosecutrix had climbed. The prosecutrix cried for help when the respondent was committing rape. A sister of the prosecutrix, PW-3 Hansa, then a child of 8-? years, reached the spot. On seeing her, the respondent ran away. PW-2 Bimla Davi, the mother of the prosecutrix, was informed by PW-3 Hansa. Bimla Davi did not report the incident to her husband fearing that he being a short tempered man could get violent. Next day she took the prosecutrix to a hospital at Gohar. The doctor noticed swelling of labie majora and laceration of hymen. He advised to be a case of rape. Bimla Davi then went to the police station and lodged the report. Police got the prosecutrix medically examined. Her clothes were also taken into possessing. On completion of the investigation, report was filed, u/s 173 Cr.P.C.

4. Children Court found the respondent guilty of the offence of rape. Sessions Judge, in appeal, has acquitted him holding that the prosecutrix is contradicted in material particulars by the statement, which she made in the Court of Additional Sessions Judge, Mandi. The Sessions Judge also observed that the prosecutrix appeared to have been tutored, by her mother, to make the statement. Also, it has been observed by the Sessions Court that there was enmity between the fathers of the prosecutrix and the respondent and that appeared to be the motive for false implication of the respondent.

5. We have gone through the evidence. The prosecutrix very categorically stated that the respondent, after removing her Salwar and his own underwear, mounted on her and tried to force enter his male organ into her vagina, as a result of which she felt pain and cried and on hearing her cries, her sister PW-3 Hansa came out, on seeing whom, the respondent ran away. PW-3 Hansa corroborated her testimony. Medical evidence, in the form of testimony of PW-4 Dr. A.K. Mishra and the medico legal certificate Ext. PW-4/A, also corroborated her testimony.

6. The Sessions Judge has disbelieved the prosecutrix holding that in her testimony, before the Additional Sessions Judge, with which she was duly confronted, she stated vide portion B to B, in her cross-examination by the defence, that after laying her down on the ground, the respondent ran away and did not do anything besides that. The Sessions Judge failed to notice the fact that the prosecutrix very categorically stated that she had been sexually assaulted, which resulted in lot of pain to her private part and her testimony was corroborated by the medical evidence as also by the testimony of her mother PW-2 Bimla Devi, who stated that she herself found redness in the vagina of the prosecutrix. The prosecutrix was only 8 years of age when examined in the Court of Additional Sessions Judge. Because of her tender age she was quite likely to err here and there, while testifying in the Court. Therefore, the Sessions Judge was not right in just picking up a sentence from the cross-examination of the prosecutrix and disbelieving her entire version, which was duly corroborated by the medical evidence and the testimony of her mother, as aforesaid.

7. The Sessions Judge also observed that the prosecutrix admitted, before the

Additional Sessions Judge, that she had been asked by her mother to state in the Court that she had felt pain. It is true that the prosecutrix, in her statement before the Additional Sessions Judge, made such a statement, but that does not mean that what she stated was not true. The prosecutrix very categorically stated that she felt pain and cried. Her statement was corroborated by PW-3 Hansa, her elder sister. The doctor also noticed laceration of hymen and swelling of labia majora, which implied that the prosecutrix had felt pain. Therefore, simply for the reason that the prosecutrix stated that her mother told her to testify in the Court that she felt pain, it cannot be said that her statement to the aforesaid effect was untrue.

Sessions Court's observation that there was enmity between the fathers of the prosecutrix and the respondent is also not borne out from the record. It is true that suggestions were thrown to the prosecution witnesses that civil litigation has been going on between the fathers of the prosecutrix and the respondent, but those suggestions were denied. Defence did not place on record, leave alone proving, the papers pertaining to the alleged civil litigation.

8. In view of above stated position, we are of the firm view that the judgment of the Sessions Judge is not based on correct appreciation of evidence and, therefore, it is not sustainable. Hence, the appeal is accepted. Judgment of the Sessions Court, in appeal, is set aside and that of the Children Court is restored and upheld.

9. Children Court ordered detention of the respondent in Special Home for a period of three years. The order was passed in August, 1991, when the respondent was 16 years of age. Now he is supposed to be around 34-35 years of age and, therefore, he cannot be sent to Special Home, at this age. From the record, it appears that the order of detention, passed by the Children Court, had not been suspended, because we do not find any order by the first Appellate Court (Sessions Judge) on the application moved for the purpose by the respondent. That suggests that he might have remained detained in the Special Home until the reversal of the judgment of the Children Court by the Sessions Judge vide judgment dated 24.8.1993. That suggests he had already been in detention for about two years.

10. In view of above stated position as also the fact that now the respondent cannot be detained in the Special Home because of his having crossed the age of 18 years, it is ordered that he shall not be detained for the remaining period, on account of the acceptance of this appeal and the restoration of the judgment of the Children Court.