

**HIGH COURT OF UTTARAKHAND AT NAINITAL**

**CRIMINAL APPEAL NO.956 OF 2001  
(OLD NO.1286/1994)**

Puran Giri

..... Appellant

Versus

The State

..... Respondent

**Dated: October 30, 2009**

**Mr. M.C. Kandpal, Sr. Advocate assisted by Mr. S.S. Chaudhary, Advocate for the appellant  
Mr. M.A. Khan, Brief Holder for the State**

**Hon'ble Dharam Veer, J.**

This appeal, preferred by the appellant u/s 374(2) of The Code of Criminal Procedure, 1973 (*hereinafter to be referred as Cr.P.C.*) is directed against the judgment and order dated 2.8.1994 passed by Sessions Judge, Almora in S.T. No.2/1994, State Vs. Puran Giri, whereby the learned Sessions Judge has convicted the accused/appellant u/s 363 of The Indian Penal Code, 1860 (*hereinafter to be referred as the IPC*) and sentenced him to undergo R.I. for a period of two years.

2. Heard learned counsel for the parties and perused the entire material available on record.

3. In brief, the prosecution story is that on 30.11.1993 Bhakhtawar Puri lodged a report before Patwari Pinglon stating therein that on 20.11.1993 at about 05:30 PM her daughter Dhuli Devi, aged about 16 years, had gone to bring water from Gadhera then the accused/appellant Puran Giri, by threatening her, took her away with him. On 30.11.1993, her daughter ran away from the custody of the accused/appellant and came to her house. With these averments, Bakhtwar Puri got the report

scribed from Narayan Puri, Gram Pradhan, Majkote (PW1) and lodged the same before Patwari Pinglon on 30.11.1993 at 04:00 PM. That FIR is Ext.Ka-1. On the basis of this FIR, Chik FIR of the case was prepared i.e. Ext.Ka-5. *(In Rural Hilly Areas of State of Uttarakhand, the Patwaris and certain Revenue Officials are being vested with police powers vide U.P. Govt. Notification No.494/VIII-418-16 dated 7.3.1916)*. Victim Dhuli Devi got medically examined by Dr. Shikha Janpangi (PW6) on 2.12.1993 at 01:35 PM, who prepared her medical report, which is Ext.Ka-7. X-ray of the victim was also conducted, X-ray report is Ext.Ka-2. During the course of investigation, the I.O. recorded the statements of the witnesses and also prepared the site-plans of the place from where the accused took her and the place through which she returned to her house, which are Ext.Ka-3 and Ka-4 respectively. On completion of the investigation, the I.O. submitted the charge sheet against the accused/appellant, which is Ext.Ka-6.

4. On receipt of the charge sheet, learned Munsif Magistrate, Almora committed the case to the Court of Sessions on 6.1.1994, after giving necessary copies to the accused/appellant as provided u/s 207 Cr.P.C.

5. On 27.1.1994, learned Sessions Judge, Almora framed the charge of offence punishable under Sections 363, 366 and 376 of IPC against the accused/appellant. The charge was read over and explained to the accused/appellant to which he pleaded not guilty and claimed to be tried.

6. In order to prove its case, the prosecution examined PW1 Narayan Puri, who scribed the report Ext.Ka-1; PW2 Bakhtawar Puri, father of the victim; PW3 Dhaula Devi, victim; PW4 Dr. A. P. Pandey, Radiologist;

PW5 Balwant Singh Rawat, Patwari, I.O. of the case and PW6 Dr. Sikha Jangpangi, Medical Officer, who medically examined the victim.

7. Thereafter the statements of the accused/appellant were recorded u/s 313 Cr.P.C. The oral and documentary evidence were put to him in question form, who has denied the allegations made against him. However, he did not produce any oral or documentary evidence in his defence.

8. Before any further discussion, it would be pertinent to mention the medical report Ext.Ka-7 of the victim which was prepared by Dr. Sikha Janpangi (PW6) at the time of medical examination. Medical Report Ext.Ka-7 reads as under:-

*“O/E – No marks of injury/violence on body parts or private parts.*

- Axillary and pubic hair present.*
- Breasts developed.*

*P/V – Vagina admits two fingers*

- wt Av, Ns*

*Vaginal smear taken and sent for H.P.*

*For age – opinion of radiologist.”*

9. To prove the aforesaid medical report, the prosecution examined PW6 Dr. Shikha Janpangi, who has stated that on 2.12.1993 at 01:35 PM she medically examined the victim Km. Dhaula Devi and on the basis of her medical examination, she prepared the medical report Ext.Ka-7.

10. X-ray of the victim was also conducted, X-ray report is Ext.Ka-2, which reads as under:-

*“(1) Right wrist AP, lateral – Epiphysis of radius and ulna have not yet fused to their respective stage.*

*(2) Right elbow AP, lateral – All the epiphysis around elbow have fused to their respective stage.*

*Opinion:- According to X-ray findings, her age is approximately above 16 yrs but below 18 yrs.”*

11. To prove the X-ray report, the prosecution examined PW4 Dr. A.P. Pandey, Radiologist who has proved the X-ray report Ext.Ka-2 and the X-ray plate Ext.1.

12. To prove its case further, the prosecution examined PW1 Narayan Puri, who has stated that on the date of incident he was the Village Pradhan of Majkote. On 30.11.1993, he wrote the report (Ext.Ka-1) of the said incident on the dictation of Bakhtawar Puri.

13. PW2 Bakhtawar Puri is the father of the victim and complainant of the case. He has reiterated the same story as set out in the first information report. He has proved the report Ext.Ka-1.

14. PW3 Km. Dhaula Devi has stated that at about 5 PM she had gone to Gadhera which was at a distance of 1/2 miles away from her house. She saw the accused/appellant there, who after threatening her, took her in the forest. Thereafter he took her to Bamdi Udiyar. She further stated that the accused/appellant committed sexual intercourse with her. She further stated that the accused/appellant used to bring food from his house and both of them used to take food together. Thereafter when she got chance she ran away from there and came to her house. She told the entire incident to her parents. Thereafter she got medically examined at Almora Hospital. In the cross-examination, she stated that she remained in

the forest for ten days. In night, accused/appellant used to bring food from his house and he used to come in one or two hours after taking food. She further stated that people used to come in the forest to graze their animals and she also used to see them.

15. PW5 Balwant Singh Rawat, Patwari has stated that he is Patwari of area Galich since 25.8.1991. Since 22.11.1993 he was also Patwari of area Pinglon for 15-20 days. On 30.11.1993, Bakhtawar Puri (PW2) lodged a report, on the basis of which, he prepared the Chik FIR of the case, which is Ext.Ka-5. On 9.12.1993, he gave charge to Ramesh Giri, Patwari Pinglon. During the course of investigation, he recorded the statements of the witnesses and on the pointing out of the victim, prepared the site-plans which are Ext.Ka-3 and Ka-4. He further stated that the charge sheet of the case was submitted by Ramesh Giri, Patwari Pinglon, which is Ext.Ka-6.

16. Thereafter the statements of the accused/appellant were recorded u/s 313 Cr.P.C. The oral and documentary evidence were put to him in question form, who has denied the allegations made against him. However, he did not produce any oral or documentary evidence in his defence.

17. Mr. M.C. Kandpal, Sr. Advocate has submitted that the appellant/accused Puran Giri and the victim Dhaula have got married with each other in 1994 and since then they are living peacefully with each other as husband and wife. He further submitted that the victim Dhaula Devi was the consenting party and even she was more than 18 years of age on the date of incident. As such, the prosecution has failed to prove the case against the accused/appellant beyond reasonable doubt. I find

substance in the submission of learned senior counsel due to following reasons:-

- (i) That the court below has acquitted the accused/appellant u/Ss 366 and 376 IPC on the ground that the victim was the consenting party. However, the court below convicted the appellant/accused u/s 363 IPC after assuming the age of the victim below 18 years. This finding of the court below is not sustainable on the basis of evidence produced by the appellant/accused before this Court. Appellant/accused has filed certified copy of Pariwar Register before this Court wherein date of birth of Dhaula Devi is shown as 9.5.1974. Thus, as per this evidence, age of victim Dhaula Devi comes to 19 years 6 months and 11 days on the date of incident which means she was major at the time of incident. Further, as per the medical evidence, her age was more than 16 years but less than 18 on the date of incident. It is a settled law that two years' margin either on the upper side or lower side may be taken. Thus, if two years' is given on the higher side then she was more than 18 years on the date of incident, i.e. on 20.11.1993 she was major.
- (ii) That the appellant/accused and the victim have got married with each other in 1994 and since then they are living with each other as husband and wife. In support of this fact, appellant/accused has filed an affidavit before this Court.

18. After considering the entire evidence on record and hearing learned counsel for the parties, I am of the considered view that the victim Dhaula Devi was major on the date of incident and she had gone with the appellant with her own consent. Apart from this, it is also required to appreciate here that the appellant and Dhaula Devi are married to each other and they are living as husband and wife since 1994.

19. In view of the above circumstances, the appeal deserves to be allowed. Accordingly, the appeal is allowed. The judgment and order dated 2.8.1994 passed by Sessions Judge, Almora in S.T. No.2/1994, State Vs. Puran Giri, is set aside. Consequently, the conviction and sentence imposed upon the accused/appellant, which has been discussed above, is also set aside.

20. Let the lower court be sent back.

**(Dharam Veer, J.)**  
**30.10.2009**

*RG*