

(2010) 06 SHI CK 0033
In the High Court Of Himachal Pradesh
Case No : Criminal A. No. 205 of 1997

State of Himachal Pradesh

APPELLANT

Vs

Ishwar Singh and Others

RESPONDENT

Date of Decision : 04-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 34, 342, 363, 366, 366A

Citation : (2010) 06 SHI CK 0033

Hon'ble Judges : Rajiv Sharma, J; R.B. Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—State has preferred this appeal against the judgment dated 17.01.1997, rendered in Sessions Trial No. 48-R/7 of 1995/91, whereby the Respondents, who were charged with and tried for offences punishable under Sections 342, 363, 366-A and 376 read with Section 34 of the Indian Penal Code, have been acquitted.

2. The case of the prosecution, in a nut-shell, is that on 15.01.1991 Padam Dev, father of the prosecutrix (PW-7), has reported the matter to the Police that on 13.12.1990, he has deputed the prosecutrix to bring certain household articles from village Duni. She did not return. He started searching her at the houses of his relations. He reported the matter on 8th January, 1991 regarding her disappearance at Police Post Reckong Peo. On the basis of statement of Padam Dev, a case u/s 363 of the Indian Penal Code was registered. The Police visited the spot and recovered the prosecutrix from the house of one Smt. Gian Devi (PW-1). The prosecutrix was medically examined and her clothes were also taken into possession. The prosecutrix disclosed to the Police that on 13.12.1990, when she was going back and reached in Peo bazaar, she was allured by accused Yupal and Chhewang Nargu and they took her to video hall. She was kept by both the accused in their quarter for a night and they committed sexual intercourse with

her one after the other. She was kept in the room from 13.12.1990 to 19.12.1990. On 20.12.1990, she was taken by accused Yupal to Shimla along with accused Chhewang Nargu and Ishwar Singh. They stayed in a hotel on 20.12.1990 at Rampur, where again all the accused committed sexual intercourse with her. The challan was put up against the accused under Sections 342, 363, 366-A and 376 read with Section 34 of the Indian Penal Code after completing all the codal formalities. Accused Yupal Singh and Chhewang Nargu were examined u/s 313 of the Criminal Procedure Code. Accused Ishwar Singh was declared proclaimed offender vide order dated 15.10.1996 by the learned trial Court. The stand of the accused u/s 313 of the Code of Criminal Procedure was that of denial simpliciter. Accused Yupal Singh and Chhewang Nargu were acquitted by the learned trial court on 17th January, 1997. Hence, this appeal by the State.

3. Mr. Rajinder Dogra, learned Additional Advocate General has strenuously argued that the prosecution has proved its case against the Respondents (accused).

4. Mr. Vinay Thakur, Advocate learned Counsel for Respondents No. 2 and 3 has supported the judgment of the learned trial Court.

5. We have heard the learned Counsel for the parties and gone through the record carefully.

6. PW-1 is Smt. Gian Devi. She deposed that 2-3 years back, Dharam Bhagti (PW-7) had come to her house. In her cross-examination, she disclosed her age to be 24 years and according to her, PW-7 was 5-6 years younger to her.

7. PW-2 is Dr. Rajni Kaushik. She medically examined the prosecutrix on 18.01.1991 at about 12:30 P.M. According to her observations, the prosecutrix (PW-7) was between 14 to 16 years of age. On local examination, she found hymen completely ruptured and easily admitting two fingers. She did not notice any tear marks. There were no injury marks. According to her opinion, the prosecutrix was habitual of sexual intercourse and there was no evidence of forcible sexual intercourse. In her cross-examination, she stated that it was possible that prosecutrix was habitual of sexual intercourse for many years before the date of examination.

8. PW-3 Dr. S.L. Kaushik has examined all the accused persons. He found these persons capable of doing sexual intercourse. PW-5 Shri Jawal Bhagat signed the certificate Ex.-PF. He did not know when the register was started. He also did not know at whose instance the entries of birth were made.

9. PW-7 is prosecutrix. She deposed that during winter of 1990, she was deputed by her father to bring the house hold articles from Dakho to Kalpa. She was standing on the road, when accused Yupal met her and forcibly took her to video hall. Accused Chhewang Nargu was also with him. They had shown her two films in the video hall up to 9:00 P.M. She asked the accused to leave her at her

house. Accused told her that they were having accommodation and they will accommodate her without any problem and allow her to go on the next morning. She went with them in their house. Both the accused after discussing something between them committed sexual intercourse with her forcibly. She was kept in the house up to 17th December, 1990. She was kept under lock inside the room and they were providing her food through window. The accused used to come at night under the influence of liquor and were committing sexual intercourse with her forcibly. On 17.12.1990, the accused woke her at 4:00 A.M. and asked her to accompany them to Shimla. She accompanied the accused up to Powari on foot. Accused Chhewang Nargu returned from Powari and accused Yupal remained with her. They took tea in the hotel and thereafter they boarded the Kalpa-Shimla bus and came to Rampur. At Rampur, they stayed in a hotel near bus stand. She fell ill at Rampur. On 18.12.1990, accused Yupal brought her to Shimla. They reached Shimla at 8 P.M. and stayed in a hotel at Lakkar Bazaar, Shimla. She stayed at Shimla up to 20.12.1990. The accused Yupal committed sexual intercourse with her. On 20.12.1990, accused Yupal took her back to Tapri, where Ishwar Singh accused met him. On 21.12.1990, they went from Tapri to Peo in a truck. From Powari, the accused took her on foot up to Peo. She remained in the same room up to 24.12.1990. Accused Ishwar Singh told that he will marry her. He took her to his house in village Roghi, where he also committed sexual intercourse with her for eight days. Thereafter, she started menstruating. Accused Ishwar Singh asked her to accompany him to his parents house, which she refused, but the accused took her forcibly. He left her on the road and thereafter returned back to Peo. She could not go to her house and went to the house of her friend Seema Devi. Her brother Raj Bhagat came to the house of Seema Devi and took her back to her parents' house. She was 16 years of age at the time of incident. In her cross-examination, she stated that there were many shops around the video hall. The accused had dragged her towards video hall. Her sister was present about two shops beyond the video hall. The house of the accused was at a distance of 1/2 Kms. from the video hall and to reach the said house, they had to go through Peo bazaar. She also admitted that there was no tap inside the bath room and the accused were bringing the water themselves. There was no toilet inside the house. She was going in the open during night hours for easing herself and also in the early morning. She also admitted that there were many passengers in the bus in which she came to Rampur. She admitted that she knew that the accused was taking her for illegal purpose. She also admitted that bus stopped at Jeori for about one hour for lunch and many people were present in the hotel where she had taken her lunch. They went to a hotel at Rampur and many people were present in the hotel. She also admitted that many people were standing at the bus-stand in Rampur, who were waiting for the bus. They changed the bus at Narkanda. She admitted that she went on foot with accused Ishwar Singh to his house.

10. PW-8 Dr. B.K. Bhardwaj has stated that the radiological age of the prosecutrix on the basis of fusion of epiphysis was between 13 to 15 1/2 years.

He issued report Ex.-PW8/F. PW Amar Singh was given up, being dead. PW-16 has resiled from his earlier statement. PW-17 Smt. Gurmeh Kaur issued certificate Ex.-PW17/A. She admitted in her cross-examination that apparently there was cutting on "1978" and similarly in hindi "Athara" was again written by changing the original word.

11. The prosecution has failed to prove that the prosecutrix was minor at the time of incident. The prosecution has placed reliance on register Ex.-PF, wherein the age of the prosecutrix has been shown as 12.06.1975. The age of the prosecutrix has been shown as 12.6.1978 in the School Leaving Certificate, i.e., Ext.-PW17/A. There are cuttings on the school register, wherein the year of the date of birth of the prosecutrix has been changed and shown as 1978. There is variance in the date of birth given in Ex.-PF and Ex.-PW17/A.

12. PW-1 Smt. Gian Devi deposed that the prosecutrix was 5-6 years younger to her. She has given her age in court as 24 years. Thus, the age of the prosecutrix was more than 18 years at the time of incident. PW-8 Shri B.K. Bhardwaj has stated in his cross-examination that the age of the prosecutrix can be fixed at 17 1/2 years. Accordingly, the prosecutrix was major at the time of incident.

13. Prosecutrix has deposed that she was allured by the accused to video hall. She has also stated that her sister was only two shops away from the video hall. She did not raise any hue and cry. She stayed in the room of the accused up to 17th December, 1990. She did not try to escape nor she raised any hue and cry. She also admitted that she used to go early in the morning or during night to ease herself. She could easily escape if she wanted to escape. She came to Rampur on 17th December, 1990 in a bus, but she did not try to escape. She stayed in a hotel at Rampur. There were many people present in the hotel according to her own statement, however, she did not raise hue and cry. She came to Shimla on 18th December, 1990 and stayed in a hotel at Lakkar Bazaar till 20th December, 1990. She has travelled from Rampur to Shimla in a bus and the bus has also stopped at Narkanda. They have changed the bus from Narkanda to Shimla. She could easily escape or raise hue and cry. She came back to Tapri on 20.12.1990 in a bus and she could escape, but she did not escape. She came to Peo on 24.12.1990 and remained in the house of the accused. Thereafter, she went to the house of accused Ishwar Singh, i.e., Roghi, where she stayed for eight days. The whole conduct of the prosecutrix makes it abundantly clear that she had gone with the accused voluntarily. She has also admitted that she was married earlier. According to PW-2 Dr. Rajni Kaushik, prosecutrix was habitual of sexual intercourse and there was no evidence of forcible sexual intercourse. She has not noticed any injuries on the person of prosecutrix. PW-14 has also stated that there were 4-5 houses adjacent to the house where the accused committed sexual intercourse with the prosecutrix. There were many shops adjacent to the video hall. She admitted that if a person is taken forcibly and that person raises hue and cry, many people would gather at the spot. PW-15 Jai Singh has also admitted that the path leading to the

house of accused Yupal Singh goes through Peo bazaar, which is very busy and there were about 8-10 houses near his house.

14. The prosecutrix was not traceable from 13th December, 1990. F.I.R. was registered on 15.01.1991. Prosecution has not explained the delay in lodging the F.I.R. belatedly. It is true that delay in lodging the F.I.R. is not fatal to the case of the prosecution always, however, the delay has to be explained by the prosecution satisfactorily. The prosecution has failed to prove the ingredients of Section 363 of the Indian Penal Code. Once the case u/s 363 of Indian Penal Code is not proved, the offence u/s 366 of the Indian Penal Code becomes non-existent. The prosecution has miserably failed to prove that the prosecutrix was kidnapped and the sexual intercourse was committed with her forcibly by the accused persons.

In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed. Bail bonds are ordered to be discharged.