

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 222 of 1999

Date of decision: 31.5.2010

State of H.P.	Appellant.
Versus	
Kamal Kumar and others	Respondents.
<i>Coram</i> <i>The Hon'ble Mr.Justice Deepak Gupta, J.</i> <i>The Hon'ble Mr. Justice Sanjay Karol, J.</i> <i>Whether approved for reporting?¹ No.</i>	
For the appellant:	Mr. Rajesh Mandhotra, Deputy Advocate General.
For the respondents:	Mr. Dinesh Kumar, Advocate.

Per Deepak Gupta, J, (oral)

1. This appeal by the State is directed against the judgement dated 11.03.1999 delivered by the learned Sessions Judge, Solan in Sessions Trial No. 12-S/7 of 1997 whereby he acquitted the accused of having committed offences punishable under Sections 363 and 376 read with Section 34 of the Indian Penal Code.
2. The prosecutrix (name withheld) got her statement recorded under Section 154 Cr.P.C. with the police on 7.12.1995 at the residence of PW-9 Shanti Devi to the effect that she is a resident of village Kurgal. Her father was employed in the DC office at

¹ ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes.***

Solan. On 7th December, 1995 she had taken her brother PW-10 Dharam Dass, aged about 15 years, to the hospital at Solan for treatment. Her brother had been admitted in hospital earlier but had been discharged and she had taken him for follow up medical check-up. After her brother was checked up in the hospital they went to the Children Park near the DC Office at Solan. There one boy, who knew her brother Dharam Dass, met them. His name was Joginder Singh @ Munshi. He told them that he was going to Chail and he offered to give them lift to Chail. Then both of them boarded the van No. HP-02-4085 which was being driven by accused Joginder Singh. At about 10.30 a.m the van moved towards Kandaghat. A little before Kandaghat two boys out of whom one was Kamal Kumar and the other she could not name, got into the van and sat on the front seat alongwith the driver and her brother. At Kandaghat instead of turning the van towards Chail Joginder drove the van towards Shimla. They crossed Shoghi and then the van was turned back and taken towards Chail. When the van was near Tundal Nallah Joginder stopped the van on the side of the road. Then Joginder asked her brother Dharam Dass and the other boy who was sitting on the front seat to walk a little ahead with him. The three then

went away. Kamal Kumar who was sitting in the van caught hold of her and made her lie down on the back seat of the van. He opened the Narah of her Salwar. He took off his pants and had forcible sexual intercourse with the prosecutrix. She could not resist since accused Kamal Kumar was much stronger than her. After raping the prosecutrix, Kamal Kumar started driving the van towards Kandaghat. The prosecutrix managed to escape from the van and ran into the jungle and reached the house of Pradhan Baldev Singh in village Kahlog. There she informed PW-9 Smt. Shanti Devi wife of Baldev Singh about the entire incident. Thereafter, Shanti Devi made a telephone call from Sadhu Pull to the Police Station at Kandaghat. On the basis of this statement Ext.PW-5/A, F.I.R. Ext.PW-5/B was recorded. The police got the prosecutrix medically examined. Further investigation in the matter was got done and after completion of the investigation challan was filed against the accused. The accused were acquitted and hence, the present appeal by the State.

3. The main ground for acquittal of the accused is that there are material contradictions in the statements of the prosecutrix and her brother and also that the version given by the prosecutrix in Court is totally different from that recorded in her statement under

Section 154 Cr.P.C., which has been adverted to herein-above.

4. The first circumstance which goes against the prosecution is that no record has been produced to show that PW-10 Dharam Dass, brother of the prosecutrix, was actually taken to the hospital at Solan. The prosecutrix stated that she had handed over this record to the police. There is no explanation why this record was not produced. It has also come in evidence that the father of the prosecutrix worked in the office of the Deputy Commissioner, Solan. If he was residing in the village he should have easily brought his son with him for treatment. If he was residing at Solan, the son would have gone to the father and got himself treated. What was the need of the sister to go specially from the village to get the brother treated?

5. The main contradiction in the statement of the witnesses is that as per Ext.PW-5/A it was Joginder @ Munshi alone who met the prosecutrix and her brother at the Children Park near D.C. Office, Solan. However, while appearing in Court the prosecutrix gave a totally different version. According to her the van in question was being driven by Kamal Kumar and the other two accused were sitting in the van. She further goes on to state that only she and her brother boarded the van

which was being driven by accused Kamal Kumar and the other two accused followed them on a scooter. In her statement in Court she stated that till date she did not know the names of the other two accused persons whereas in her statement recorded under Section 154 Cr.P.C. she has not only named accused Joginder but also given his parentage, address and his alias 'Munshi'. Therefore, she is obviously not telling the truth. The brother while appearing as PW-10 stated that it was only Joginder Singh who was in the van when he met them at the Children Park Solan and the other two accused got on to the van two curves short of Kandaghat. First of all, there is a difference as to whether it was Joginder alias Munshi or Kamal Kumar who was present in the van. The brother does not make any mention of any scooter.

6. Another major contradiction is that whereas according to the prosecutrix it was Kamal Kumar who went to the shop at Shoghi according to the brother it was Joginder who went to the shop. According to the prosecutrix all this time Kamal Kumar was driving the van whereas according to the brother it was Joginder who was driving the van. These major contradictions in the statements of the prosecutrix and her brother coupled with the fact that no record of the treatment of

the brother has been produced give credence to the defence of the accused that in fact PW-10 Dharam Dass was not present. In case he had been present these major contradictions could not have come in their testimony.

7. Another major reason to disbelieve the prosecution case is that according to PW-10 Dharam Dass when he had gone a little ahead of the van and looked back he saw accused Kamal Kumar lying on top of his sister. He did not raise any hue and cry. He did not protest but walked with the other accused and then went to his house. His version is that at his house he informed his aunt, Durgi Devi, and then went to the house of his uncle and informed him. Despite this for three days they took no steps to either trace out the prosecutrix or to report the matter to the police and only on 10.12.1995 they went to the Police Station at Kandaghat where the accused and the prosecutrix were already present. This totally belies the prosecution version. Admittedly, telephone facility was available near their village and the father of the prosecutrix works in the D.C. Office, it cannot be believed that the brother, who was aged about 15-16 years, the aunt and the uncle would keep silent for three days.

8. In view of the above discussion, it is apparent that no reliance can be placed on the testimony of the prosecutrix, which is full of contradictions. The learned trial Court was justified in acquitting the accused. We find no reason to differ with the findings given by the learned trial Court. The appeal is accordingly dismissed. The bail bonds furnished by the accused are discharged.

(Deepak Gupta)
Judge

31st May, 2010.
TM

(Sanjay Karol)
Judge.