

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

Cr. Appeal No. 106 of 1993

Decided on: May 30, 2008

State of H.P.	VersusAppellant.
Karan Bahadur.	Respondent.

Coram

Hon'ble Mr. Justice V. K. Ahuja, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting¹? yes

For the appellant : Mr.J. S. Guleria, Law Officer.

For the respondent : Mr. B. K. Malhotra, Advocate.

SURINDER SINGH, J.

Respondent was tried and acquitted, for the offences punishable, under sections 363, 366 and 376 of the Indian Penal Code, by the learned Sessions Judge, Sirmour District at Nahan in Sessions Trial No. 7-N/7 of 1992 dated 11.12.1992. His acquittal has been assailed in this appeal by the State.

In short, the prosecution case is that on 21.11.1991, prosecutrix aged about 16 years was present in her house along with her minor sisters Pratima, Rekha and minor brother Sunil Kumar. Their father was lodged in judicial lock up, on the charge of rape, and her mother had deserted her father and left his house after his arrest. The prosecutrix and her sisters and brother were under the care and custody of their maternal grand mother (Nani) Sumitra

¹Whether reporters of the Local papers are allowed to see the judgment? Yes.

Devi in village Johana. Smt. Sumitra Devi had gone to Nahan, leaving behind the minor children in the company of the prosecutrix. In the evening, the respondent visited the house of the prosecutrix to see the television. After some time, the prosecutrix served meals to her younger sisters and brother. Respondent also expressed his desire to take food as he was feeling hungry. She also served food to him. It had gone dark. Respondent told the prosecutrix that he would stay in their house for a night as he was scared on going out. The prosecutrix prepared bed for him and he laid thereon. Around 9 p.m. when the younger sisters and brother of the prosecutrix fell asleep, the respondent made advances towards the prosecutrix and allured her that he would marry her and provide colourful clothes and costly ornaments. Respondent also told her that he was employed in a Factory at Dhaula Kuan and had handsome money to make her living comfortable. The prosecutrix expressed her unwillingness, the respondent gagged her mouth and raped her. Thereafter, she was taken forcibly towards village Bagthan and from there he took her to the house of one Chhote Lal, in village Dagala-Ghat and kept her confined there for two days. She was also raped there. Thereafter, respondent took her to many other places and finally lodged her in the house of one Tek Bahadur in village Jamta, where he disclosed his name as Karan Bahadur for the first time. Some of the villagers of village Jamta brought the prosecutrix and respondent to Police Station, Nahan, from where they were taken to Sarahan by the police, where her grand maternal mother had already lodged a report of her missing. The police registered the FIR on the statement of the prosecutrix at 7.30 P.M. Police got her medically examined at

9 P.M. The respondent was also medically examined on 6.12.1991 he was found fit to perform the sexual intercourse.

No injuries were found on the person of the prosecutrix. She was found to be used to coitus and in the opinion of the Doctor last intercourse was within past 72 hours. There was old rupture of hymen. Her clothes were sealed and sent to the Chemical Examiner. Salwar of the prosecutrix had stains of semen. Police took into possession the birth entries of the prosecutrix.

After completing the investigation, case was presented in the court for trial.

Respondent was charge-sheeted for the offences aforesaid but he pleaded not guilty and claimed trial.

To prove its case, the prosecution examined its witnesses. Respondent was also examined under section 313 of the Code of Criminal Procedure.

The circumstances put to the respondent were denied by him but the trend of cross-examination of witnesses show that the respondent had tried to put forth the case of consent.

The respondent was called upon to enter into his defence but he did not lead any evidence.

On the conclusion of the trial, the respondent was acquitted on the grounds:

- a) The deposition of the prosecutrix had falsified her FIR Ex.PE and there were material contradictions in her statement which renders her testimony doubtful.
- b) The evidence led about the age was also doubtful. Medical evidence shows her to be of 19 years of age.

- c) PW13 Doctor Savita Sharma (PW13), who had conducted the medico-legal examination of the prosecutrix, deposed the history of the case, as narrated to her by the prosecutrix that she had gone with the respondent of her own and had been enjoying sex with the respondent voluntarily and she wanted to marry him.
- d) PW5 her sister Pratima has denied having raped the prosecutrix in the house. She did not corroborate the testimony of the prosecutrix.
- e) PW3 Laja Devi (PW3) stated that on the previous night prosecutrix had run away with a gorkha which means that she had joined the company of the respondent of her own will.

Shri Guleria, learned Law Officer has forcefully argued that the prosecutrix was proved to be minor and her testimony inspires confidence therefore, her consent is immaterial.

We have gone through the evidence on record and have reappraised the deposition of the prosecution witnesses.

In the instant case, the age of the prosecutrix is of a prime importance. To prove the age of the prosecutrix, the prosecution has relied upon admission form Ex.PH and school certificate Ex.PG showing her date of birth as 2.2.1975. If date of birth, as per school record is taken to be true on the date of alleged incident, her age comes to three months short of 17 years. Although the admission form is a relevant evidence under section 35 of the Evidence Act but what value should be attached to it is a matter of evidence. The said form is alleged to have been signed by one Vidya Devi. There is no document on record to show what was the basis of recording the date of birth as 2.2.1975 in the school. The entry of birth and death register has not been produced. The

prosecution relied upon the copy of Parivar register (Ex.PR) produced by PW16 Dev Dutt Secretary of the Panchayat wherein the date of birth is recorded on estimation. Even according to PW16, there was a cutting in the date of birth of the prosecutrix in the original register, therefore, the very basis of the entry of date of birth in the admission form has become doubtful.

The prosecution has also relied upon the skeletal age of the prosecutrix. According to the Ossification Test, as deposed by Dr.H.K.Pant (PW1) the age of the prosecutrix was between 15 to 17 years. In the cross-examination he has admitted that average-mean age may go up to 19 years.

Therefore, in the above circumstances, in our considered opinion, the prosecutrix could not be proved to be minor as alleged rather she was more than 18 years at the relevant time and had attained the age of discretion. If that being so, the statement of the Doctor Savita Sharma assumes importance to whom the prosecutrix gave the history that about 15 days back she went with the respondent with her consent with a view to marry him. She stayed with him and had sexual intercourse many times. She was in perfect senses during the aforesaid acts. She wanted to marry him.

Further the FIR was also recorded on the same day at 7.30 P.M. which was received by the Chief Judicial Magistrate, Camp at Sarahan (H.P.) on 9.12.1991 at 12.15 P.M. It is not understood as to how it took three days to reach him, which means that the FIR was ante dated and ante timed which gives an impression that the prosecutrix was made to change her version as given to the Doctor.

Now coming to the statement of the prosecutrix, on its examination we find that it does not inspire confidence for various reasons. She is the maker of the FIR. She has materially contradicted it. She has stated in the court that after taking meals, the respondent had left her house but returned after some time and sought permission to spend night there, because it had gone dark, whereas in the FIR it is mentioned that after taking meals he sought permission of the prosecutrix to sleep there due to darkness and he was afraid of going out. PW5 her sister Kumari Pratima, do not corroborate this version of the prosecutrix, made in the court. Further, the prosecutrix has alleged in the FIR that she was forcibly taken from her house by the respondent to the house of one Chotte Lal where the respondent again committed rape with her but she did not state anywhere that she raised hue and cry for seeking help. She also introduced a new story, different from the FIR that she was threatened by the respondent with a knife to remain with her throughout but this material fact was not mentioned in the FIR. She had been travelling, all through and along with the respondent at various places, i.e. villages Katal Kango Johri, Jamta, Bagthan and Nahan Town but she did not disclose either to the villagers or to the police at Nahan about the above story of rape alleged to have been committed by the respondent against her wishes.

Smt.Lajja Devi (PW3) a neighbour of the prosecutrix stated that younger brother and sisters of the prosecutrix had informed that the prosecutrix had run away on the previous night this goes to show that the prosecutrix had voluntarily left the place of her Nani Smt. Sumitra Devi and joined the company of the respondent.

She was a consenting party to the sexual act with the respondent.
She had attained the age of discretion.

In the aforesaid circumstances, we do not find that the findings recorded by the learned trial court for acquittal of the respondent are perverse. Accordingly we dismiss the appeal.

The respondent is discharged of the bail bonds, entered upon by him, during the proceedings of this case.

(V.K.Ahuja),J.

May 30, 2008
(D)

(Surinder Singh),J.