
(2010) 04 SHI CK 0209
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 406 of 1995

State of Himachal Pradesh	Vs	APPELLANT
Bharat Bhushan and Another		RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 375, 376, 511

Citation : (2010) 04 SHI CK 0209

Hon'ble Judges : Sanjay Karol, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This appeal by the State is directed against the judgment of the learned Sessions Judge Shimla in sessions trial No. 62-K/7 of 1993 decided on 31.10.1994 whereby he acquitted the accused of having committed an offence punishable u/s 376 read with Section 511 of the Indian Penal Code.

2. The prosecution case in brief is that on 22.6.1993 two girls C & R (names withheld to protect their identity) were working in the fields at Village Kanda. Prosecutrix C was aged about 11 years and the other girl R was aged about 10 years. At about 12.00 noon when the girls were tilling the fields, the two accused Bharat Bhushan and Dinesh Kumar came to the field. Accused Bharat Bhushan lifted the prosecutrix C, untied her salwar and committed forcible intercourse with her. Accused Dinesh Kumar tried to lift the other girl R but she managed to escape and ran away. She raised a hue and cry. On this Piarmani and Piar Devi who were working in the nearby fields came to their rescue. On seeing these two ladies the two accused fled away from the scene of occurrence.

3. R narrated the incident to Piarmani who lifted the prosecutrix C, who was unconscious, and took her to her "Dogri" (a small outhouse situated in the field). In the meantime Narbhutika, (PW-4) mother of C arrived at the Dogri. The prosecutrix then narrated the incident to her. Thereafter her mother took the

prosecutrix C to her own "Dogri" in Village Kanda. Later in the evening the brother and father of C came to the "Dogri" at Kanda and took prosecutrix C to their house at Village Sangla. On the next day in the morning the father PW-5 took the prosecutrix to the Police Post where she made a statement Ex.-PW-1/A, on the basis of which FIR was lodged. After lodging of the FIR, the prosecutrix C was got medically examined. The accused were arrested and also got medically examined. Clothes of the accused and the prosecutrix were taken into possession and sent for chemical examination. On completion of investigation challan was filed. The case was committed to the Court of Sessions. The accused pleaded not guilty and claimed trial and they were acquitted. Hence, the present appeal by the State.

4. We have heard Mr. Vivek Singh Thakur, learned Additional Advocate General, on behalf of the State and Mr. Bimal Gupta learned Counsel for the accused.

5. Mr. Vivek Singh Thakur learned Addl. Advocate General contends that the judgment of the learned Sessions Judge is totally perverse. According to him, the case of the prosecution is proved by the statement of the prosecutrix, (PW-1) the other girl R (PW-2), the statement of PW-3, and the statements of the parents of the prosecutrix (P Ws 4&5). Even the medical evidence of Doctor PW-8 fully supports the prosecution case. He, therefore, contends that the offence is fully proved and therefore, the impugned judgment should be set aside and the accused should be convicted and sentenced for commission of an offence punishable u/s 376 of Indian Penal Code.

6. On the other hand, Mr. Bimal Gupta appearing for the Respondents- accused has urged that since the accused have been acquitted, the presumption of innocence available to the accused under criminal law is doubled. He further contends that learned Sessions Judge has given valid reasons for acquitting the accused and submits that this judgment calls for no interference. In the alternative he submits that no case whatsoever is made out against Dinesh Kumar and at best a case of attempt to rape is made out against the accused Bharat Bhushan.

POWERS OF AN APPELLATE COURT

7. At the outset , we may note the principles relating to the powers of the Appellate Court while dealing with an appeal against acquittal which have been enumerated by the Apex Court in Chandrappa and Others Vs. State of Karnataka, The Apex Court held as follows:

15. Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, -4-the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such

evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

8. Thereafter the Apex Court Culled out the following principles:

42. From the above decisions, in our considered view, the following general principles regarding powers of appellate court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law"

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusion", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be -5-

innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

9. Keeping in mind the aforesaid principles, we have considered the case in hand. We are aware that we are dealing with an appeal against acquittal. We have, therefore, dealt in detail with the evidence, both oral and documentary, in detail.

10. Before we deal with the rival contentions of the parties, it would be apposite

to refer to the main grounds which weighed with the learned Sessions Judge while acquitting the accused.

1. According to the learned Sessions Judge the medical evidence did not support the version of the prosecutrix that any sexual act committed to her since the Labia Majora and Labia Minora were not found to be injured.

2. No injury was found on the male organ of the accused.

3. That the Doctor made no attempt to microscopically examine the accused to find out the presence of spermatozoa. He has also come to the conclusion that the identity of the accused was not known to PW-3 Piar Devi. He has also found some other discrepancies which we shall deal with later.

Evidence led in the case:

11. Prosecutrix C was examined as PW-1. Her statement was recorded on 19.8. 1994. She stated that she knew the accused Dinesh Kumnar. However, she also identified the other accused Bharat Bhushan. According to her, about one year back when she alongwith PW-2 (R) were tilling the field at Kanda, both the accused came there. Accused Bharat Bhushan caught hold of the prosecutrix "C" and Dinesh Kumar caught hold of R. Bharat Bhushan forcibly lifted the prosecutrix, took her near the wall of the field, untied the string of her salwar and lay down on top of her. Thereafter accused Bharat Bhushan untied his own pants and committed sexual intercourse with her by inserting his penis into the Vagina of the prosecutrix. He gagged her mouth so that she could not raise any alarm. Blood started oozing from the private parts of the prosecutrix. The accused Bharat Bhushan wiped the blood with the cap which the prosecutrix was wearing at that time. The prosecutrix fainted. PW-2 "R" however, managed to escape from the clutches of accused Dinesh Kumar and raised an alarm. Then Piarmani and Piar Devi after hearing the hue and cry arrived at the spot and on seeing them the accused fled away. PW-2 "R" then narrated the incident to Piarmani. Piarmani lifted the prosecutrix and took her to her "Dogri". The mother of the prosecutrix arrived there. The prosecutrix narrated the incident to her mother. Thereafter her brother and father also came in the evening and then the matter was reported to the Police at Sangla. The prosecutrix C states that she made statement Ex- PW-1/A on the basis of which FIR was lodged. She identified the cap Ex. P1 as well as the salwar and shirt Ex.- P 2 and 3 which she was wearing at that time of rape. She further stated that the accused persons hail from her village and she knows them well. In cross- examination she stated that when Bharat Bhushan lifted her, she had raised a hue and cry. She states that there were small pebbles on the ground where the accused committed sexual intercourse with her. She felt pain in her back and in her vagina. However, she did not receive any injury on her back. A suggestion has been put to her that she and her family do not have good relations and are not on talking terms with the accused and therefore, a false case has been lodged. She denied this suggestion.

12. PW-2 R is the girl who was accompanying C. She is one year younger to

prosecutrix. She has fully corroborated the version of the prosecutrix. She states that accused Dinesh Kumar tried to untie her salwar but she ran away. She could not say what act was committed by Bharat Bhushan with the prosecutrix. She raised a hue and cry and on hearing her cries, her mother Piar Devi and aunt Piarmani came to the spot. On seeing them the accused fled away. She then went towards the prosecutrix who was lying unconscious and blood was oozing out from her private part. The cap of the prosecutrix C was also lying there, which was stained with blood. Thereafter the prosecutrix was taken by Piarmani to her "Dogri". This witness correctly identified both the accused in the Court. Though this witness has been cross examined, nothing material in favour of the accused has been extracted in her cross- examination, except that when she ran away accused Dinesh Kumar did not try to follow her.

13. PW-3, Piar Devi, is the mother of PW-2 and aunt of the prosecutrix. She states that at about 1 pm she heard her daughter calling her. She went to the field and saw the two accused running away. The prosecutrix was in a semi conscious state. She was crying and blood was coming out from her private part. A cap was lying nearby which was stained with blood. She thereafter carried the prosecutrix to her "Dogri" and called the mother of the prosecutrix to her "Dogri". There the prosecutrix narrated the incident to her mother and stated that accused Bharat Bhushan had committed sexual intercourse with her. In cross examination she stated that the name of -8 the accused was disclosed by the prosecutrix in the "Dogri".

14. PW-4 Narbhutika is the mother of the prosecutrix. She stated that she had taken her goats and sheep for grazing. When she returned home in the evening she was called by Piar Devi, PW-3 to the Dogri of Piarmani where her daughter was lying. The prosecutrix told her that the accused Bharat Bhushan had committed sexual intercourse with her. Blood was coming out from the private part of the prosecutrix. She then carried the prosecutrix to her own "Dogri" at Kanda.

15. PW-5, Misru is the father of the prosecutrix. He states that at about 8 pm his wife came to their house at Sangla and disclosed that their daughter, the prosecutrix had been sexually assaulted. He then went back to the "Dogri" at Kandi, where his daughter was lying unconscious. Piar Devi disclosed to them about what had happened and even the prosecutrix disclosed the name of the assailant i.e. Bharat Bhushan accused. They stayed at the "Dogri" for about two hours and then returned to the house at Sangla and reached Sangla at about 4 am. Next morning he took the prosecutrix to the Police Post Sangla where the matter was reported. Thereafter, the prosecutrix was got medically examined at Peo from a female doctor. He states that the prosecutrix was conscious when she lodged the complaint and she had disclosed the name of the accused.

16. PW-7, Dr. Ajay Negi found that the accused was capable of committing sexual intercourse.

17. PW-8, Dr. Suresh Bansal examined the prosecutrix on 23.6.1993 in the presence of Staff Nurse S.N. Sushma. The relevant portion of his report read as follows:

... On examination I found that the female child had not started menstruating. There was painful separation of thighs. No marks of violence were present. Clotted blood was present on labia majora and on thighs. Secondary sexual characters were developed. Breasts were developed according to age. Pubic and axillary hairs were present but were scanty. Hymen was freshly fractured. Posterior fourchette was torn. The child admitted one little finger with pain. The vagina was congested..... Injury mentioned in MLC Ext. PW-8/C appeared on the prosecutrix was subject to sexual intercourse....

18. The witnesses also took into possession the salwar and shirt which was sent for chemical examination. The prosecutrix was subjected to ossification test and radiological age of the prosecutrix was determined to be 9 to 12 years. He admitted that the labia minora and labia majora were not injured. He admitted the suggestion that when a well built man commits sexual intercourse then the labia minora and labia majora comes into contact with the male organ.

19. PW-9, Dr. D.C. Negi has proved the report Ext. PW-8/B and the X-rays which shows that the prosecutrix was 9 to 12 years old.

20. PW-13 has proved that the date of birth of the prosecutrix was 13.4.1982. This she was about 11 years and 2 months old at the time of occurrence.

21. PW-15 is the Investigating Officer and he sent the cap for chemical examination. As per the report of the State Forensic Laboratory human blood was found on the salwar of the prosecutrix but no semen was found on the same. As per this report, small traces of blood and human semen were found on the cap recovered at the spot.

Age of the Prosecutrix:

22. As far as the age of the prosecutrix is concerned, her date of birth has been proved and as per the certificate issued by the Pradhan Gram Panchayat Sangla her date of birth is 13.4.1982. The radiological report shows that she was aged 9 to 12 years. The Doctor observed that she was 12 years old and had not started menstruating . In fact there is not much cross examination with regard to the age. It has been proved that the prosecutrix was less then 12 years old when the incident in question took place.

Does the statement of the prosecutrix inspire confidence:

23. The law by now is well settled that an accused in a rape case can be convicted even on the sole testimony of the prosecutrix so long as her statement inspires confidence. The prosecutrix is not to be treated like an accomplice. She is the victim of a dastardly crime. Corroboration in every case is not required but in the present case there is more than sufficient corroboration to the statement

of the prosecutrix also.

24. We have gone through the statement of the prosecutrix in great detail. The version given by her unfolds in the most natural manner. It is apparent that she is telling the truth. She is a girl of tender age. She was just about 11 years old at the time of the incident and was little more than 12 years old when her statement was recorded. Her statement has a ring of truth. The version of the prosecutrix is also corroborated in all material particulars by the statements of the other witnesses, especially the other girl "R" PW-2, her Aunt Piar Devi PW-3, her mother PW-4, and her father PW-5.

25. This unfortunate incident occurred in the day time in the field. Only PW-2 was present at the spot alongwith the prosecutrix. She raised an alarm. Thereafter her mother PW-3 came to the spot and saw the accused running away. PW-3 found that the prosecutrix was in a semi conscious state and carried her to her "Dogri". She sent for the mother of the prosecutrix. The mother the father of the prosecutrix was called and the father was told about the occurrence and he carried the unfortunate child back to Sangla. They reached Sangla at about 4 am and at 8.10 am the report was lodged with the Police Post Sangla. There was no delay in lodging the FIR. There was no time to either embellish the facts or cook up a false story. The version of the prosecutrix is corroborated in all material particulars by the other witnesses. There are some minor discrepancies with regard to time etc. These minor discrepancies will always occur when the statements are recorded in the Court after a long time. However, on material issues, the case of the prosecutrix stand fully corroborated.

26. The version of the prosecutrix also stand corroborated by the presence of semen and blood stain on the cap. The prosecutrix has clearly stated that she was wearing the cap and the accused Bharat Bhushan used this cap to wipe her private part. This also supports her version.

27. The defence of the accused is that they have been impleaded because of enmity. Other than making a bald allegation that the relations between the two families were inimical, there is no evidence worth the name to support the defence version. No mother or aunt will put the entire reputation of her daughter at stake just to settle scores with some other person. There is no manner of doubt that the prosecutrix was sexually assaulted. The medical evidence supports the prosecutrix to the hilt. Some body did assault the prosecutrix. There is no reason for the prosecutrix and all other witnesses including PW-2 and PW-3 to implicate the accused falsely.

Legal Provisions:

28. Section 375 reads as follows:

"A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

First - Against her will.

Secondly:- without her consent.

Thirdly:- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly:- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is a another man to whom she is or believes herself to

Fifthly:- be lawfully married. With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the

Sixthly:- administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. With or without her consent, when she is under sixteen years of age.

The prosecutrix was less than 12 years of age at the time of occurrence. The first explanation to Section 375 reads as follows:

Explanation:- Penetration is sufficient to constitute the sexual intercourse Necessary to the offence of rape.

29. A bare perusal of explanation to Section 375 clearly shows that penetration is necessary to constitute the sexual intercourse to the offence of rape. From a reading of the aforesaid provisions, it is clear that no offence u/s 376 can be made out unless there was penetration to some extent. In the absence of any penetration the offence would not fall within the four corner of Section 375 of the Indian Penal Code. However, it is not necessary that the entire sexual act should be completed. Mere penetration of the male organ within the private part of the woman with or without any emission of semen is sufficient to constitute a rape. Penetration of the male organ completely, partially or slightly would be enough to constitute an offence within the meaning of Section 375 and 376 IPC. This point stands decided by the Apex Court in State of U.P. v. Babul Nath (1994) 6 Supreme Court Cases 29.

30. In Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand), the Apex Court dealt with the word penetration in great detail. It held as follows:

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction u/s 376 IPC.

Xxx.... Xxx... xxx...

21. In view of the catena of Judgments of the Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in the vagina is sufficient to

hold the accused guilty for the offence u/s 375 IPC punishable u/s 376 IPC.

31. The Apex Court in *Aman Kumar and Another Vs. State of Haryana*, has held as under:

7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines*, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse (See *S.P. Kohli (Dr.) v. High Court of Punjab and Haryana*.) In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gladi is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration.

Whether rape was committed or it was only an attempt to rape:

32. *Shri Bimal Gupta*, learned Counsel for the accused in the alternative raised a plea that at best this is a case of outraging the modesty of a girl or at best a case of attempt to rape. He contends that no rape was committed since penetration has not been proved to have taken place.

33. This contention cannot be accepted. The prosecutrix has clearly stated that the accused inserted his penis into her vagina. This itself is proof of penetration. The learned Counsel for the accused has urged that the Doctor *Suresh Bansal*, PW-8, did not find any injuries on the labia minora or labia majora. This doctor also admitted that the labia minora is the first organ of a minor which comes into contact with the male organ in case of sexual intercourse. It is therefore, contended that since there are no injuries on these two organs of the prosecutrix, penetration is not proved.

34. We may note that no suggestion was put to the Doctor that it is necessary in every case of rape of that injuries must be present on the labia minora and labia majora to prove penetration. The only suggestion put to this witness was that this portion of the vagina of the prosecutrix did not suffer injury. No other material has been brought to our notice which would show that it is necessary for the labia minora and labia majora to be injured in every case of rape. In addition to the oral statement of the prosecutrix the Doctor found painful separation of thighs. He also found clotted blood on the labia minora and thighs. Most importantly the Doctor found that the hymen was freshly ruptured. These findings of the Doctor clearly indicate that the penetration had taken place and therefore, this is a clear case of rape.

35. It is not necessary that the male organ must suffer injury when sexual act is committed by a fully developed male with a girl of tender age. This normally may be so but is not a universal proposition of law. Reference in this behalf may be made to *Ishwaroo v. State of Himachal Pradesh*, 1992(2) Sim. L.C. 102.

36. Lack of injuries on the male organ of the accused as well as the lack of any major injuries on the prosecutrix is not conclusive of the fact that penetration did not take place. Each case has to be decided on its own facts.

For the reasons given hereinabove we are of the considered opinion that this is a case of rape.

37. We have already pointed out above the reasons which weighed with the learned Sessions Judge while acquitting the accused. We are constrained to observe that the reasoning given by the learned Sessions Judge, to say the least, was ludicrous. He treated the prosecutrix like an accomplice. He discarded the statements of the prosecutrix and the other witnesses merely on the ground that it was alleged that there was some enmity between the parties but accepted the bald suggestions in this behalf put by the defence. He failed to take into consideration the fact that neither the prosecutrix nor her parents would have staked the reputation and honour of the prosecutrix. We have dealt with the various reasons given by the learned Sessions Judge while discussing the various issues above and we are compelled to observe that the approach of the learned Sessions Judge towards such a sensitive issue was callous and insensitive, to say the least. We have, therefore, no doubt in our mind that the reasoning given by the learned Sessions Judge is perverse and therefore, we have no hesitation in setting aside his judgment of acquittal.

38. In view of above discussions we are of the considered view that the accused Bharat Bhushan is guilty of having committed an offence punishable u/s 376 IPC. Since the prosecutrix was less than 12 years of age at the time of commission of the offence the accused is found guilty of having committed an offence punishable u/s 376(2)(f).

39. However, as far as co-accused Dinesh Kumar is concerned, we find that no case is made out against him and the appeal against him is dismissed.

40. Having held the accused Bharat Bhushan guilty for the commission of the aforesaid offence he has to be heard on the question of sentence. For this purpose alone the matter be listed on 29.4.2010. The accused is directed to personally present on the next date.