

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Criminal Appeal No. 256 of 2012

Kulvant Appellant

versus

State of Uttarakhand Respondent

Ms. Renu Chaudhary, Advocate, holding brief of Mr. Harshpal Sekhon,
present for the Appellant/accused.

Ms. Meena Bohara, Brief Holder, present for the State of
Uttarakhand/respondent.

JUDGMENT

Hon'ble U.C. Dhyani, J. (Oral)

PW1 Ram Phal wrote a complaint (Ext. Ka1) to Circle Officer, Kashipur, District-Udham Singh Nagar, enumerating the facts contained therein that, on 06.05.2006, informant PW1 Ram Phal and his wife had gone in search of wages. When they returned in the evening, they found that their daughter Km. Archana, aged 15 years was not at home. When PW1 (Ram Phal) inquired about the same, it was revealed that Kulwant Singh, Amrish and Narrotam took Archana alongwith them. PW1 (Ram Phal) went to Police Chowki-I.T.I., Kashipur, but the police could not trace out the daughter of the PW1 (Ram Phal). After the investigation, a charge sheet for the offences punishable

under Sections 363, 366 and 376 of I.P.C. was submitted against the accused persons. The case was committed to the Court of Sessions. A chargesheet was also submitted against the accused Smt. Pravesh and Smt. Bhoori for the offences punishable under Sections 363 and 366 of IPC.

2. When the trial commenced and prosecution opened its case, two separate charges were framed. Accused Kulwant Singh was charged for the offence punishable under Section 376 of I.P.C. Accused Kulwant Singh was also charged, alongwith Amrish, Narrotam, Pravesh and Bhoori, for the offences punishable under Sections 363 and 366 of I.P.C. The accused persons pleaded not guilty to the charge and claimed trial.

3. PW1 Ram Phal (father of the victim), PW2 Km. Archana (victim), PW3 Dr. Bhagirathi Garbyal (who medically examined the victim), PW4 Constable Jagdish Prasad (formal witness), PW5 Sub Inspector R.K. Saklani (investigating officer), PW6 Surendra Singh and PW7 Ravindra Singh (both the brothers of the victim) were examined on behalf of the prosecution. Incriminating evidence was put to the accused persons under Section 313 Cr.P.C., in reply to which they said that they were falsely implicated in the case. After considering the evidence on record, accused persons, namely, Amrish, Narrotam, Smt. Pravesh and Smt. Bhoori were exonerated from the charges levelled against them. Accused Kulwant Singh was convicted of the offences punishable under Sections 363, 366 and 376 of I.P.C. and was sentenced appropriately.

Aggrieved against the said judgment and order dated 11.09.2012, passed by 1st Additional Sessions Judge, Udham Singh Nagar, present Criminal Appeal was preferred.

4. Prosecution led the evidence through PW2 Km. Archana (victim), who, in her examination-in-chief said that she passed class VIII from Government Higher Secondary School, Kashipur, District-Udham Singh Nagar in the year 2004. Her date of birth was 15.09.1990. She was acquainted with the accused Kulwant Singh. He was working in I.G.L., Kashipur. On 06.05.2006, PW2 (victim) was all alone in her house. Kulwant Singh came to her house and offered her job/service, saying that since PW2 Archana passed class VIII, she could get a job. Kulwant Singh was accompanied by others also, the names of whom are not being discussed here, in as much as, they have been exonerated by the Court below. Those people insisted PW2 Archana to accompany Kulwant. They forced PW2 to accompany Kulwant in a tempo. They came to Aloo Farm. Others left the farm. Only Kulwant (accused) and she (victim) remained there. Kulwant brought her to Aloo Farm and then to Kashipur and from Kashipur to Gorkhpur, where she was kept at different places. Kulwant Singh sexually assaulted her (victim) against her will. She was kept in Gorakhpur against her will for 20 -25 days. Accused came to drop PW2 at her home after 20 - 25 days. Kulwant and PW2 (victim) were apprehended by police. She (PW2 Archana) was medically examined. Her statement was recorded before the Magistrate. She proved her statement under Section 164

Cr.P.C. (Ext. Ka2). She said that she was fifteen years of age when the incident took place.

5. In her cross-examination, PW2 Archana said that Kulwant did not come to her house before this incident. He was her neighbour. He was an old acquaintance of PW2 Archana. Aloo Farm was situated at a distance of two and a half kilometers from her house. Kulwant came to her on the fateful day at 12 noon. She went with the accused to Aloo Farm on foot. One has to go via Kundeswari, Shivilal Pur, Cotton Mill for reaching Aloo Farm. It took about half an hour for PW2 Archana to reach Aloo Farm. A taxi stand was there in the Aloo farm. They came to Kashipur by a tempo. They reached roadways bus stand at Kashipur. They stayed at Kashipur bus stand for 10 to 15 minutes. They were waiting for Gorakhpur bound bus. Accused Kulwant purchased the ticket. In the meantime, she waited for him in the bus, which was occupied by passengers. Neither PW2 Archana nor the accused alighted themselves from the bus while on their journey from Kashipur to Gorakhpur. Kulwant Singh (accused) hired a room near railway station. They stayed there for 4-5 days. Thereafter, they shifted to another room, which was situated at a distance of one kilometer. After a few days, they again shifted to another room. In all PW2 Archana stayed with the accused in Gorakhpur for 20-25 days. They travelled from Gorakhpur to Kashipur by train, which was full of passengers. The accused escorted PW2 Archana to her house on foot. The Magistrate recorded her statement on 03rd June 2006, She came to depose in the trial court with her parents. Accused

used to say PW2 Archana very often that she should do a job. On 06.05.2006, the accused came to her and said that a job has been arranged (for her). He kept PW2 Archana in a house of his relatives for 3-4 days, before going to Gorakhpur. He sexually assaulted PW2 Archana against her wishes. When the police apprehended PW2 Archana, she was in the company of accused. Therefore, she was given in the custody of her parents.

6. The examination-in-chief and the cross-examination of PW2 Archana indicated that she went with the accused on her own and with her free will. She accompanied accused from Aloo farm to Kashipur, and then from Kashipur to Gorakhpur. In between, she stayed at different places with the accused. She had sexual intercourse with the accused. She never tried to raise an alarm. She did not seek help of the police. She did not express her agony to the passengers who were traveling with her in bus or in train. She did not try to free her from the clutches of the accused Kulwant.

7. The age of the victim, in the above circumstances, assumes great significance. The question is that-what was the age of the victim as on the date of the incident?

8. PW3 Dr. Bhagirathi Garbyal, medically examined the victim on 31.05.2006 at 5.00 p.m. PW3 proved the medical report (Ext Ka3), and also supplementary medical report (Ext Ka4). PW3 said that

neither external mark of injury was seen nor any injury was seen, on the private part of the body of the victim. Vagina admitted two-fingers easily. Hymen was torn. Vaginal discharge was taken for vaginal smear for evidence of spermatozoa. The victim was also referred to the Radiologist at another hospital.

9. X-rays of right elbow joint, right wrist joint and right knee joint were taken. Epiphysis around the right elbow joint was fused. Epiphysis of lower end of the right ulna and radius were in the process of fusion and fusion line was present. Epiphysis around the right knee joint were fused. According to the radiologist's report, the age of the girl (victim) was about eighteen years. The medical officer opined that she was about eighteen years old. In the cross-examination, PW3 Dr. Bhagirathi Nabyal said that PW2 Archana had sexual intercourse with the accused Kulwant. There was no indication that the accused had sexual activity with PW2 forcibly.

10. The only evidence whereby the prosecution made an attempt to show that the victim was below 18 years was the evidence of PW5 Sub Inspector R.K. Saklani (investigating officer). This fact is under no dispute that the prosecutrix was recovered from the possession of the accused. It is also established that the accused took the victim away from her house, but the fact remains that, as per radiologist's report, she was eighteen years of age on the date of incident. Prosecution attempted to show that she was 16 years old, when PW5 R.K. Saklani (investigating officer)

said that he obtained a photocopy of the transfer certificate from victim's school, but the same was neither brought on record, nor proved.

11. According to the PW5 S.I. R.K. Saklani (investigating officer), PW2 Archana was aged 16 years as on the date of the incident. PW5 S.I. R.K. Saklani did not indicate as to what was the date of birth of the victim. Neither the said transfer certificate was brought on record, nor any effort was made to prove the same. In the absence of any other reliable piece of evidence, the Court has no option but to fall back upon the report of the radiologist, according to which she (victim) was 18 years, as on the date of the incident. Although, PW2 Archana also said that she was born on 15.09.1990, but no document was offered in support of the said statement. Even if her date of birth as 15.09.1990, be presumed to be true, she was more than 16 years, and not below 16 years on the date of the incident. In any case, no offence punishable under Section 376 of I.P.C. was made out against the accused/appellant. Since, she was a consenting party to the sexual activity between her and the accused and she being definitely above 16 years of age, the accused cannot be held guilty of the offence under Section 376 of I.P.C. in any case.

12. So far as other offences are concerned, it has come on record, that she was approx 18 years of age when the incident took place and it has been abundantly made clear that she did not resist her movement with the accused, right from her house to Aloo farm, Kashipur and then from

Kashipur to Gorakhpur and back, therefore, will it not be reasonable to grant appellant/accused benefit of doubt? In a nutshell, the prosecution was unable to prove the case against the accused/appellant beyond a shadow of reasonable doubt.

13. Learned trial court committed a mistake by holding that the victim was 16 years of age as on the date of incident. This conclusion of the trial court has resulted into conviction of the accused/appellant, which is interferable. It is being said, at the cost of repetition, that no school certificate was provided and filed by the prosecution to show that she was below 16 years (for Section 376 I.P.C.) or below 18 years of age (for Sections 363 & 366 I.P.C.), and in the absence of such document, the Court has no option but to fallback upon the report of the radiologist, according to which the age of the victim, as on the date of incident, was approx 18 years or may be read as 18 years. Impugned judgment and order is, therefore, liable to be set aside.

14. The criminal appeal filed by the appellant/accused Kulwant is allowed. Impugned Judgment and order dated 11.09.2012, as also the conviction and sentence awarded to the appellant by the trial court is set aside giving the accused/appellant benefit of reasonable doubt. Accused/appellant is on bail. His bail bonds are cancelled and sureties are discharged. He need not surrender.

15. Let a copy of this Judgment along with the Lower Court Record be sent to the Court below for compliance.

(U.C. Dhyani, J.)

Dt. June 28, 2013

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