

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Criminal Appeal No.12-AA/2003

Date of decision : July 04, 2007

Krishan Chand

VS

State of J & K

Coram:

Hon'ble Mr. Justice Virender Singh, Judge

Appearing Counsel:

For the Appellant(s) : Mr. M.L. Gupta, Advocate.
For the Respondent(s) : Mr. S.C. Gupta, Additional Advocate General.

Appellant, Krishan Chand, (hereinafter to be referred to as 'Accused) stands convicted under Sections 376/511 RPC vide impugned judgment of learned Sessions Judge, Udhampur, dated 11-12-2002 and 16-12-2002, and has been sentenced to undergo RI for five years and a fine of Rs.1,000/-; in default thereof to undergo simple imprisonment for three months.

Record reveals that accused is in custody since the date of his conviction, as at one stage, his application for suspension of sentence was dismissed by this Court way back on 02-12-2004. He has not knocked at the door of this Court for the said relief again. Mr. Gupta states that perhaps the accused has served his entire sentence.

Be that as it may, the instant appeal, which already stands admitted, has to be disposed of on merits.

The occurrence is of 14th of November, 1999. The prosecutrix, in this case, is none else but the daughter of the accused, who had fallen prey to the sexual lust of the father.

Name of the prosecutrix is not being disclosed intentionally. She was of the age of 12 years at the time of alleged occurrence and was able to understand the nature of questions put to her by the Court. After the Court found her to be a capable witness, recorded her statement, who deposed that she, along with her two younger brothers, namely, Jagdish and Rimbo, was at the home, when at 2.00/3.00 p.m. (noon hours), the accused, who was lying inside the room, as her mother had gone outside the house to cut grass in village Chinass, asked her to bring soap for him. When she reached near by, he caught hold of her arm, dragged her and then started pressing her breasts and she started crying. In the meanwhile, her brother Jagdish came inside and hit the accused with a lathi, and she ran away. It is then the case of the prosecutrix that she stayed outside the compound when after half an hour later, the accused again summoned her to bring radish (mooli). She again went with the radish as required by her father, who caught hold of her, forced her to lie down on the cot, untied cord of her 'salwar' and removed his 'pant' also. It is then stated by her that the accused started kissing her and did lie on her body. He even went to the extent of placing his penis on her vagina and started rubbing it. She

started raising cries, whereupon the accused left her. Some white fluid came out of her vagina. It is then the case of the prosecutrix that the accused brought a jug of water and told her to clear the vagina. She did the same. She was threatened by the accused not to tell this fact to anybody. She then went in search of her mother and told this incident to her. Then they contacted an old man, who was present there who suggested them to go to one Bhushan. Thereafter, Bhushan took them to the Police Station at Tikri and the matter was reported. This witness has proved the report, which was exhibited as EXPWAD.

In cross-examination, this witness has stated that at the time of occurrence her mother was cutting grass at Chinaas. Earlier, her mother was engaged by Bhushan. She further stated that the accused had also misbehaved with her elder sister, who had ultimately got married. The explanation given by her for going nearer to the accused was that she was under fear of being beaten by him. She further stated that her mother was living in the house of Bhushan Kumar, whereas she was living with her maternal grandmother (Nani).

Prosecution also examined Toshi, wife of the accused, who also stated that her daughter was sexually assaulted by the accused. She also talks about the misbehaviour of the accused with his other daughter, who had got married.

PW Kulbhushan had also stated that the mother and the victim had approached him for lodging report and he had taken them to the police for the same purpose.

PW Dr. Uma Sharma, had medico-legally examined the victim and gave the opinion that there was no evidence of rape in this case. Dr. Dinesh Khajuria had conducted ossification test of the prosecutrix for determining her age and found that she was more than 10 years but less than 12 years.

I do not feel the necessity of discussing the other evidence, as the same is not very material for the decision of the instant appeal.

Accused had denied all the allegations and in defence, he examined one Bansi Lal, who stated that present case is slapped upon the accused at the behest of PW Kulbhushan, who had illicit relations with the wife of the accused and, therefore, the accused was a hurdle in their relationship.

After examining the entire case, the accused stands convicted and sentenced as stated hereinabove. Hence this appeal.

Mr. Gupta has not been able to pin point any material flaw in the evidence of the young girl except submitting that she was of tender age and possibility of her being tutored by her mother or Kulbhushan could not be ruled out. Beyond the aforesaid submissions, Mr. Gupta has not been able to touch any other aspect of the case.

I am not convinced with the arguments advanced by Mr. Gupta at all.

It cannot be said that the conviction cannot be maintained on the statement of a child witness, if it inspires confidence. The only rule of caution is that the evidence of such type of witness has to be scanned

with very care and caution, so as to appreciate that it is free from any tutoring from outer source on account of the tender age. Admittedly, the prosecutrix was considered to be capable witness by the Court after certain questions were put to her, as is clear from the record itself. Therefore, she was having sufficient power of understanding. One fact is very clear that it cannot be a case of mistaken identity. After all, she is accusing her father of the sexual assault. In my view, she has unfolded the entire occurrence in a very true manner without any tinge of adulteration. The contention of Mr. Gupta that the victim being a minor could come under undue influence by her mother, is otherwise ruled out for the reason that it has come in the statement of the girl that she was staying with her maternal grandmother (Nani) and her mother was staying with Kulbhushan. This fact, by itself, leads this Court to conclude that the child was not under the influence of her mother or PW Kulbhushan.

The matter does not rest here. The FSL report establishes that there was human spermatozoa/semen/vaginal epithelial cells on the 'salwar' sent for examination. This piece of evidence also goes in favour of the prosecution.

I find no unreality in the statement of the child. She was earlier caught hold of her by the accused from her breasts and then she went out crying. The way she is sexually assaulted in the second episode is the fact, which cannot be just lost sight of, and possibly this cannot be tutored from outer influence. One can understand that had it not been

the case of the daughter of the accused and of some one else, the victim, after the first episode, would not have come nearer to the accused, but herein the accused was not the stranger to the child. He had called his own daughter for the second time asking her to bring radish (mooli) for him. She so did without expecting this beastly act from her father. The incident touches the judicial conscience. Therefore, the accused has no escape from the charge of Section 376 read with Section 511 RPC.

What a sin?

As a sequel to the aforesaid discussion, the conviction of the accused, as already recorded by the trial Court under Sections 376/311 RPC, is hereby upheld and the instant appeal stands dismissed being devoid of any merit in it.

Jammu
July 04, 2007
T.Arora, PS

(Virender Singh)
Judge