

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 21 of 2007.

Judgment reserved on: 12.10.2007.

Date of decision:31.10.2007.

Karan RaiAppellant
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Versus

State of H.P. Respondent

Coram:

The Hon'ble Mr. Justice Deepak Gupta, J.

Whether approved for reporting ? No

For the Appellant: Mr.N.S.Chandel, Advocate

For the respondent: **Mr.J.S.Guleria, Law Officer.**

Deepak Gupta, J.

This Appeal is directed against the judgment of the learned Sessions Judge, Shimla passed in Sessions Trial No.25-S/7 of 2005 whereby he has convicted the appellant of having committed offences punishable under Sections 315, 376(1) and 506 IPC. For the offence under Section 376(1) he has been sentenced to undergo imprisonment of 7 years and to pay fine of Rs.10,000/-. In default of payment of fine he has been directed to undergo further rigorous imprisonment for 2 years. The appellant has been sentenced to undergo rigorous imprisonment of five years for the offence punishable under Section 315 and to pay fine of Rs.10,000/-. In default of payment of fine he has been ordered to undergo rigorous imprisonment for one year. The appellant has also been sentenced to undergo rigorous imprisonment for 2 years and to pay fine of Rs.5000/-

for having committed offence punishable under Section 506 IPC, in default he has been directed to undergo rigorous imprisonment for one month. All the sentences have been directed to run concurrently. It has been further directed that the amount of fine of Rs.25,000/- if deposited shall be paid to the prosecutrix by way of compensation.

The appellant aggrieved against his conviction and sentence has challenged the same by way of this appeal. It has been urged that there is no evidence whatsoever to convict the accused and he deserves to be acquitted.

I have heard Sh.N.S.Chandel, learned counsel for the appellant and Sh.J.S.Guleria, learned Law Officer appearing on behalf of the State.

The prosecution case, in brief, is that the prosecutrix (name withheld) who was studying at the relevant time in class 12 in Chapslee Garden School filed a complaint Ext.PW-10/A with the Superintendent of Police, Shimla on November 2, 2004. In this complaint she alleged that the appellant resides at Annandale. He insisted that the prosecutrix should meet him and she developed acquaintance with him in the year 2002. The appellant started contacting her on telephone frequently and used to meet her on the way to school. In July, 2003 at about 4 p.m. he lured the prosecutrix towards the jungle near Glen in a white maruti van. He then pointed a pistol at the forehead of the prosecutrix and

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threatened her with dire consequences in case she did not yield to his sexual advances. Being scared and all alone and faced with a pistol, the prosecutrix gave in to the demands of the accused. Thereafter, the appellant allegedly threatened to kill the prosecutrix and also threatened to throw acid on her face and time and again made her to do illegal acts. Resultantly, she conceived a child and the accused got the child aborted and buried the foetus somewhere. According to the complaint the foetus was aborted by taking some pills and her parents were not aware of this fact. She did not tell these facts to her parents because the accused continued to threaten her. On the basis of this complaint, daily-diary report Ext.PW-10/B was recorded and formal FIR Ext.PW-11/A was registered.

The case was investigated by PW-15. Medical Examination of the prosecutrix was got conducted and her blood samples were taken for DNA test. The accused was arrested. According to the prosecution, the accused during the course of investigation disclosed where he had sexually assaulted the prosecutrix and also made a statement that he could tell the police the spot where the foetus was buried. The police took the accused to the spot along with PW-4 Dr.Piyush Kapila. The foetus was allegedly recovered at the instance of the accused on 3rd November, 2004. Post mortem on the foetus was conducted by Dr.Piyush Kapila. After investigation, a challan was filed in the Court. The case was committed

by learned JMJC-III to the court of Sessions and charges against the accused were framed initially under Sections 376 and 506 IPC. During the course of trial, on the basis of the evidence charge under Section 315 IPC was also framed against the accused. The accused pleaded not guilty and claimed trial.

At the outset it would be pertinent to note that the date of birth of the prosecutrix as is apparent from her birth certificate is January 29, 1988. The date of birth is not seriously disputed by the counsel for the accused. It is thus apparent that the prosecutrix turned 16 years of age on January 29, 2004.

PW-1 HC Ravinder Kumar stated that the accused made disclosure statement Ext.PW-1/A on 3rd November, 2004 in his presence to the police that he can disclose the place where he, the accused, had buried the fetus. Thereafter, the accused took the police party to the Annandale jungle in the presence of PW-4 Dr.Piyush Kapila. At the instance of the accused fetus was recovered and taken into possession vide memo Ext.PW-1/B.

PW-4 Dr.Piyush Kapila is a post graduate in Forensic Medicine. He states that on 3.11.2004 he received a written request Ext.PW-4/A from the Police Station, West, Shimla to exhume an aborted fetus. He alongwith police officials, a Magistrate and Dr.V.K.Misra who is the Head of the Department of the Forensic Medicine visited the spot which was situated

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about 400 meters from Annandale ground near the cemented road going uphill towards the jungle. He clearly states that the spot was identified by the accused. The autopsy on the foetus was conducted on the next day. On observation it was found that the foetus was of the age of six months intrauterine life. According to the witness the foetus was probably buried about 5 weeks earlier to this examination. Post mortem report is Ext.PW-4/B. He states that material for DNA examination of the foetus was also collected. In cross examination he has stated that the statement of the accused was recorded on the spot. He has further stated that the police were preparing some documents but he does not know what documents they were preparing.

PW-8 HHC Govind Ram stated that on 3.11.2004 he went to the jungle in Annandale and took photographs of a child buried in the ground. The photographs are Exts.PW-8/1 to PW-8/3. He in cross examination has stated that the accused had taken the police party to the spot.

PW-15 Piarey Mohan, the Investigating Officer states that on interrogation the accused disclosed the place where he had buried the foetus aborted by the prosecutrix. He then recorded statement Ext.PW-1/A. An application Ext.PW-9/B was moved with the SDM, Shimla to exhume the buried foetus. On permission being granted he made a request to the Head of the Autopsy Department to depute a doctor to accompany the police party.

Thereafter, the accused alongwith the police and the photographer reached Kennedy chowk where SDM (Urban) and Dr.Piyush Kapila also accompanied the police team. According to this witness the accused first identified the spot where he had first raped the prosecutrix and spot map Ext.PW-15/A was prepared in the presence of the parties. From there the accused took the police party towards Annandale. There he identified the spot where he had buried the foetus.

From the above facts it is more than apparent that the foetus in question was recovered at the instance of the accused. Dr.Piyush Kapila is an independent witness and has no axe to grind. He has clearly stated that the spot was identified by the accused. He has been cross examined but no suggestion has been put to him that the spot was not identified by the accused. Sh.N.S.Chandel, learned counsel for the accused has laid great emphasis on the statement of this witness that the statement of the accused was recorded on the spot. However, if the statement is read as a whole it is apparent that this witness was not clearly aware what were the various documents being prepared on the spot. He has said so in the later part of his statement.

From the above facts it is more than apparent that the accused had identified the spot where the foetus was buried. The foetus was buried in a remote jungle and the accused would have known the spot only if he had buried the foetus. This clearly indicates that the accused had

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intimate illicit relations with the prosecutrix and after she had conceived he helped her to abort the foetus and thereafter buried the foetus. This clearly shows that he had engaged in sexual intercourse with the prosecutrix. It is true that the DNA tests were inconclusive but there is sufficient evidence to show that the foetus was begotten from the loins of the accused.

The next question is whether the sexual intercourse was with the consent of the prosecutrix and whether the prosecutrix was legally in a position to give consent.

The prosecutrix appeared in the witness box as PW-12. According to her the accused first met her in the year 2002 when she was in class-10. At that time she had just completed 14 years of age. In July, 2003 when she was coming back from School the accused came and dragged her into his car. She raised an alarm but none helped her as there was nobody present on the spot. Then he took her to a jungle near glen. He put a pistol on her forehead, gagged her mouth and compelled her to have sexual intercourse with her. She was about 15 ½ years of age at that time. She further states that after about one month the accused again met her outside the school, forced her to sit in the car, took her to the same jungle and again raped her. She then states that accused raped her for a 3rd time but she does not remember the date or month of the incident but she

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became pregnant because of the 3rd act of sexual intercourse. She further states that when she became pregnant she told the accused about this fact. Thereafter, in September, 2004 the accused brought some pills and forcibly gave the same to her to eat in his presence and thereafter she delivered a dead baby in her house. She then informed the accused on telephone and he came near her house and she delivered the dead body to the accused. On that date her mother was at Ghaziabad with her sister and her father was in his shop. Even thereafter the accused kept calling her on telephone and demanded that she should carry on the relationship. When she refused, the accused threatened her and her family. Then she told the above facts to her sister and also to her mother. Then her sister accompanied her to the office of the S.P. Shimla where she gave the application Ext.PW-10/A in writing to the Superintendent of Police, Shimla.

In cross examination she admits that the complaint Ext.PW-10/A is undated. She also admits that in this complaint no dates have been mentioned about the first two incidents of rape which she has stated in the examination in chief. She admits that when she was coming out of the school other children were also coming out but according to her no children had seen her being forcibly taken into the car. She admits that near Chapslee school between 3.30 and 4 p.m. there is rush of people. A suggestion has been put to her which she did

not admit or deny that from her school to Glen jungle, Longwood, Lakkar Bazar Bus Stand, Petrol Pump, Victory Tunnel, Kennedy House and HPSEB office fall on the way. She states that she could not raise any alarm because the accused threatened her. However, she admits that she was not gagged. She also states that the pills were given to her by the accused near her school and he gave water to her from his car. She could not remember the date of 3rd incident of rape. She also did not remember the time when the accused allegedly took the dead body of the unborn child. According to her she aborted the child within half an hour of reaching her house after pills were administered to her by the appellant. She further states that she had told her mother about the abortion in the middle of October when her mother had returned from Delhi.

PW-13 is the sister of the prosecutrix. According to her the prosecutrix is 8 years younger to her. Since the witness was pregnant their mother was residing with her at Ghaziabad in September, 2004. The witness came to Shimla towards the end of October, 2004. She found that the prosecutrix was depressed and upset. When she made inquiries the prosecutrix told her that one boy Karan Rai (appellant) threatens her, harasses her and had forcible sexual intercourse with her 3 times. The prosecutrix also informed her that she (the prosecutrix) had become pregnant and thereafter the boy had given her pills for abortion of the unborn

child. The foetus was taken by the said boy. She then took the sister to the police station and lodged the report. In cross examination she states that she does not remember when her mother came to the house. She states that she and her mother were both present when her sister disclosed the aforesaid facts.

This is the entire evidence relating to the factual aspect. Neither the mother nor the father of the prosecutrix have been examined by the prosecution. The prosecutrix states that she had told her mother about the abortion some time in the middle of October. This was obviously before the sister PW-13 had arrived. Why did the parents not take any steps to lodge a complaint at that stage? This question has not been answered. The complaint was lodged on 3rd November, 2004.

From the evidence on record it is more than amply clear that the prosecutrix and the accused were known to each other since 2002. The evidence of the prosecutrix itself is suggestive on the fact that she had developed a friendship with the accused. The accused is also a young boy who was about 20 years of age at that time. In case any act of sexual intercourse prior to 29th January, 2004 is proved then the said act would amount to rape even if it was done with the consent of the prosecutrix. However, there would be no offence of rape after 29th January, 2004 if the sexual intercourse was committed with the consent of the prosecutrix.

By now the law is well settled that conviction in a case of rape can be recorded even on the sole testimony of the prosecutrix. However, this is subject to one important condition and that condition is that the statement of the prosecutrix should be unimpeachable and should inspire confidence. The learned trial Court has recorded conviction of the accused under Section 376(1) IPC solely on the sole testimony of the prosecutrix. Unfortunately, in the present case, the statement of the prosecutrix in so far as it relates to consent does not inspire any confidence whatsoever.

According to the prosecutrix she was dragged by the accused into his car near the school. It is difficult to believe that just outside the school at a time when the school was getting over and a large number of students were present the prosecutrix could have been dragged into the car without her consent and without the knowledge of any other student. This story is difficult to believe. Further as per the prosecution from the school the prosecutrix was taken to the jungle at Glen. The distance from the school to Glen jungle will not be less than six kilometers. The road passes through fairly thickly populated areas and areas where there is traffic congestion. The accused could not have gagged the prosecutrix and driven the car at the same time. The prosecutrix did not raise any alarm. Her explanation that her mouth was gagged cannot be believed. It is also very difficult to believe that a young girl who is

a student of a good school and has been raped would not inform her parents or friends of such an incident. Therefore, it is difficult to place reliance on the sole testimony of the prosecutrix that she had been raped on two earlier occasions also. There is no evidence to support such a version that the accused dragged her from school in July, 2003 and raped her in the Glen jungle. There is similarly no corroborative evidence to support the version of the prosecutrix that such an incident took place one month later. Neither her parents have been examined nor any school children examined to show that she had been forcibly taken from the school.

However, it is absolutely clear that there was one act of sexual intercourse which resulted in the prosecutrix becoming pregnant. The foetus was recovered on 3rd November, 2004. According to Dr.Kapila the age of the foetus was about 6 months. He has also stated that the foetus may have been buried about 5 weeks earlier. This is corroborated by the version of the prosecutrix herself that the accused had given her some medicines to abort the child in September, 2004. Therefore, the alleged act of coitus which led to her pregnancy took place some time in March, 2004. This was after she had turned 16 years of age.

In view of the various facts narrated above I am clearly of the view that this act of sexual intercourse which took place some time in March, 2004 was a consensual act of sex and the prosecutrix was a

consenting party. I am also of the considered view that the allegation of the prosecution that previously the accused had sex with the prosecutrix in July, 2003 and August, 2003 has not been proved on record. There is no material to support this bald assertion of the prosecutrix.

In view of the above discussion, I am of the view that the statement of the prosecutrix is inconsistent and unreliable. It would not be fair to convict the accused of the offence under Section 376 IPC solely on the statement of the prosecutrix that she had been raped earlier also. There is no corroborative evidence to support the version of the prosecutrix that the accused had intercourse with her in July and August, 2003. The only sexual act proved on record is of March, 2004 which occurred after she had become 16 years and as discussed above this act was with the consent of the prosecutrix. Therefore, the conviction and sentence recorded against the appellant-accused under Section 376 IPC is liable to be set-aside.

As far as the offence under Section 506 IPC is concerned there is no reliable or cogent evidence to prove the same also. Though in her statement and in the complaint the prosecutrix states that the accused had threatened that he would kill her family members and throw acid on her face but her sister PW-13 has not stated these facts. According to her, the prosecutrix

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had only told that the accused was harassing and threatening her. These allegations are also not proved.

However, I am clearly of the opinion that the offence under Section 315 IPC has been proved against the accused. It stands proved that he had sexual intercourse with the prosecutrix. The prosecutrix became pregnant. He helped her in getting the unborn child aborted and thereafter buried her. Therefore, he has rightly been held guilty of having committed offence under Section 315 IPC.

In view of the above discussion, the appeal is partly allowed. The appellant is acquitted of having committed the offence under Sections 376 and 506 IPC. However, his conviction and sentence under Section 315 IPC is upheld.

The appeal is disposed of in the aforesaid terms.

October 31, 2007
PV

(Deepak Gupta),
Judge