

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. : 426 of 1998

Judgment reserved on: 22.7.2010

Date of Decision : September 30 , 2010

State of Himachal Pradesh

Appellant

Versus

Ram Chand

Respondent

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge

The Hon'ble Mr. Justice Sanjay Karol, Judge.

*Whether approved for reporting?*¹ No.

For the appellant : Mr. Rajesh Mandhotra, Deputy Advocate General for the appellant/State.

For the respondent : Mr. Vinay Thakur, Advocate with Mr. R. S. Kanwar, Advocate, for the respondent.

Sanjay Karol, J.

For an offence, which is alleged to have been committed on 10.8.1995, accused was put to trial. In terms of judgment dated 29.8.1998 passed by the learned Sessions Judge, Kullu and Lahaul Spiti Districts at Kullu, H.P. in Sessions Trial No. 13 of 1997, titled as State versus Ram Chand, the accused stands acquitted of the charged offence.

Whether reports of Local Papers may be allowed to see the judgment?

2. It is the case of prosecution that Sh. Bhag Chand (PW-9) alongwith his wife Smt. Nirmala Devi (PW-10) and her daughter i.e. the prosecutrix (PW-11) used to reside in their native village. Brothers of Sh. Bhag Chand including Sh. Balak Ram (PW-2) and their family members lived together. On 10.8.1995 at about 10.00 a.m. accused Ram Chand alongwith his brother-in-law Sh. Sangat Ram (PW-5) came to the house of Sh. Bhag Chand where they had meals. Accused Ram Chand desired to sleep for some time therefore PW-9 and PW-5 left for Patlikuhal at about 10.30 a.m. Thereafter PW-10 and PW-11 went to graze the cattle. Accused Ram Chand continued to sleep in their house. At about 2.00 p.m. PW-11 felt hungry therefore PW-10 asked her to go home to take meals. When prosecutrix came home accused Ram Chand took off his pants and after opening her salwaar lied on her. Prosecutrix bled and her clothes got soiled. Accused asked her not to narrate the incident to anybody and thereafter ran away from the spot. When PW-10 returned in the evening she found the prosecutrix lying unconscious. She thought her to be sleeping and therefore did not disturb her. It was only the next day that the prosecutrix narrated the entire incident to her mother. PW-9 was away from home as he was busy in connection with apple business. His brother (PW-2) was also away and at that time no other male member was present in the house. It was only when they returned on 17.8.1995 the incident was narrated to them and on the next day i.e. on 18.8.1995 the matter was reported to the police and F.I.R.

No. 168/95 (Ext. PG) dated 18.8.1995, registered with Police Station Manali, H.P. under Section 376 I.P.C.

3. Inspector Jagat Ram (PW-14) carried out the investigation. Prosecutrix was taken for medical examination at the District Hospital, Kullu where she was examined by Dr. Sushila (PW-8) who issued M.L.C. (Ext. PH). The accused was got medically examined by Dr. Shrivastava (PW-1). The investigating agencies took into possession the handkerchief, clothes of the prosecutrix, underwear of the accused and the 'dari' (chaddar) used at the time of the alleged crime. The swab and smear samples taken from the private parts of the prosecutrix were sent for chemical analysis alongwith the clothes and report of the chemical examiner was obtained by the police. In order to prove the age of the prosecutrix radiological test was conducted by Dr. G. D. Gaur (PW-13) and report (Ext. PK) taken by the police. With the completion of investigation challan was presented in the Court.

4. The accused was charged for having committed an offence punishable under Section 376 of the Indian Penal Code to which he did not plead guilty and claimed trial.

5. In order to prove its case prosecution examined 14 witnesses. Statement of the accused under Section 313 Cr. P.C. was also recorded.

6. It cannot be disputed that the age of the prosecutrix is less than 16 years. In fact as per the medical record duly proved by PW-13, her age is between 5 to 6 years.

7. The question however is as to whether the prosecution has been able to prove that the prosecutrix was actually raped and if yes then was the accused involved in the alleged crime.

8. Now as per the version of the prosecutrix when she returned home to take meals accused put off his pants and opened her salwaar and lied on her. Blood came on her clothes and accused asked her not to disclose it to anyone. Thereafter he ran away to his house. When her mother returned she was unconscious and consequently she narrated the incident to her the following morning. Now this witness does not talk about the accused covering her mouth with any handkerchief. She also does not talk about the 'dari' which was soiled with blood. But she is a small child and consequently such omissions can be ignored. However from her statement alone, it could still not be proved that the accused had actually raped her.

9. To prove this fact prosecution has relied upon the statement of the Doctor (PW-8). Now according to this witness no external marks of injury were found on the genitalia, labia majora and labia minora of the prosecutrix. Even the hymen was intact. The introitus could hardly absorb a swab. Even though she opined that the prosecutrix was exposed to coitus but however she clarified that this opinion was based on the report of the chemical

examiner and not on the basis of local examination as there was no basis for her to opine as such. However with reference to the said report she clarified that in the chemical examiner's report words 'exposed to coitus' are not mentioned. She further admits that report of the chemical examiner was not seen by her and it was only in the Court that she saw the same for the first time. Obviously her opinion that the prosecutrix was exposed to coitus is not correct. It is definitely not based on medical evidence. Thus her version does not prove that the prosecutrix was subjected to rape. She further admits that the parcel containing the swab and the smear samples of the prosecutrix, which she had handed over to the police, were sealed with nine seals. She further admits that on 27.10.1995 police had asked for a clarification on her M.L.C. and she opined that if a girl of 5 to 6 years of age was subjected to intercourse with male organ by a healthy built man of 33 years the same is unlikely to be without any injury to the genitalia. Thus from her statement it could not prove that even minor penetration had taken place. Even according to PW-1 no external injury was found on the body of the accused.

10. Inspector Jagat Ram (PW-14) admits that the sealed sample handed over by Dr. Sushila (PW-8) was deposited with HC Sita Ram (PW-7) who in turn admits that the same were handed over to constable Mast Ram for being taken to F.S.L. Junga on 3.9.1995. Now Mast Ram has not been examined in Court. Whether the samples, on way to F.S.L. Laboratory were

kept intact and in safe custody is not evident from record. This fact gains significance for the reason that according to PW-14, as per the report of the chemical examiner (Ext. PJ) the parcel sent to the laboratory contained eight seals. Whereas according to the Doctor she had affixed nine seals on the sample. This contradiction is material and renders the prosecution case to be extremely doubtful. There is no eye-witness to the occurrence of the alleged incident and the prosecution has tried to link the accused on the basis of the chemical examiner's report.

11. In the instant case the offence is alleged to have taken place on 10.8.1995 and the F.I.R. was lodged only on 18.8.1995. The delay is unexplainable. There is nothing to show why and where PW-9 and PW-2 had gone for more than a week. There unexplainable absence further renders the prosecution version to be doubtful.

12. It is the defence of the accused that he alongwith Sh. Sangat Ram (PW-5) had returned back after having tea at the house of PW-9. No doubt PW-5 is the brother-in-law of the accused but however according to him even PW-9 is the brother-in-law of the accused. Thus parties are all close relatives. According to this witness, after taking tea accused went to Raison and he proceeded for Manali. No doubt this witness was declared hostile and extensively cross examined by the Public Prosecutor but however nothing incriminating has come out in his statement. On the

contrary in cross examination by the defence he categorically states that PW-9 had asked for money from the accused for doing apple business and when the accused refused to give Rs. 20,000/- Bhag Chand proclaimed that the relationship with the accused is broken. Smt. Nirmala Devi had also told Ram Chand that he had defamed her. Now he is a prosecution witness and this part of his testimony goes unrebutted. The witness has not been cross examined on these points. Thus the probability of a false implication cannot be ruled out totally.

13. That apart, from the testimony of PW-2, PW-9, PW-10, PW-11 and Smt. Durga Devi (PW-12) it is evident that at the time when the alleged offence took place not only father of Sh. Bhag Chand but also his another brother and the other ladies of the family were present in the house. We further find that PW-10 has contradicted her own statement made before the police. In her earlier statement she states that when she came back after grazing cattle, prosecutrix was crying. She only thought that the children had fought and therefore did not pay any attention towards her. It was only the following day that the prosecutrix disclosed the incident to her. In juxta position to this, in Court she had deposed that when she returned home prosecutrix was lying unconscious. Even though she shook her 3 to 4 times but she did not respond. She thought that the prosecutrix must be tired therefore she left it at that. Now if she found the prosecutrix to be unconscious why did she not immediately

brought this fact to the other members of her family. Even in the morning when she learnt about the incident she chose to remain silent and not informed anyone. Admittedly her father-in-law, her brother-in-law Poshu and the wives and the families of the other two brothers were present there. Why did she wait for over one week for her husband to come back. According to PW-9 his wife had told him that the incident was not disclosed out of shame. This explanation does not appear to be correct. There were women folk in the house at that time. Even her mother-in-law was in the house. The matter could have been brought to her notice.

14. Further she admits that on 17.8.1995 her husband had returned at about 5 – 6 p.m. and the incident was immediately narrated to him. She further admits that police post Patlikuhal is just at a distance of 2 kilometers from her house and is approachable by road. Undisputedly there was a telephone at village Katrain. Then why did the complainant wait for the next morning and not immediately lodge the complaint on 17.8.1995 itself has not been explained. It casts a serious doubt about the prosecution case.

15. According to PW-12 when she returned back from the fields she saw accused Ram Chand leaving the room of PW-9 in a hurry. He did not talk to her. She could hear loud cries of the prosecutrix coming from the room. She thought that children might have fought with each other therefore she did not bother to look into the

matter. This version of hers does not appear to be convincing. Importantly she admits that 2 – 3 days after the occurrence prosecutrix had also narrated the incident to her. She further admits that at that time her father-in-law was also in the house. Yet she chose not to disclose this fact to anyone. This is a very unusual conduct of a lady living in a joint family. It also falsifies the version of PW-10 to the extent that the incident was not disclosed out of shame.

16. According to PW-9 his wife had told him that she had also washed the clothes of the prosecutrix. Now if this was true then obviously prosecution version that the blood stained clothes of the prosecutrix and the 'dari' was taken into possession by the police stands falsified.

17. There is nothing on record to prove the absence of PW-9 and PW-2 from the house. Some independent witness could have been examined by the prosecution to show that PW-9 had gone with PW-5 to Patlikuhal in connection with his apple work.

18. For the aforesaid reasons it cannot be said that the prosecution has been able to prove the complicity of the accused to the charged offence.

19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*, (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on

record or that acquittal of the persons has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

(Deepak Gupta),
Judge.

(Sanjay Karol),
Judge.

September 30, 2010
(PK)