

(1994) 06 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 331 of 1992

State of Himachal Pradesh

APPELLANT

Vs

Madan Mohan

RESPONDENT

Date of Decision : 28-06-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 376, 511

Citation : (1995) CriLJ 3845 : (1994) 2 ShimLC 497

Hon'ble Judges : Lokeshwar Singh Pant, J; Bhawani Singh, J

Bench : Division Bench

Advocate : Shyama Dogra, Deputy Advocate General, for the Appellant; P.P. Grewal, for the Respondent

Judgement

Lokeshwar Singh Pant, J.—Accused Madan Mohan was tried for an offence u/s 376 of the Indian Penal Code and having been convicted, was sentenced to undergo 3 years" rigorous imprisonment and to pay a fine of Rs. 3,000/- by Sessions Judge Kangra Division at Dharamshala on 29-9-1992. In default of payment of fine, the accused had been directed to undergo one year rigorous imprisonment. In case the fine is recovered from the accused, Rs. 2000/- is directed to be paid to the prosecutrix.

2. The case of the prosecution briefly stated is as follows:--

On September 28, 1991 at about 5 or 5.30 p.m. prosecutrix Kumari Nisha aged about 6 1/2 to 7 years had gone from her house for playing some game in the village. Her father Bishan Dass (PW-2) came to his house in the evening and inquired about the whereabouts of Kumari Nisha from his wife. The wife told him that the prosecutrix had gone for playing outside, when she did not return to her house a search was carried out to find out her whereabouts. PW Bishan Dass inquired from Puran Chand (PW-5) whether his daughter had come to his house. Puran Chand replied in negative. PW Bishan Dass along with his son, Sanjay went to the house of one Roop Lal the maternal uncle of the prosecutrix in her

search, but the prosecutrix was also not found there. Thereafter, they went towards a place known as "Sudhir". On the way PW Puran Chand gave a call to PW Bishan Dass asking the latter about the whereabouts of the prosecutrix. PW Puran Chand also joined Bishan Dass in the search of the prosecutrix. Thereafter, they all went to the house of another Bishan Dass, Gaddi where Subhash Kumar (PW-6) son of Bishan Dass Gaddi informed the father of the prosecutrix that the accused had also taken his sister and he had rescued her from his (accused's) clutches. Immediately, the father of the prosecutrix, in the company of PW Puran Chand and his son Sanjay went to the house of the accused. They noticed that the light of the room of the accused was on but the door was closed. The moment father of the prosecutrix gave a call to the accused, he switched off the light. The father of the prosecutrix opened the door of accused by pushing. He entered the room and switched on the light and found that Kumari Nisha was lying naked on the ground and the accused was wearing his underwear. There was profused bleeding from the private part of the prosecutrix. The father immediately took up his daughter in his arms and came out from the room and shouted for the help of the villagers. The prosecutrix was immediately taken to the Hospital where she was admitted. Thereafter Bishan Dass straightway went to the Police Station Dharamshala the same day to lodge the report at about 10 p.m. A case u/s 376, I.P.C. came to be registered vide F.I.R. (Ext. PW-2/A) against the accused on the basis of the report and investigation followed. Inspector Durga Datt (PW-10) took up the investigation. He went to the spot and prepared the spot map (Ex. PW-10/A). He, after seizing certain articles namely "Chappal" (Ex. P1), Pajami" (Ex. P2), Frock (Ex. P-3), one bed sheet (Ex. P4) and one quit (Ex. P5) took them into possession and duly sealed them. The accused was arrested during the intervening night of 28th and 29th of September, 1991. The accused was interrogated and he made a disclosure statement (Ex. PW-2/D) and got recovered one "Thelu" (Ex. P6) (small cotton bag). The articles were stained with blood and some whitish material. He sent the victim girl and the accused simultaneously for medical examination.

3. Doctors Mrs. Shashi Mahajan (PW-4) medically examined Kumari Nisha on 28-9-1991 at 10.40 p.m. According to the finding of the Doctor the child was having no clothes on her person, her breasts were not developed and Axillary and pubic hair were not present. The doctor found two following injuries on her person :--

(1) There were two-three contusions on the left leg in its antoromedial aspect, red in colour. Size varying from 1/2" x 1/2", 1/2" x 1/4" and 1/2" x 1".

(2) There was redness on the anterior aspect of the base of neck.

4. On local examination the Doctor found blood stains present over and around external genitalia and on the medical aspect of thighs. There was a fresh tear on the posterior vaginal wall running from interotius to anterior wall of anus. Interotius admitted two fingers.

5. In the opinion of the Doctor injuries Nos. 1 and 2 were simple and there was definite evidence of penetration of the object in the vagina. She confirmed her opinion after seeing the Chemical Examiner's report (Ex. PX). The Doctor issued Medico Legal Certificate (Ex. PW-4/B).

6. Doctor Sushil Sharma (PW-3) medically examined the accused on 29th September, 1991 at 10.4V p.m. He found the accused well built person capable of performing the sexual intercourse. Two infraorbital margins contusions blue in colour with congestion of both the conjunctiva were found on the person of the accused. One to two abrasions on the right elbow joint in the posterior aspect were also found on the person of the accused. These injuries were less than 18 hours duration and were caused by bount trauma and were simple in nature. String of the underwear was found broken, and there were few blood stains and certain dirty stains on underwear. He issued medico legal certificate (Ex. PW-3/A).

7. After completion of the investigation the Police submitted a charge-sheet for the prosecution of the accused.

8. The accused in his statement u/s 313 of the Code of Criminal Procedure merely denied the prosecution case. He added that while he was proceeding to his house from his tailoring shop, one constable in the company of PWs. Puran Chand, Bishan Dass and one son of Bishan Dass met him on Charri road and brought him to the Police Station at about 7.00 p.m. His further defence is that PW Bishan Dass had taken a sum of Rs. 1500/- from him with a promise to give slates to him from Khanyara States Quarry and the amount was not returned nor the states as promised were given to him. He stated that he had not committed any crime nor the prosecutrix was found in his house and a false case is claimed to have been foisted upon him.

9. The prosecution in order to prove its case against the accused placed reliance on the evidence of Bishan Dass (PW-2), Puran Chand (PW-5) Subhash Kumar (PW-6) and medical evidence of Doctor Mrs. Shashi Mahajan (PW-4). Other witnesses examined in this case gave evidence of a general nature which needs no reference. The accused did not examine any witness in his defence. The trial Court, on consideration of the entire evidence, came to the conclusion that a case was made out beyond reasonable doubt against the accused and, in the result, convicted and sentenced him in the manner indicated earlier.

10. We have heard the learned counsel on either side and have also perused the record of the case. It has been brought to our notice that the accused has not preferred any appeal against his conviction and sentence. The State of Himachal Pradesh being aggrieved against the inadequacy of sentence awarded by Sessions Judge, has preferred this appeal for enhancement of sentence.

11. Mrs. Shyama Dogra, learned Deputy Advocate General has taken us through the evidence on record, as also the judgment of the trial Court. She points out that as far as the commission of the offence is concerned, the evidence is conclusive and that the State is only aggrieved with the quantum of sentence.

She has contended that in the facts and circumstances of the case it is necessary that deterrent sentence is awarded to the accused. She has placed reliance upon the State of Karnataka Vs. Mahabaleshwar Gourya Naik, . In that case the Supreme Court convicted the accused u/s 376 read with Section 511, I.P.C. and sentenced him to undergo rigorous imprisonment for 5 years. In other case namely, State of Himachal Pradesh Vs. Raghubir Singh, , the Supreme Court observed that for an offence punishable u/s 376 a more severe sentence would have been desirable. The apex Court maintained the sentence of rigorous imprisonment for a period of 5 years awarded by the trial Court for committing rape on victim girl of 7/8 years old.

12. The first contention raised on behalf of the accused by Ms. P. P. Grewal is that the plea set up by the accused regarding his false implication in this case was true, and that the trial Court committed an error in rejecting that plea. She contended that according to the observation of Doctor Sushil Sharma (PW-3) he found two abrasions over the infraorbital margins with congestion of both the conjunctivae and one to two abrasions on the right elbow joint on the posterior aspect of the accused which injuries would show that the accused was given beatings by the Police. We are afraid, the mere fact that the accused was found to have injuries on his body, cannot lead to the conclusion that the plea set up by him has any substance. It has come in the evidence of Bishan Dass (PW-2) that the accused had been over-powered by the villagers. It is natural that the fury of the people of the village would have fallen on the accused and they would have consequently, given him beatings. It has come in the evidence of Investigating Officer Durga Datt (PW-10) that the accused was apprehended by the local inhabitants and was given beatings and on account of those beatings, he received minor injuries on his person. The existence of the injuries on the body of the accused, therefore, lends more support to the prosecution case than to the defence theory. Apart from what has been stated above, it cannot, be accepted for any moment that a person would bring a false accusation of this nature to implicate another person. Whether a man is rich or poor and whether he belongs to a high caste and low caste, the fact remains that such an accusation brings bad repute to the family to which the girl belongs. No person, therefore, would bring such charge falsely against the another. We have therefore, no doubt in our mind that the plea set up by the accused is an afterthought, invented for the purposes of defence.

13. Learned counsel for the accused then contended that the prosecution has not examined independent witnesses of the village who admittedly, were present on the scene of occurrence to corroborate the testimony of PWs. Bishan Dass, Puran Chand and Subhash Kumar. The evidence of three witnesses who gave account of the occurrence was not consistent. She further contended that the accused is a married man and his wife and children were living with him in one room and on the day of occurrence, the accused was not at his residence and was arrested on "Charri" road while coming to his house, after closing his shop. According to the learned counsel the offence could not have been committed by the accused in

the presence of his wife and children. We are once again unable to agree with these contentions. Bishan Dass PW-2 made a clear statement to the effect that Subhash Kumar (PW-6) informed him that the accused had also taken his sister to his house and he had rescued her from his (accused"s) clutches. Immediately, the witness in the company of his son and Puran Chand (PW-5) went to the house of the accused. The light of the room of the accused was on but the door was closed. The moment he gave a call to the accused, the accused put off the light and he pushed open the door. After entering the room he switched on the light and found that Kumari Nisha was lying naked on the ground and the accused was wearing his underwear. He noticed profused bleeding on the private part of the victim girl. The prosecutrix was brought to the Hospital in the same condition. The other witness Puran Chand (PW-5) has corroborated the version of PW-2. It has come in his evidence that when he along with PW-7 and his son reached the house of the accused they heard the slow voice of the prosecutrix. The prosecutrix was found inside the room of the accused in naked condition and the accused was tying the string of his underwear. The accused has not shattered the version of these witnesses in their cross-examination nor any suggestion was put to them that the wife and children of the accused were present in the house at the time of the occurrence. It is also not suggested to them that they were deposing falsely against the accused on account of some inimical relations between them. The evidence of these witnesses is quite convincing and cogent and their statements are quite consistent about the commission of the offence by the accused. The girl was found lying naked inside the room and the accused was present in the room with no one else and that when the girl was medically examined, she was found having marks indicative of the fact that rape was committed on her. These circumstances put together can lead to only one conclusion namely, that it was the accused who committed the rape on the girl.

14. Learned counsel next contended that the prosecutrix was not examined by the prosecution and the link of the circumstantial evidence has not been proved beyond reasonable doubt against the accused. In support of her contention, she placed reliance on Jaharlal Das Vs. State of Orissa, . In that case the apex Court held as under:--

"The circumstantial evidence in order to sustain conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused."

There cannot be any dispute about the well settled principles of law laid down by the apex Court in the decision referred to above. In the present case the trial

Judge questioned the prosecutrix while she appeared as PW-7 about her competency to appear as witness. He noticed that prosecutrix did not understand the sanctity of oath and affirmation and she was not in a position to explain the sequence of occurrence, therefore, she was not examined. Merely because the victim girl is not examined for the reasons mentioned by the trial Court, this can never be a ground to acquit an accused if there is evidence, otherwise available, proving the criminal act of the accused concerned. As earlier stated the evidence of PWs. Bishan Dass and Puran Chand is quite reliable and trustworthy about the account of occurrence. The non-examination of the prosecutrix is not very much material.

15. The learned counsel for the accused contended that the occurrence took place in a village and yet the prosecution did not examine any person except Bishan Dass (PW-2) and Puran Chand (PW-5). She urged that since no independent witness has been examined in this case, it would not be safe to rely on the testimony of the witnesses actually examined. We are once again unable to agree. It has not been elucidated in the cross-examination of the prosecution witnesses that other independent witnesses were available and that the prosecution has withheld them. It has come in the evidence of Investigating Officer Durga Datt (PW-10) that he recorded the statements of those persons who witnessed the incident. Further, as already stated earlier, people do not generally bring false cases of rape even against their enemies. The want of independent witnesses in cases of rape should not, therefore, normally have a damaging effect on the prosecution case.

16. Learned counsel further contended that the conduct of the prosecutrix was shrouded with suspicion. She was conscious and did not make noise of any kind to attract the people. We are afraid that this contention of the counsel is also not acceptable. The victim girl is about 7/8 years old rustic villager and she could not explain the sequence of occurrence nor she could understand as to what had happened to her. She was in depressed and shocking state of mind and incapable of knowing the act of the accused.

17. Having given our careful consideration to the evidence on the record and to the contentions raised, we find no good ground for refusing to act on the testimony of Bishan Dass (PW-2) and Puran Singh (PW-5). The charge u/s 376, I.P.C. was brought home beyond reasonable doubt against the accused on that evidence and the trial Court had rightly convicted the accused.

18. The learned counsel for the accused lastly contended that in view of the fact that the accused is a young man aged about 30 years and he has a wife and children to maintain, leniency may be shown on the point of sentence and the sentence awarded by the trial Judge may be maintained. She has placed reliance upon Padam Bahadur Darjee Vs. State of Sikkim, . In that case the accused was sentenced to life imprisonment by the trial Court. The Division Bench of the Sikkim High Court observed that the accused was hardly 22 years of age and considering the social set up in which the accused and the prosecutrix had been

brought up and other relevant circumstances, the sentence was found highly excessive and the same was reduced to four years" rigorous imprisonment. The second decision relied upon by the learned counsel is Phul Singh Vs. State of Haryana, In that case Krishna Iyer, J., speaking for the Bench has observed as under:--

"He is a youth barely 22 with no criminal antecedents save this offence. He has a young wife and a farm to look after. Given correctional courses through meditational therapy and other measures his erotic aberration may wither away. A man like the appellant has a reasonable prospect of shaping into a balanced person, given propitious social environs, curative and congenial work and techniques of internal stress release or of reformatory self-expression." In that case, on the basis of the observations referred to above, the sentence of four years" rigorous imprisonment was reduced to two years" rigorous imprisonment by the Supreme Court."

19. This case represents certain facts that require to be specially highlighted, the first of them is the fact that this happens to be a sexual assault on a child of tender age. The law has made specific provision for rigorous punishment in respect of offence of this category and it would be a total mockery of the Justice Dispensation System if leniency is to be shown to depraved persons in cases of this type. The physical injuries apart, the mental trauma involved are good grounds to categorise it as one of the worst forms of anti-social offences and under these circumstances, in our considered view the trial Judge was totally misplaced. The argument that the accused is a young man totally fails to convince us. The accused being of the age of 30 years, married man and being father of children is sufficiently grown-up and even in society, it is intolerable for the accused of this age to indulge himself in sexual assault on tender young girl. It has come in the evidence of Subhash Kumar (PW-6) that the accused even tried to carry his minor sister with him after payment of Rs. 1.25 p. to her but luckily, she was rescued from the clutches of the accused by him. This conduct of the accused shows that he appears to be a depraved character indulging in this type of offence with the minor girls of the village. In these circumstances, to our mind, the provisions for rigorous punishments specifically prescribed by the Legislature after the amendment of Section 376, require to be applied so that the punishment proves deterrent and an eye-opener to those who have similar inclinations.

20. Having regard to this situation, we therefore, feel that the ends of justice would be met if the sentence to be imposed on the accused is increased to four years. He has already suffered more than two years" imprisonment and he is a married man and has children to look after. Having regard to this situation, as for as conviction is concerned, we confirm the same. The sentence of three years" rigorous imprisonment awarded by the trial Judge is increased to four years" rigorous imprisonment. As regards, the sentence" of fine of Rs. 3000/- and in default thereof, the sentence imposed by the trial Judge is concerned, the same

is confirmed.

In the result, the appeal accordingly succeeds and the same is allowed to the aforesaid extent.