
(2010) 10 SHI CK 0331
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 77 of 1997

State of Himachal Pradesh

APPELLANT

Vs

Samas Din and Others

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 366, 368, 376

Citation : (2010) 10 SHI CK 0331

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 dated 7.10.1996 delivered by the learned Sessions Judge, Chamba, H.P. in Sessions Case No. 3 of 1995 whereby he acquitted the accused of having committed offences punishable under Sections 366, 368 and 376 of the Indian Penal Code.

2. The prosecution story in brief is that the prosecutrix is the daughter of the complainant Sh. Shuker Din (PW-3). The complainant filed a complaint (Ext. PD) with the police on 1.10.1991 to the effect that on 25.9.1991 at about 12 O' Clock midnight Gulzar Mohammad (Accused No. 2) came to the house of the complainant. He enticed the prosecutrix and kidnapped her and took her to his house with the intention of marrying her. It was also alleged that accused had raped the prosecutrix. The father searched for the prosecutrix up to 29.9.1991. Then he came to know that she had been taken by accused Gulzar Mohammad and was being kept in the house of Gulab Din (accused No. 3). He went to the house of Gulab Din and found that accused Gulzar Mohammad was terrorizing the prosecutrix with intention to forcibly agreeing her for marriage. Thereafter the complaint was filed. This complaint was endorsed by the Deputy Superintendent of Police to the S.H.O. on 3.10.1991 and F.I.R. (Ext. PF) was registered on 4.10.1991. Thereafter the prosecutrix was recovered from the

house of Accused No. 3 vide memo Ext. PE. The prosecution case itself is that at the time the prosecutrix was recovered she was sleeping with Gulzar Mohammad (Accused No. 2). Samas Din (Accused No. 1) is the second husband of the mother of accused Gulzar Mohammad i.e. the step father of the main accused. As far as accused Bakhat Mohammad is concerned he is alleged to have given refuge to the accused and the prosecutrix and therefore has been arrayed as accused. Gulab Din (Accused No. 3) died during the pendency of the appeal and as such appeal against him stands abated.

3. After the recovery of the prosecutrix she was got medically examined from Dr. Anju Puri (PW-2) who found that the prosecutrix was habitual to sexual intercourse. She was radiologically examined to determine her age and as per the Radiologist her age was between 14 1/2 and 17 years. On this basis challan was filed against the accused. The accused pleaded not guilty and claimed trial. After trial the learned Trial Court acquitted all the accused. Hence the present appeal by the State.

4. The learned Trial Court came to the conclusion that from the material on record it stands proved that the prosecutrix had left the house of her father on her own accord and had willingly gone with accused No. 2. He also came to the conclusion that the prosecutrix was more than 16 years of age and in fact found that prosecution had failed to prove that she was below 18 years of age and hence acquitted all the accused persons of the charged offences.

5. We have heard Sh. Vivek Thakur, learned Addl. Advocate General on behalf of the State and Sh. Harish Behl, learned Counsel on behalf of respondents No. 1 and 2 and Sh. Devinder Sharma, learned Counsel on behalf of respondent No. 4.

6. The most important question in this case is as to what was the age of the prosecutrix at the time when the incident occurred. The father of the prosecutrix stated that he got married some time in the year 1973 and that his first child who was elder to the prosecutrix was born in the year 1974 and the prosecutrix was born some time in the year 1976. The father (PW-3) could not even give his own age. He clearly stated that age of the prosecutrix and her brother were got recorded with the Gram Panchayat and entries were made in the Births and Deaths Register. However such registers which were the primary evidence to prove the date of birth of the prosecutrix were not produced and the only documents produced are the copy of Pariwar Register (Ext. PM) and certificate (Ext. PN). It is a settled law that entry in the Pariwar Register and certificate issued by the Gram Panchayat on the basis of the Pariwar Register are not sufficient to prove the age which has to be proved from the Births and Deaths Register. When admittedly entries were made in the Births and Deaths Register they should have been got proved. If such evidence is withheld from the Court then adverse inference has to be drawn against the prosecution.

7. Even the prosecutrix is not clear about her age. Though she stated that she was born in the year 1976 she admitted that she had never attended school and

is not even clear about the English calendar. According to the prosecutrix her brother is elder to her and may be 22 - 23 years old on the day of recording the statement which was recorded in the year 1995 which would mean that the prosecutrix was 21 - 22 years old. This would also indicate that the prosecutrix was about 18 years of age when the incident took place and not 15 years, as alleged. Therefore, much reliance cannot be placed on her statement.

8. The radiological age, as observed above, has been proved to be between 14 1/2 to 17 years. The law is well settled that the radiological age of a person depends on many factors. It is affected by diet, by genetics and also by the environment in which a person grows. The age fixed radiologically is not an exact science and it has been judicially held that there can be a variation of two years on either side. As per the estimation of the Doctor on the higher side age of the prosecutrix is to be 17 1/2 years. If leeway of two years is allowed then the prosecutrix could be up to 19 1/2 years of age.

9. It is the duty of the prosecution to prove its case. The prosecution in the present case has miserably failed to prove that the prosecutrix was below 18 years of age.

10. Next comes the question as to whether the prosecutrix had gone willingly with the accused or not. As already pointed out above when the prosecutrix was recovered after nine days of the alleged abduction she was found sleeping with accused No. 2. True it is that the prosecutrix in Court states that accused No. 2 wanted to marry her but she had refused. Her version is that on the night of the occurrence she had gone outside the house to answer the call of nature at about 11.00 -11.30 p.m. when accused Gulzar Mohammad and Samas Din caught hold of her and abducted her and therefore she could not cry. Even according to her version she was taken to village Bhandal and then to village Kuteli. Then she was taken to village Diur where she was kept in the house of some person whose name she does not know. Lastly she was taken to village Kuteli. Her version that for eleven days she was kept hidden cannot be believed. She would have had to answer the call of nature. There were many occasions when she could have raised an alarm or complained to the persons to whose houses she was allegedly taken that she had been abducted. Her conduct of moving around with the accused and his family members for eleven days without raising any objection whatsoever itself indicates that she was a consenting party and had gone willingly with the accused.

11. In view of the above discussions we find no merit in the appeal which is accordingly dismissed. Bail bonds furnished by the accused are ordered to be discharged.