

STATE OF H.P. A
v.
SURESH KUMAR @ DC
(Criminal Appeal No. 841 of 2002)

MAY 29, 2009 B
[DR. MUKUNDAKAM SHARMA AND DR. B.S.
CHAUHAN, JJ.]

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Penal Code, 1860 – ss.376 and 342 – Rape of minor girl
pursuant to wrongful confinement – Conviction of accused-
respondent – Set aside by High Court – Justification of –
Held: Not justified – Accusation made by the two child
witnesses i.e. the victim and her elder sister was cogent,
credible and not influenced by any tutoring – High Court
erroneously ignored their credible evidence and the statement
of their mother, which was further corroborated by medical
evidence – This amounted to miscarriage of justice.

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According to the prosecution, the respondent raped
PW3, a minor girl, after wrongfully confining her in his
house. The trial court convicted the respondent under
ss.376 and 342 IPC. The High Court however acquitted
the respondent. Hence the present appeal.

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Allowing the appeal, the Court

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HELD: 1.1. The prosecutrix, PW3, had categorically
and affirmatively stated that the respondent committed
rape on her. Immediately after the occurrence she
reported the matter to her sister, PW4, who had also in
her statement corroborated the said fact. The mother of
the prosecutrix, PW-5, also corroborated the said fact that
she was informed by her daughter on the very next day
that the accused-respondent had committed rape on her.
She has also stated that the accused took her to his

A room, bolted the room from inside and thereafter committed rape on her. [Para 11] [150-F-H]

1.2. Though it was submitted by respondent that there was no other independent witness to support the

B allegation, in a case like this, when the prosecutrix, who was a minor girl on the date of incident, has come forward and stated that she was raped by the accused and her testimony could not be shaken in the cross-examination, there is no reason to disbelieve her for no girl would ever

C lie on a vital issue of this nature. Even her sister and mother also stated as to what were reported by the prosecutrix herself immediately after the alleged occurrence. In fact, a witness in this case, PW-6, although,

D turned hostile at one stage of her examination, yet she had stated that PW5 had come to her house along with prosecutrix and had told that respondent had committed sexual act with prosecutrix and she advised her to report the matter to the police. She had in her cross examination by the public prosecutor admitted that PW-5 had told her that accused had raped her daughter and accused had

E given a currency note of Rs. 5/- & "Shakkar" to the prosecutrix after the sexual act. She also stated that she enquired from the prosecutrix and the prosecutrix narrated her the entire incident. [Para 11] [151-A-E]

F 1.3. The further submission of respondent that the prosecutrix was habitual to sexual intercourse cannot be accepted. It is disclosed from the medical report that the prosecutrix was not habitual to sexual intercourse as the doctor, PW8, herself stated that the prosecutrix was not used to sexual intercourse because her vagina admitted only one finger. She has explained that there was redness over the margin of hymen and on the basis of this redness, the possibility of recent sexual intercourse could not be ruled out. As the testimony of the

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prosecutrix, her sister and mother has not been shaken in cross-examination, the statement of the doctor appears to be a plausible and convincing version. [Para 11] [151-E-H] A

1.4. The submission made by respondent that both the child witnesses, namely, PW-3 and her sister, PW-4, should not and could not have been believed, cannot be accepted. The depositions of PW-3 and PW-4 with regard to the occurrence of such incidence are firm and convincing. No reason is found as to why a child of her age i.e. prosecutrix would get an innocent person named for an offence which was undisputedly committed on her. Conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim if the evidence of the prosecutrix is found to be credible and convincing. [Para 13] [152-B-D] B

1.5. When the evidence of PW-3 and PW-4 is taken into consideration, it becomes quite clear that the accusation made by them in their deposition are cogent, credible and had grain of truth and was not influenced by any tutoring. While passing order of acquittal, the High Court erroneously appreciated the evidence by ignoring credible evidence which is available in the nature of two child witnesses and the statement of the mother of the prosecutrix, which was further corroborated by the medical evidence. Clearly, the aforesaid manifest error committed by the High Court amounts to miscarriage of justice. [Para 15] [153-E-H] C

State of Rajasthan v. Om Prakash (2002) 5 SCC 745; Panchhi v. State of U.P. (1998) 7 SCC 177 and Mohd. Kalam v. State of Bihar (2008) 7 SCC 257 – relied on. G

2. The judgment of the High Court is illegal and unjustified in the fact situation of the present case. There H

A cannot be an order of acquittal of the accused – respondent. Accordingly, the order of acquittal passed by the High Court is set aside and the judgment passed by the Sessions Judge is restored. [Para 16] [154-A-B]

B Case Law Reference:

(2002) 5 SCC 745 relied on Para 13

(1998) 7 SCC 177 relied on Para 14

(2008) 7 SCC 257 relied on Para 15

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 841 of 2002.

D From the Judgment & Order dated 16.11.2001 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 410 of 2001.

Naresh Kumar Sharma for the Appellants.

E Rajeev Kumar Bansal, Sanjeev Bansal and Akshai K. Ghai for the Respondents.

The Judgment of the Court was delivered by

F DR. MUKUNDKAM SHARMA, J. 1. This appeal is filed by the State of Himachal Pradesh challenging the judgment and order of acquittal passed by the High Court of Himachal Pradesh whereby and whereunder the High Court acquitted the respondent - Suresh Kumar from the charges under Sections 376 of Indian Penal Code (hereinafter referred to as 'the IPC') and also under Section 342 IPC.

G 2. Before dealing with the contentions raised on behalf of the parties and in order to appreciate the said contentions it would be necessary to state a few facts leading to registration of the aforesaid criminal case.

[DR. MUKUNDAKAM SHARMA, J.]

3. The age of the prosecutrix – Km. Kusum Lata (PW-3) A was opined by PW-7 Dr. Devinder Kaur as between 5 to 12 years on the date of examination i.e. 17.03.2000. Therefore, there is no dispute with regard to the fact that she was minor at the time of commission of alleged offence of rape. The prosecutrix and the accused are the residents of the same B village and in fact they were neighbours. The respondent – accused was about 25 years of age on the date of commission of the alleged crime whereas, as stated hereinbefore, the prosecutrix was a minor on the date of commission of alleged C offence of rape. On 15.03.2000, the parents of the prosecutrix, namely, Smt. Shakuntla Devi, PW-5, and Shri Ramesh Chand had gone to the house of maternal uncle of the prosecutrix. On D the said fateful day, PW-4, Km. Punam, the elder sister of the prosecutrix, had gone to the jungle to fetch green leaves for the goats leaving behind the prosecutrix along with her two younger brothers, namely, Vicky and Ajesh at their residence. It is alleged that on the said date the accused went to the house of the prosecutrix and took her to his house and after entering his room the accused bolted the door of the room from inside and put the prosecutrix on the cot and switched on the T.V. It is also alleged that thereafter the accused opened the salwar of the prosecutrix and took off his trouser and underwear and thereafter the accused committed rape on the prosecutrix. The prosecutrix stated in her deposition that she wanted to cry and weep but she could not do so because the accused had gagged her mouth. It is also alleged that after committing the rape the respondent-accused gave a currency note of Rs. 5/- and some “shakkar” to the prosecutrix. The prosecutrix ate the said “shakkar” and thereafter she returned home. When PW-4, Km. Punam, the elder sister of the prosecutrix, returned from the forest after collecting the green leave for the goats, prosecutrix narrated the whole incident of rape on her. On G 16.03.2000, when parents of the prosecutrix, PW-5, Smt. Shakuntla Devi and Shri Ramesh Chand returned back to their residence at village Sunali, at about 2.30 p.m., the prosecutrix narrated the incident of rape by the accused to them. PW-4, H

- A sister of the prosecutrix handed over currency note of Rs. 5/- to her mother Smt. Shakuntla Devi (PW-5) which was given to her by the prosecutrix on the previous day. Thereafter, the parents reported the matter to the Pradhan of the Gram Panchayat, who sent telephonic intimation to the police station.
- B The police reached the village on 16.03.2000 at about 9 p.m. and recorded the statement of the prosecutrix, on the basis of which a case for offence under sections 376 and 342 IPC was registered.
- C 4. After registering the case, the police started investigation into the case and during the same the prosecutrix was got medically examined on 17.03.2000 at District Hospital, Bilaspur. Dr. (Ms.) J. Goswami (PW-8) conducted the said medical examination. The police also examined the witnesses and on completion of the investigation submitted a charge sheet
- D against the respondent – accused for committing the offence under Sections 376 and 342 IPC. When the charge was explained to the accused, he pleaded not guilty and claimed to be tried.
- E 5. Consequently, the prosecution examined as many as 13 witnesses to establish the charge against the respondent – accused. The statement of the accused was also recorded under Section 313 Cr.P.C. The respondent-accused led no evidence in support of his denial of the allegation. After
- F conclusion of the trial, the learned Sessions Judge, Bilaspur, Himachal Pradesh by judgment and order dated 30.04.2001, convicted the accused – respondent under Sections 376 and 342 IPC with sentence of rigorous imprisonment of seven years and fine of Rs. 2000/- for the offence under section 376 IPC and rigorous imprisonment of one year for the offence under section 342 IPC. Learned Sessions Judge further ordered that both the sentences of imprisonment would run concurrently.
- G 6. Being aggrieved by the aforesaid judgment and order, the accused – respondent preferred an appeal before the High
- H Court of Himachal Pradesh. After hearing the counsel

[DR. MUKUNDAKAM SHARMA, J.]

appearing for the parties, the High Court by its judgment and order dated 16.11.2001 allowed the appeal thereby setting aside the judgment and order of conviction imposed upon the respondent and acquitted him of all the charges with the direction that the accused be released forthwith.

7. Aggrieved by the impugned judgment and order of acquittal passed by the High Court of Himachal Pradesh, the State has preferred the present appeal, on which we have heard learned counsel appearing for the parties.

8. The counsel appearing for the parties in support of their respective cases had drawn our attention to the statements made by the various witnesses and also to the contents of the medical report of the prosecutrix and also to the statement of the doctor, who examined the prosecutrix.

9. The records placed before us, clearly prove and establish that the prosecutrix was a minor on the date of occurrence. The doctor has given a medical opinion to that effect and the Sessions Court as also by the High Court has accepted the said report of doctor. Dr. J. Goswami (PW-8) had medically examined the prosecutrix on 17.03.2000 at 4.10 p.m. The doctor has stated in her statement before the court that she examined the prosecutrix on the basis of alleged history of sexual molestation by her so called 'Chacha', aged 26 years. At the time of examination on 17.03.2000, the said doctor was told by the prosecutrix that the accused – respondent had sexually molested the prosecutrix many days back i.e. when she appeared in class-I examination and at the time of medical examination she had appeared in class II examination. On examination of the prosecutrix, the doctor found sign of recent sexual act, as there was small-reddened area over the left upper margin of hymen. In the cross-examination, the doctor has categorically stated that the prosecutrix was not habitual of sexual intercourse because her vagina admitted only one finger. The doctor, however, admitted that absence of hymen proves that she had been used to sexual intercourse earlier. The

- A aforesaid medical report of the doctor is corroborated by the statement made by the prosecutrix that she was earlier also raped by the same accused. As against the suggestion of the accused that the sexual intercourse as alleged would have been taken place more than one week prior to 17.03.2000, the
- B doctor while accepting the same also stated that there can be a possibility of recent sexual intercourse i.e. within a week from 17.03.2000, which cannot be ruled out because of the redness on the margin of hymen. The High Court mainly relied upon the opinion of the doctor holding that the doctor herself was unclear
- C about the actual date of the alleged rape, and therefore, the said medical report could not be relied upon. While doing so, the High Court ignored the fact that the doctor had also stated that there can be a possibility of recent sexual intercourse i.e. within a week from 17.03.2000. The alleged rape was in fact committed within a week from 17.03.2000 i.e. on 15.03.2000.
- D The fact that prosecutrix was subjected to rape on 15.03.2000 is proved and established from the statement of the prosecutrix, medical report and the statement of the doctor (PW-8), who had examined the prosecutrix. The doctor had also stated that hymenal appearance cannot rule out recent coitus. Therefore, it is also proved and established beyond doubt that the prosecutrix was subjected to rape on 15.03.2000.

10. Having come to the aforesaid findings we are now left to decide as to whether or not the respondent was the accused, F who committed the rape on the minor girl.

11. The prosecutrix had categorically and affirmatively stated to be so. Immediately after the occurrence she reported the matter to her sister, who had also in her statement corroborated the said fact. The mother, who was examined as PW-5, also corroborated the said fact that she was informed by her daughter on the very next day that the accused had committed rape on her. She has also stated that the accused took her to his room, bolted the room from inside and thereafter committed rape on her. It is submitted by the counsel appearing

for the respondent – accused that there is no other independent witness to support the aforesaid allegation. In fact, in a case like this, when the prosecutrix, who was a minor girl on the date of incident, has come forward and stated that she was raped by the accused and her testimony could not be shaken in the cross-examination, we have no reason to disbelieve her for no girl would ever lie on a vital issue of this nature. Even her sister and mother also stated as to what were reported by the prosecutrix herself immediately after the alleged occurrence. In fact, we have a witness in this case, who is Smt. Kanta Devi (PW-6). Although, she turned hostile at one stage of her examination, yet she had stated that on 16.03.2000 at about 3.30 p.m. Smt. Shakuntla Devi had come to her house along with her daughter, prosecutrix and had told that accused - respondent had committed sexual act with prosecutrix and she advised her to report the matter to the police. She had in her cross examination by the public prosecutor admitted that it is correct that Smt. Shakuntla had told her that accused had raped her daughter and accused had given a currency note of Rs. 5/- & "Shakkar" to the prosecutrix after the sexual act. She also stated that she enquired from the prosecutrix and the prosecutrix narrated her the entire incident. It was sought to be submitted by the respondent – accused that the prosecutrix was habitual to sexual intercourse since her hymen was absent. The aforesaid statement of the respondent also cannot be accepted in view of the fact that the prosecutrix has stated that the accused himself had earlier raped her about a year back. It is also disclosed from the medical report that the prosecutrix was not habitual to sexual intercourse as doctor herself stated that the prosecutrix was not used to sexual intercourse because her vagina admitted only one finger. She has explained that there was redness over the margin of hymen and on the basis of this redness, the possibility of recent sexual intercourse could not be ruled out. As the testimony of the prosecutrix, her sister and mother has not been shaken in cross-examination, the statement of the doctor appears to be a plausible and convincing version.

A 12. There is another vital submission made by the respondent-accused which is required to be dealt with at this stage. It was submitted that both the child witnesses, namely, PW-3 and PW-4, the prosecutrix and her sister respectively, should not and could not have been believed due to the following two reasons. Firstly, both PW-3 as well as PW-4 was child at the time of commission of the said offence and secondly, they were tutored by their parents and police.

B 13. We have considered the said submission, but we find the same to be unacceptable. The depositions of these two witnesses, i.e. PW-3 and PW-4 with regard to the occurrence of such incidence are firm and convincing. We find no reason as to why a child of her age i.e. prosecutrix would get an innocent person named for an offence which was undisputedly committed on her. It is settled position of law that the conviction for offence under Section 376 on the sole testimony of a rape victim if the evidence of the prosecutrix is found to be credible and convincing. This Court observed as follows in the case *State of Rajasthan v. Om Prakash*, (2002) 5 SCC 745, at page 753:

C E 13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In *State of Punjab v. Gurmit Singh*, referring to *State of Maharashtra v. Chandraprakash Kewalchand Jain* this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are

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compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In *Panchhi v. State of U.P.*, (1998) 7 SCC 177, it was observed by this Court that the evidence of a child witness cannot be rejected outrightly but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others.

15. Relying on the aforesaid decision, in *Mohd. Kalam v. State of Bihar*, (2008) 7 SCC 257, this Court has observed that the evidence of a child cannot be rejected outrightly and the same must be evaluated with great circumspection. The aforesaid law laid down by this Court is squarely applicable in the facts and circumstances of the present case. When the evidence of PW-3 and PW-4 is taken into consideration, it becomes quite clear that the accusation made by them in their deposition are cogent, credible and had grain of truth and same was not in any manner could be said to be influenced by any tutoring. When we examine the impugned judgment in light of above, we find that while passing of order of acquittal, the High Court erroneously appreciated the evidence by ignoring credible evidence which is available in the nature of two child witnesses and the statement of the mother of the prosecutrix, which was further corroborated by the medical evidence. Clearly, the aforesaid manifest error committed by the High Court amounts to miscarriage of justice.

A 16. In that view of the matter, we find that the judgment and order of the High Court is illegal and unjustified in the fact situation of the present case. There cannot be an order of acquittal of the accused – respondent. Accordingly, we set aside the order of acquittal passed by the High Court of B Himachal Pradesh and restore the judgment and order passed by the Sessions Judge, Bilaspur.

C 17. The accused – respondent is directed to surrender before the trial court forthwith to serve out the remaining period of the sentence within a period of four weeks from the date of pronouncement of judgment failing which he shall be traced out by the police and arrested to serve the remaining sentence.

18. Accordingly, the appeal is hereby allowed.

B.B.B.

Appeal Allowed.