

**(2011) 01 SHI CK 0006**

**In the High Court Of Himachal Pradesh**

**Case No : Criminal Appeal No's. 46 and 204 of 2000**

State of H.P.

APPELLANT

Vs

Sushil Kumar @ Sunil and Others <BR> Sushil Kumar @  
Sunil and Others Vs State of H.P.

RESPONDENT

**Date of Decision : 05-01-2011**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2), 376(2), 377  
Penal Code, 1860 (IPC) — Section 34, 376, 498A, 506

**Citation : (2011) 01 SHI CK 0006**

**Hon'ble Judges : Sanjay Karol, J;R.B. Misra, J**

**Bench : Division Bench**

## **Judgement**

R.B. Misra, J.—Criminal Appeal No. 46 of 2000 has been preferred by the Appellants / convict u/s 374(2) Code of Criminal Procedure for setting aside the impugned judgment, whereas, Criminal Appeal No. 204 of 2000 has been preferred by the State of Himachal Pradesh u/s 377 Code of Criminal Procedure for enhancement of sentence in reference to common judgment dated 16.2.2000, passed by learned Sessions Judge, Hamirpur, H.P., in Sessions Case No. 20 of 1997, whereby the Appellants / accused have been convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs. 4000/- each and in default of payment of fine, they were ordered to further undergo two years rigorous imprisonment, for offences under Sections 376(2)(g), 506 read with Section 34 of the Indian Penal Code, in reference to F.I.R. No. 103 of 1995 dated 14th November, 1995, Police Station, Bhoranj.

2. The prosecution case, in brief, is that on 10.11.1995, at about 10 P.M., victim / prosecutrix (name not given), wife of Baldev Raj of village Keharwin, was alone in her house and her husband Baldev Raj did not return in the evening after performing manual labour, therefore, his wife, (victim / prosecutrix), went to the house of her sister, namely, Lila Devi (PW-7) in village Naziar, in search of him where nothing was known about her husband, therefore, the victim / prosecutrix started coming back alone to her home. On way, she was followed by the

accused persons. Accused Karam Chand and Prem Chand when reached near the house of Sushil Kumar, they caught hold of victim / prosecutrix and took her to the house of accused Sushil Kumar. All the accused persons were drunk. The victim / prosecutrix was taken to the lower storey of the house. Her mouth was gagged by accused Sushil Kumar with a piece of cloth and on breaking the string of her salwaar, committed sexual intercourse with her forcibly. Thereafter, Karam Chand and Prem Chand also sexually assaulted her. During the course of intercourse, when she tried to raise alarm, she was threatened to be cut into pieces with drat which was lying on the bed. After sexual assault, she started for her home. On way, she felt giddiness and fell down in the fields near her house and lost her consciousness. Baldev Raj, husband of the victim / prosecutrix, while returning to his house, noticed victim / prosecutrix lying in the field, took her to his house, where the incident was narrated by the victim / prosecutrix to her Jethani wife of Udho and in that reference matter was reported to the police and F.I.R. was lodged and she was medically examined and after completion of investigation, accused persons were charged for the aforesaid offences and the case trial was conducted by the Sessions Court.

3. In order to prove its case, prosecution has examined as many as twelve witnesses, whereas, Respondents / accused, through their statements u/s 313 Code of Criminal Procedure , denied the prosecution case.

4. PW-1, Dr. Suman Sharma, Chief Medical Officer, District Hospital, Hamirpur examined the victim / prosecutrix, on 15.11.1995 at 5 P.M., aged about 26 years, mother of three children, (the youngest one was about four years and thereafter she was sterilized). PW-1 noticed that the victim / prosecutrix was mentally retarded and could not give detailed history of incident and the clothes worn by victim / prosecutrix at the time of incident were changed by her. On examination, no mark of injury on her face, arms, hands, breasts, abdomen, back or thighs was noticed. Menstruations were noticed having commenced from 11th or 12th November, 1995 as she had been living with her husband, as such, was found to have cohabited with her husband twice after the incident. In the opinion of PW-1, after lapse of five days, signs of sexual assault might have disappeared. In the cross examination, PW-1 has reiterated that the victim / prosecutrix was mentally retarded, so she could not give detailed history.

5. PW-2, Dr. J.S. Dhillon, SMO Mental Hospital, Amritsar, examined, victim / prosecutrix when she was admitted in Mental Hospital OPD as a patient from 18.1.1995 to 24.1.1995, where her illness was suspected as manic depressive psychosis / (mania) and she was being treated accordingly. However, on the request of her husband, she was discharged on 24th January, 1995 to undergo further treatment for one month. According to PW-2, manic depressive psychosis means that a person having not proper reasoning and understanding, lack of insight relating to understanding. However, as per record, the victim / prosecutrix was conscious, cooperative and her memory was intact. As stated by PW-2 in his cross examination, when victim / prosecutrix was discharged vide

Ext.PW-2/B, she was not fully cured and was advised to take medicines for one month. However, as stated by PW-2, victim / prosecutrix did not visit hospital for follow up. On the basis of Ext.PW-2/A i.e. the original admission record and Ext.PW-2/B the discharge slip, PW-2 was not sure that the patient was same person who was admitted and treated in the hospital.

6. PW-3, (victim / prosecutrix), was found competent to give her testimony and as such her testimony was recorded on 12.10.1998 by learned Sessions Judge. PW-3, in support of the prosecution case, has stated that she has three daughters and lives with her husband and children in a joint family consisting of her parents-in-law and Jethani. According to PW-3, on the date of incident her husband was not at home and till late night when her husband did not return from manual work, she went in search of him and went to her maternal sister Lila Devi where nothing was known about her husband. While returning back to her home alone, she was followed by all the three accused persons. According to PW-3, accused Sunil Kumar alias Sunil / (nickname "Pappi") runs a tailoring shop, accused Karam Chand runs a Halwai shop and accused Prem Chand deals in Maniari articles. PW-3 has further stated that accused Sushil Kumar and accused Karam Chand followed her up to the house of the former and both of them caught hold of victim / prosecutrix and taken her to the house of Sushil Kumar. In the meantime, accused Prem Chand also came to the house of accused Sushil Kumar. All the three accused persons were drunk. The house of accused Sushil Kumar is double storeyed. The victim / prosecutrix was taken first to the lower storey of the house, where, accused Sushil Kumar gagged her mouth with a piece of cloth and after breaking the string of her Salwaar, committed forcibly sexual intercourse with her, followed by accused Karam Chand and accused Prem Chand. During such occurrence, as and when she tried to raise alarm, the accused persons threatened that she would be cut into pieces with a darat. After such sexual assault, she started for home and on way, feeling giddiness, she fell down unconscious in the fields near her house. Clothes, which the victim / prosecutrix was wearing at the time of occurrence, were handed over by her to the police. The occurrence was narrated to the wife of Udho i.e. "Jethani" of victim by the wife of accused Karam Chand when she had gone to the house of accused Sushil Kumar in search of her husband who had not come home from his shop. PW-3 has also stated that earlier to the occurrence, she remained under treatment for mental ailment in mental Hospital, Amritsar and was also given electric shocks. In cross examination, PW-3 has, however, submitted that there are 7 - 8 houses in the vicinity of the house of accused Sushil Kumar and has denied the suggestion that wife and children of accused Sushil Kumar were also present in the house at the time of occurrence. Volunteered that wife of accused Sushil Kumar was away to the house of her parents along with her children. PW-3 has also admitted that she was detained in Police Station, Thural for about ten days. She has also accepted that she has lodged a complaint in Police Station, Bhoranj regarding demands of more dowry and has also accepted that when she reached near the house of accused Sunil

Kumar he had told her to accompany him in his house to view television and accordingly victim had gone to his house with him. In view of testimony of PW-3 victim / prosecutrix, Udho Ram had come to the spot and had raised alarm and despite that the accused did not release her and during the sexual assault her clothes were not torn and only the string of the Salwaar was broken. As per testimony of victim / prosecutrix, when Udho Ram had raised alarm, none had gathered at the spot from the nearby houses. However, accused persons had dispersed from the spot after Udho Ram had raised alarm and PW-3 has stated in her cross- examination that she had not narrated the incident to the members of her family after she had reached home after the occurrence. However, she has denied that she owed a sum of Rs. 5000/- to accused Sushil Kumar, a sum of Rs. 3000/- to accused Karam Chand and a sum of Rs. 4000/- to accused Prem Chand. PW-3 has denied that she is of easy virtue and has falsely implicated the accused persons in this case.

7. PW-4 Baldev Raj, husband of the victim / prosecutrix (PW-3), while supporting the prosecution case, has stated that his wife was not insane though she was getting treatment in Mental Hospital, Amritsar and on 10.11.1995, he had gone to village Raziar where he met Bhalku, who is his Bua's husband, on whose request, on that day after work, he had accompanied him in connection with his work of witchcraft and after his work was completed, PW-4 and Bhalku started for the house of PW-4 and after reaching a place at a distance of about 300 yards short of his house, PW-4 noticed victim / prosecutrix lying unconscious in the fields. Then PW-4 and Bhalku lifted her and brought her to the house of PW-4 and in the following morning, PW-4 came to know from Bimla Devi / (wife of accused Karam Chand, that victim / prosecutrix had been sexually assaulted in the house of accused Sushil Kumar. Victim / prosecutrix regained consciousness on 11.11.1995 in the evening at about 4 - 5 P.M. However, she did not disclose anything about the occurrence to PW-4 or Bhalku and the occurrence was narrated by her to PW-4 and Bhalku on 12.11.1995 when PW-4, along with victim, went to lodge report to Police Station, Bhoranj. The report was not recorded instead PW-4 was asked to go back home with an assurance that the police would visit their house in the next morning. Thereafter, PW-4, along with victim, went to Superintendent of Police, Hamirpur who advised them to report the matter in writing. Accordingly, application Mark-A was got scribed from a person in the office of Superintendent of Police and victim put her signatures on the application Ext.PW-4/A. PW-4 has also accepted in his cross examination that victim had lodged a complaint against him u/s 498A IPC and volunteered that it was a family dispute between husband and wife and had no bearing in the present case and the case was tried and PW-4 was acquitted. PW-4 has denied that the victim / prosecutrix was detained in Police Station, Thural for ten days and was brought back home by PW-4.

8. PW-5, Udho Ram, in support of the prosecution case, has stated that his house is at a distance of 200 - 250 yards away from the house of accused Sushil Kumar and on the date of incident when he was sleeping, wife of accused Karam

Chand came to his house and told that victim / prosecutrix was going through the road and making noise and shouting. PW-5 accompanied Bimla Devi but there was none. PW-5 has further stated that accused Karam Chand was going to his house along with his children. Accused Prem Chand was sitting in his shop and accused Sushil Kumar alias Sunil was present in his house. In cross-examination, PW-5 has stated that accused Sushil Kumar was standing in front of his house, accused Karam Chand was standing on the road and accused Prem Chand was present outside his shop. PW-5 has further stated in his cross examination that victim / prosecutrix might have left before PW-5 reached there and he did not see the victim on the spot. PW-5 Udho Ram has also stated that he had not seen the wife and children of accused Sushil Kumar in his house at that time.

9. PW-6, Gian Chand, has stated that Baldev Raj (PW-4) is his son and PW-3 (victim / prosecutrix) is the wife of PW-4, as such, is his daughter-in-law. As per testimony of PW-6, victim / prosecutrix is a lady of low intellect since her birth, though understands the things and is capable of doing all types of works but is not very much worldly wise. PW-6 has further stated that after finishing dinner on 10.11.1995, he noticed that PW-3 was not in the house, however, he thought that she might have gone to her parents' house or to the house of her maternal uncle and finally PW-4 Baldev Raj and Bhalku came at 11.30 PM with victim. The victim was unconscious at that time and she regained consciousness on 12.11.1995. As per testimony of PW-6, the incident was narrated to him also, whereas, as per testimony of Baldev Raj (PW-4) the incident was narrated to him and Bhalku. PW-6 has, however, denied that victim due to her mental illness loiters around. Voluntarily stated that the victim remained admitted in the hospital for 6 - 7 days and has also denied that the victim is a woman of easy virtue and she keeps on loitering, volunteered that she is a woman of moral character.

10. PW-7, Lila Devi, in her endeavour to support the prosecution case, has also stated that victim / prosecutrix is a woman of low intellect (Mand Budhi) and on 10.11.1995, at about 8 - 8.30 PM, victim came to her enquiring about her husband, PW-7 told her that she was not aware as (PW-4) Baldev Raj had not come to her house on that day.

11. PW-8, Kulbir Singh, in support of the prosecution case, has stated that on 10.11.1995, he met accused Sushil Kumar near his house when PW-8 proceeded further at a distance of about 200 - 300 meters on the boundary of village Chontra, victim / prosecutrix met him and asked him whether he was going home. PW-8, however, did not reply.

From the testimony of PW-8, it appears that she might have gone to enquire from Lila Devi (PW-7) about her husband, therefore, she might have met PW-8 Kulbir Singh.

12. PW-9, HC Puran Chand, had recorded the F.I.R. Ext.PW-9/A. PW-10, LHC

Nathu Ram, had helped in the investigation. PW-11, SI Jai Chand, took into possession Kameez, Salwaar and underwear, worn by the prosecutrix and sealed all these articles and also helped in the investigation.

13. PW-12, Doctor Naresh Sharma, Medical Officer, CHC Bhoranj, conducted the medical examination of accused persons and has opined that there is nothing that the accused persons are not capable of performing the sexual act.

14. Hon''ble Supreme Court in Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another, has observed that conviction in reference to offence u/s 376 IPC can be made on the sole testimony of prosecutrix provided the evidence of the prosecutrix inspire confidence and appears to be natural and truthful.

15. Hon''ble Supreme Court in Aman Kumar and Another Vs. State of Haryana, has observed as under:-

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct and circumstantial, which would lend assurance to her testimony. Assurance short of corroboration as understood in the context of an accomplice would suffice.

16. In State of Himichal Pradesh Vs. Gian Chand, it was observed by Hon''ble Supreme Court that in the incidents like rape, moreso when the perpetrator of the crime happens to be a member of the family or related therewith, involve the honour of the family and, therefore, there is a reluctance on the part of the family of the victim to report the matter to the police and carry the same to the Court. A cool thought may precede lodging of the FIR.

17. The omissions and contradictions found in cross-examination create doubt about the truthfulness of the testimony of alleged raped married woman rendering her testimony unsafe to rely upon and convict the accused only on the basis of testimony of victim / prosecutrix. In view of testimony of PW-3 (victim / prosecutrix), Udho Ram came to the spot, raised alarm and on his raising such alarm accused persons dispersed from the spot. Such testimony of PW-3 is contradicted by the testimony of PW-5 Udho Ram, who has very categorically stated that accused Sushil Kumar alias Sunil alias Pappi was standing in front of his house, accused Karam Chand was standing on the road and accused Prem Chand was present outside his shop and the victim / prosecutrix might have left before PW-5 reached on the spot and had not supported the prosecution case. PW-5 Udho Ram has not stated that he has raised any alarm as has been stated by PW-3 victim / prosecutrix. The victim / prosecutrix has very categorically indicated that when she reached near the house of accused Sunil Kumar, he had

told her to accompany him in his house to view television and accordingly victim / prosecutrix had gone to his house with him and the clothes of the victim were not torn during the occurrence and only the string of her Salwaar was broken. Udho Ram (PW-5) had come to the spot and had raised alarm. Such testimony of the victim / prosecutrix indicates that she was a consenting party and her clothes were not torn, so her testimony cannot be relied upon, whereas, the victim had very categorically stated that PW-5 Udho Ram had come on the spot, whereas, as per the testimony of Udho Ram he had not seen the victim on the spot and had not raised any alarm. Testimony of PW-3 also is not inspiring confidence as she had not divulged about the incident even to her husband and the incident was known through other sources to PW-4 Baldev Raj and Bhalku. There was apparent delay in lodging the F.I.R. as the occurrence took place on 10.11.1995, whereas, the F.I.R. was lodged on 12.11.1995. The testimony of victim / prosecutrix, so far the sexual assault has been committed on her, is not reliable as she is a lady of low intellect and no mark of sexual assault was noticed on her body.

18. In State of Rajasthan Vs. Kishanlal, Hon"ble Supreme Court has held that where serious suspicion has arisen about truthfulness of prosecution version when there was non seizure of knife from the accused, as alleged by the prosecutrix, in reference to the threatening at the time of committing sexual assault on the victim / prosecutrix. In the present case also, in view of testimony of PW-3, drat was lying in the bed by which she was threatened, however, the same was not recovered, as such, the observations in the case of Kishanlal (Supra) gives protection to the case of the defence.

19. Hon"ble Supreme Court in Narendra Singh and Another Vs. State of M.P., has observed that if there is possibility of two views then the view which favours the accused should be upheld.

20. On analysis of prosecution witnesses and materials on record, we notice that PW-1 Dr. Suman Sharma has stated that the victim was residing with her husband and has cohabited with him twice after the incident and since she was medically examined on 15.11.1995 i.e. five days after the date of occurrence, as such, there was no sign of sexual assault on the body of victim / prosecutrix and she could not narrate properly to the doctor and could not give the detailed history of incident, as she was mentally retarded. In view of statement of PW-2 Doctor J.S. Dhillon, the victim was undergoing depressive psychosis and was not having proper reasoning and understanding, lack of insight relating to illness, when she was discharged from Mental Hospital, Amritsar, she was not fully cured. Victim / prosecutrix had also filed a case against her husband u/s 498A IPC it means she was legally aware about her right then her conduct about the said incident of sexual assault becomes doubtful when she immediately did not divulge to her husband and the occurrence was divulged through some other sources as indicated above. In view of the statement of PW-4 Baldev Raj, she was not keeping mentally fit and PW-4 had himself had come to know about the

occurrence from the wife of accused Karam Chand, namely, Bimla Devi. In view of testimony of PW-3 / victim / prosecutrix, occurrence was narrated to the wife of Udho i.e. "Jethani" of victim by the wife of accused Karam Chand when she had gone to the house of Sushil Kumar in search of her husband, whereas, PW-4 Baldev Raj, husband of victim (PW-3), came to know from Bimla Devi, the wife of accused Karam Chand that victim / prosecutrix (PW-3) was sexually assaulted by accused Sushil Kumar. PW-4 Baldev Raj, in his cross-examination, has stated that he had stated to the police that he himself and Bhalku came to know about the occurrence through Bimla Devi, wife of accused Karam Chand. Apparent contradiction is emanating from the testimony of PW-3 / victim / prosecutrix. PW-5 Udho Ram has stated that while he was sleeping, wife of accused Karam Chand came to his house and told that victim / prosecutrix was going through the road and making noise and shouting and thereupon PW-5 accompanied Bimla Devi but found none. In view of these narrations of fact by PW-4 and PW-5, the testimony of PW-3 (prosecutrix / victim) does not inspire confidence. Therefore, the sole testimony of prosecution witnesses is not inspiring confidence and the apparent contradictions are being noticed from the testimony of PW-5 Udho Ram and PW-3 / (victim) and from the testimony of PW-1 Dr. Suman Sharma, who has not noticed any mark of violence on the body of PW-3.

21. Bhalku, who has alleged to have accompanied PW-4 Baldev Raj, has not been examined for the reasons best known to prosecution, whereas, Bhalku could have divulged truth and could have described better about the condition of victim / prosecutrix, who was found unconscious and was lifted and taken to the house of PW-4 Baldev Raj. Medical report is also not supporting the case of the prosecution as no mark of injury was found on the body of the victim / prosecutrix.

22. In the facts and circumstances, in our considered view, the learned Sessions Judge, Hamirpur had not appreciated the prosecution evidence properly and correctly, therefore, the observations and findings arrived at from the impugned judgment are not legally sustainable, therefore, the judgment is set aside, consequently, Criminal Appeal No. 46 of 2000, preferred by the Appellants / convict, is allowed and Criminal Appeal No. 204 of 2000, preferred by the State of Himachal Pradesh for enhancement of sentence, is dismissed being devoid of any merit. The prosecution has failed to prove its case beyond reasonable doubt, as such, accused / convict are given benefit of doubt and their bail bonds are discharged. As a result, all the three accused / convict are acquitted for the offences u/s 376(2)(g) and 506 read with Section 34 of the Indian Penal Code.

23. As a result of acquittal, as mentioned above, bail bonds furnished by the alleged accused / Respondents are hereby discharged.