

---

**(2013) 03 UK CK 0038**

**In the Uttarakhand High Court**

**Case No : Government Appeal No. 223 of 2002**

State of Uttaranchal (Now State of Uttarakhand)

APPELLANT

Vs

Dilshad

RESPONDENT

---

**Date of Decision : 07-03-2013**

**Acts Referred:**

**Citation : (2013) 1 NCC 780**

**Hon'ble Judges : V.K. Bist, J**

**Bench : Single Bench**

**Advocate : Mamta Bisht, A.G.A. and Ms. Sangeeta Miyan, Brief Holder, for the Appellant; Nagesh Agarwal, for the Respondent**

---

## **Judgement**

V.K. Bist, J.—This appeal, preferred u/s 378 of Code of Criminal Procedure, 1973, is directed against judgment and order dated 22.12.2002, passed by the learned Sessions Judge, Dehradun, in Sessions Trial No. 21 of 1998, whereby the said court has acquitted the accused/respondent Dilshad from the charge of offences punishable u/s 363, 366 and 376 of I.P.C. Heard learned counsel for the parties and perused the lower court record.

2. Prosecution story, in brief, is that the complainant Smt. Walrila lodged a First Information Report on 03.10.1997 at 5:30 p.m. at Police Station Sahaspur, stating therein that accused/respondent Dilshad eloped/kidnapped her daughter Rukhsana, aged about 16 years on 23/24.09.1997 night. On the next day, the complainant went to the house of Dilshad, where the brother of accused, namely, Irshad met her and told her that her daughter might be in the house of Mansaf and that he would help her in the search of her daughter. On reaching Mansaf's house, Mansaf turned them out of his house and said that her daughter was not there. Thereafter, Irshad took her at one place and another for two days, but her daughter could not be found. On the basis of said report, Chik report (Ex. A-11) was prepared and case crime No. 309 of 1997 was registered in respect of offences punishable u/s 363 and 366 of I.P.C., against the accused Dilshad and one Mansaf. Investigation was taken up by P.W.7 S.I. Madan Pal Singh, who

interrogated the witnesses and started investigation. During investigation, Rukhsana, daughter of the complainant, was recovered from the Court complex of S.D.M., Dehradun. On 10.10.1997, Rukhsana was sent for medical examination. Her statement u/s 164 Cr.P.C. was recorded on 14.10.1997. During investigation, it came into light that Hamid and Wahid helped the accused Dilshad in kidnapping of Rukhsana. The Investigation Officer also made them co-accused. After completion of investigation, the said Investigating Officer submitted charge sheet against the accused Dilshad, for his trial in respect of offences punishable u/s 363, 366 and 376 of I.P.C. and a separate charge sheet was also submitted against the co-accused Hamid and Wahid in respect of offences punishable under Sections 363, 366, 376 and 120-B of I.P.C.

3. The Additional Chief Judicial Magistrate IVth, Dehradun, on receipt of the charge sheet, after giving necessary copies to the accused, as required u/s 207 Cr.P.C. committed the case to the court of Sessions for trial. After hearing the parties on 30.10.1998, learned Sessions Judge, Dehradun, framed charge of offences punishable u/s 363, 366 and 376 of I.P.C. to which the accused Dilshad pleaded not guilty and claimed to be tried. However taking cognizance on the charge sheet filed against the co-accused Hamid and Wahid, the learned Sessions Judge framed charge of offences punishable u/s 114 of I.P.C. read with Section 366 of I.P.C. against the co-accused. On this, prosecution got examined P.W. 1 Rukhsana, P.W. 2 Smt. Wakila (complainant), P.W.3 Salatun, P.W.4 Dr. Manju Sachan, P.W.5 Dr. V.K. Nautiyal, P.W.6 Dinesh Bahuguna, P.W.7 S.I. Madan Pal Singh (Investigating Officer), P.W.8 Con. Anil Kumar, P.W.9 Smt. Kanchan and P.W. 10 Asgar Ali. Oral and documentary evidence was put to the accused u/s 313 of Cr.P.C. in reply to which he alleged that the evidence adduced against him is false. However, no evidence in defence was adduced. The trial court after hearing the parties opined that prosecution could not prove the charge of offences punishable u/s 376 of I.P.C. against the accused, and the accused Dilshad was given benefit of doubt for the offences punishable u/s 363 and 366 I.P.C. and acquitted him of the charge. Aggrieved by judgment and order dated 22.12.2001, passed by the learned Sessions Judge, Dehradun, in Sessions Trial No. 21 of 1998, this appeal is filed by the State, against the order of acquittal before this Court. Thereafter, leave to appeal was granted and appeal was admitted and lower court record was summoned.

4. P.W. 1 Rukhsana is star eyewitness of the incident. She is the alleged victim of kidnapping and rape. In her statement, she has clearly stated that after kidnapping, when the accused Dilshad was taking her, at that moment, one lady of her locality Smt. Salatun met them on their way. On her asking, Dilshad told her that victim has stomach pain and he is taking her to doctor. Rukhsana neither resisted to come out of the clutches of the accused nor she screamed for her protection. She further disclosed that that she got married to accused Dilshad. At the time of her statement before the Court, the prosecutrix has registered her age as 16-17 years. In the medical report, her age has been ascertained in between 17-18 years. The Radiologist P.W. 5 Dr. V.K. Nautiyal, in

his cross-examination, has admitted that at the time of incident, the age of the victim was below 18 years and it can be presumed that there may be difference of six months in both upper and lower age.

5. The main submission of Mrs. Mamta Bisht, learned A.G.A. for the State/appellant is that at the time of incident, the prosecutrix was minor and in view of this fact, the learned Sessions Judge, Dehradun has committed error in passing order of acquittal. She submitted that the School Leaving Certificate, produced by the prosecution shows the age of the prosecutrix as 12 years. She submitted that even if it is assumed that the age of the prosecutrix given by the doctor, if treated to be correct, even then, the prosecutrix at the time of incident was below 18 years. Learned A.G.A. for the State submitted that there is no contradiction in the statement of the prosecutrix given before the Court as well as before the Magistrate u/s 164 Cr.P.C. Thus, in both her statements, the prosecutrix has specifically said that the accused, Dilshad, forcefully took her with him and she accompanied the accused, Dilshad, under threat and the rape was also committed on her against her wish. Learned A.G.A. for the State submitted that in view of this fact, the appeal deserves to be allowed and the order of acquittal passed by the Court below be set aside.

6. Shri Nagesh Agarwal, learned counsel for the respondent, on the other hand, submitted that the prosecutrix at the time of incident was major and infact, the two doctors have examined the prosecutrix. He submitted that the pathology test shows the age of the girl, at the time of incident, between 17-18 years. He relied upon the judgment given by this Court in Criminal Appeal No. 1188 of 2001 reported in [2010] 2 NCC 159, in which this Court has held that it is settled law that two years margin either on the upper side or lower side can be given. Learned counsel for the respondent submitted that in the facts and circumstances of the case, the age of the victim should be treated more than 18 years. He also relied upon the judgment of the Hon"ble Supreme Court reported in Ranjitham Vs. Basavaraj and Others, in which the Hon"ble Supreme Court has held that if two views are possible on appreciating the evidence and if the view taken by the acquitting Court is a reasonably possible view, it cannot be substituted by the other view just because it appears to be a possible view.

7. I have considered the submission advanced by the learned counsel for the parties. The victim in her statement stated that accused Dilshad forcefully took her to Selakui road from where they boarded a bus and reached Dehradun. Thereafter, Dilshad took her to Khurbura at his relative's residence and committed rape upon her. In her statement, she also stated that while Dilshad was taking her to Selakui road, one lady of her locality, Smt. Salatun met them. On her asking, Dilshad told her that victim had stomach-pain and he was taking her to the doctor. At least, at this moment, she had opportunity to come out of the clutches of the accused and raise alarm, but she did nothing and quietly went with Dilshad. Even after reaching Dilshad's relatives place at Khurbura, she did not tell anybody about her kidnapping/abduction and rape. Her conduct clearly

shows that she, by her own wish, went with Dilshad and had sex with him. In her statement, she also said that on 29th September, 1997 Dilshad took her to Kutchery and got signed marriage papers forcefully. At the public place also, she had opportunity to raise alarm. In her statement u/s 164 Cr.P.C. she stated that the Court Marriage was consented to by her to save her honour. Thus, the argument of learned A.G.A. is not correct that there is no contradiction in her statement and statement given u/s 164 Cr.P.C. All the aforesaid facts show that prosecutrix was fully capable to understand everything. In such statement, benefit of the judgment cited by the learned counsel for the respondent Mukesh Dhyani Vs. State of Uttrakhand can be given. As per the medical report, the age of the victim, at the time of incident, was between 17-18 years. By considering the judgment cited by the learned counsel for the respondent, it appears that the prosecutrix was major at the time of incident. Charges against the accused are not proved. There is nothing, which could show that judgment impugned is perverse. Accordingly, the appeal is dismissed. Let lower court record be sent back.