

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.246 of 2004

Reserved on: June 26, 2007

Decided on : June 29, 2007

Jagdish Kumar @ Kaka

....Appellant.

VERSUS

State of Himachal Pradesh

....Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldeep Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Vir Bahadur Verma, vice Mr. Sandeep Kaushik, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

The present appeal is directed against the judgment of the Sessions Court whereby the appellant has been convicted of offences under Sections 342 and 376 IPC and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment for a further period of six months, in respect of offence under Section 376 IPC, and to undergo rigorous imprisonment for six months and to pay a fine of Rs.500/-, in default of payment of fine to undergo simple imprisonment for one month, for offence under Section 342 IPC.

2. Prosecution version, as per record, is like this. Houses of the appellant and the parents of the victim of the alleged crime are

Whether the reporters of the local papers may be allowed to see the Judgment?

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situated opposite each other. In between the two houses is a common courtyard. The children of the two households play in that common courtyard. The victim of the crime, who shall hereinafter be referred to as the girl, was aged less than four years at the relevant time. On 19.8.2002, she had been playing in the company of her brother, who is elder to her by a couple of years, in the aforesaid courtyard. The mother of the girl was busy at that time doing some household chores. The grandmother of the girl was busy washing clothes, on one side of the courtyard, where there is a water tap. Around 1 p.m., the mother and the grandmother of the girl heard her cries, upon which the mother of the girl proceeded towards the room on the upper storey of the house of the appellant, because the cries were erupting from that room. In the meanwhile, the appellant came down carrying the girl in his arms. The mother of the girl noticed blood stains on the ankle of the girl. She also found that the string of her (girl's) *Salwar* had been loosened. On examining the private parts of the girl she noticed that blood was oozing from the vagina. The condition of the girl was noticed by her grandmother also. The father of the girl was not at home, as he had gone to a nearby village in connection with his work. He was informed telephonically. He reached around 2.30 or 3 p.m. At that time, the appellant, his mother and his maternal aunt were also there. The father of the girl enquired from the appellant as to what had happened. He replied arrogantly that he had done what he wanted to do and he (the father of the girl) was free to take whatever action he wished. Thereafter, the father of the girl alongwith the girl proceeded towards the Police Station to lodge the report. Sensing that they would be in trouble, initially the mother and the maternal aunt and then the appellant also started pleading with the father of the girl for pardoning the appellant. At that time several persons of the

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village were there. They included PW-6 Urmila Devi, PW-7 Sunehru Devi and PW-8 Chamela Ram. Ultimately, the father of the girl went to the Police Station. He covered the distance partly on foot upto a place called Nabahi and partly by bus from Nabahi to Sarkaghat. Mother of the girl also went with him. Girl was taken along. Report was lodged with the Police.

3. Police got the girl medically examined. Doctor, PW-17 Dr. Chitra Kaushal, noticed laceration of the fourchette and abrasion in the left side of hymen which bled on touch. The doctor prepared slide of vaginal swab. She also took into possession the clothes, which the girl was wearing. The same were sent to the Chemical Examiner, who gave the opinion that the blood was present in the vaginal slide and on the clothes of the girl. Expert opinion was also obtained from another lady doctor, namely PW-11 Dr. Anjali Soni. She examined the girl on 21.8.2002 and reserved the final opinion to be given after seeing the report of the Chemical Examiner. After the report of the Chemical Examiner was made available to her, she gave the opinion that penetration had taken place though it was not possible to say whether it was complete or partial. However, PW-17 Dr. Chitra Kaushal, who examined the girl on the day of the occurrence itself, i.e. 19.8.2002, opined that there was possibility of penetration upto fourchette.

4. Prosecution examined the mother, the grandmother, the father and some residents of the village, besides the doctors to bring the charge home to the appellant. Mother of the girl Veena Devi appeared as PW-1, grandmother of the girl Kirpi Devi appeared as PW-5 and the father of the girl Ramesh Kumar appeared as PW-4. All of them fully supported the prosecution version, as summarized hereinabove.

5. To seek corroboration to the testimony of the father of the girl to the effect that the appellant was initially arrogant when questioned as to what he has done to the girl but later on realizing that report was going to

be lodged with the police, he and his mother and his maternal aunt started begging pardon for the mistake, prosecution examined PW-6 Urmila Devi, PW-7 Sunehro Devi and PW-8 Chamela Ram, all of whom testified with one voice that they were present in the courtyard of PW-4 Ramesh Kumar on the relevant date where the appellant, his mother and maternal aunt pleaded with Ramesh Kumar, the father of the girl, not to go to the Police Station to lodge report against the appellant.

6. Learned counsel for the appellant submitted that this was a case of false implication, on account of the grouse which the parents of the girl are having against his mother because of her having inherited the property from her mother in the village of the parents of the girl. There is no evidence on record in support of this plea of the appellant. No doubt, suggestions were thrown to the witnesses, including PW-6 Urmila Devi, PW-7 Sunehro Devi, PW-8 Chamela Ram, PW-1 Veena Devi, the mother of the girl, PW-4 Ramesh Kumar, the father of the girl and PW-5 Kirpi Devi, the grandmother of the girl, that the parents of the girl were unhappy over the inheritance of the house and the landed property by the mother of the appellant from her own mother but they all denied these suggestions. Suggestions were also thrown to the witnesses that had the mother of the appellant not inherited the property from her mother, the same would have been inherited by the father of the girl. These suggestions were also denied.

7. As a matter of fact, the defence version is falsified by the trend of cross-examination of the prosecution witnesses. Suggestions were made to the witnesses of the prosecution that when the appellant brought the girl holding her in his arms, she was not bleeding. This suggestion falsifies the plea of there being any unpleasantness between the family members of the appellant and the parents of the girl.

8. It was also submitted on behalf of the appellant that PW-2 Jagdish Chand, who was present on the spot at the relevant time, did not support the prosecution version. It is true that Jagdish Chand resiled from his statement to the police and, therefore, the prosecution cross-examined him with the leave of the Court and contradicted him with his previous statement under Section 161 Cr.P.C. but the way he was cross-examined by the defence proves that in the presence of this witness the appellant was being accused of committing the heinous crime. It was in the cross-examination by the defence that the witness stated that he had minutely observed the girl but noticed no stains of blood on her *Salwar*. He also stated in the cross-examination by the defence counsel that he examined the cot too but did not notice any blood stains. Now, if the witness had not seen anything or there was no accusation against the appellant when he went to the spot, why should have he examined the *Salwar* of the girl or the cot on which she was raped.

9. It was also submitted by the learned counsel that the medico legal evidence was uncertain, inasmuch as PW-7 Dr. Chitra Kaushal had though stated that penetration had taken place either partially or in full but PW-11 Dr. Anjali Soni, the Expert, stated that it could not be said whether penetration had taken place or not. PW-11 Dr. Anjali Soni, in the examination-in-chief, categorically stated that it was a case of penetration, though it could not be said whether it was complete or partial. In the cross-examination, no doubt, she stated that it could not be said whether the penetration had taken place or not, but the fact remains that this doctor examined the girl on the third day of the occurrence for expert opinion whereas PW-17 Dr. Chitra Kaushal examined the girl on the very day of the occurrence. PW-11 Dr. Anjali Soni clarified that she would have been in a position to give definite opinion had the girl been examined by her on the day of the occurrence itself. That means the doctor, who conducted the

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medico legal examination, namely PW-17 Dr. Chitra Kaushal, was in a better position to say whether penetration had taken place or not. Therefore, the contention that the medico legal evidence does not corroborate the prosecution version is rejected.

10. As a result of the abovestated position, appeal is dismissed.

(Surjit Singh), J.

June 29, 2007_(sd)

(Kuldip Singh), J