



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 481 of 2017

Reserved on: 01.07.2019

Decided on: 25.07.2019

Rakesh Kumar alias Fanger

.....Appellant

Versus

State of Himachal Pradesh

.....Respondent

Coram

The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.

¹ *Whether approved for reporting? Yes.*

For the appellant :

Mr. Suresh Kumar Thakur, Advocate.

For the respondent:

Mr. Shiv Pal Manhans and Mr. P. K. Bhatti, Addl. AGs.

Chander Bhusan Barowalia, Judge.

The present criminal appeal has been maintained by the appellant-accused-convict (hereinafter to be called as "the accused") against the judgment dated 05.11.2016, passed by learned Additional Sessions Judge (II), Kangra at Dharamshala, H.P., in Sessions trial No. 14-K/VII/2014/13, whereby the accused was convicted for commission of offences punishable under Sections 363, 376 and 377 of the Indian Penal Code.

2. Succinctly the facts giving rise to the present appeal as per the prosecution story are that on 30.03.2006, the prosecutrix (name withheld) alongwith her nephew was returning from her sister's house. About 4:00 p.m. they reached at Kangra

¹ *Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

Bus Stand and were waiting for the bus. In the meanwhile, accused met them and introduced himself by saying that the father of nephew of prosecutrix is his uncle and took prosecutrix and her nephew to a nearby shop, where he offered them tea and snacks. The accused was having a bag with him, which he handed over to the nephew of the prosecutrix. The accused took the prosecutrix with him from the back side of the bus stand towards the main road and then to bus stand. The nephew of the prosecutrix waited for a long for return of the prosecutrix, but she did not return. Thereafter one Ravi Kumar came there, to whom he narrated the incident. The nephew of the prosecutrix thereafter returned home and also narrated the incident to his father, who called the father of the prosecutrix and informed him about the matter. The father of the prosecutrix alongwith other relatives thereafter searched the prosecutrix in Kangra Bazar, but could not find her. Around 9:30 p.m., the matter was reported to the police of Police Station Kangra, subsequently, FIR No. 120/06, under Section 363 of the Indian Penal Code was registered. S.I. Kamal Jeet Singh investigated the matter and seized plastic bag, having clothes of the accused, which was handed over by the accused to the nephew of prosecutrix. On the next day, i.e. 31.03.2006, the prosecutrix returned home and disclosed that the accused firstly took her to Gaggal on the pretext that his sister is waiting at

Gaggal and from Gaggal to Dharamshala and thereafter to Sheela Chowk by bus and lastly to nearby field of Sheela Chowk, where he committed rape and sodomy with her. The statement of the prosecutrix was recorded, she was medically examined at Civil Hospital Kangra and medico legal certificate was procured. The Medical Officer concerned handed over a parcel containing swab hair vagina, swab from exit genitalia, swab from anus and vaginal slides to the police. For expert opinion, the prosecutrix was referred to Dr. Rajinder Prasad Medical College Tanda, where it was opined that possibility of sexual intercourse and sodomy cannot be ruled out. Accordingly, Sections 376 and 377 of IPC were incorporated in the case. The prosecutrix also got scene of crime identified. On the basis of which, spot map was prepared. The aforesaid parcel, containing swabs of prosecutrix was sent for forensic examination to SFSL, Junga and after receipt of SFSL report, it was opined by the Medical Officer that there is possibility of sexual intercourse and sodomy. The birth certificate of the prosecutrix was also procured. During investigation, it was revealed that name of the accused, who committed the crime is Fanger @ Rakesh Kumar of village Sohara, but he could not be traced, as such, untraced report was prepared and was filed before learned JMIC, Kangra, which was accepted by learned Magistrate.

3. On 19.03.2013, police got information that the

accused was seen in the area, so the police moved an application to investigate the matter. On the same day, at 7:00 p.m., the accused was arrested. Thereafter, he was sent to Civil Hospital Kangra for medical examination, whereupon it was opined that there is no abnormality in his genitalia and he is capable of doing sex. On 20.03.2013, in presence of Tehsildar, Test Identification Parade of accused was conducted in District Jail, Dharamshala. On 01.04.2013, blood sample of the accused was taken on FTA Card for DNA profiling and the same was sent for forensic examination to FSL Junga. On completion of investigation, *challan* was presented before the Court.

4. The prosecution, in order to prove its case, examined as many as twenty two witnesses. Statements of the accused was recorded under Section 313 Cr. P.C., wherein he denied the case of the prosecution. The accused did not lead any defence in his favour.

5. The learned trial Court, vide judgment dated 05.11.2016, convicted the accused for the commission of offences punishable under Sections 363, 376 and 377 of IPC and sentenced him as under:

“(1) for offence under Section 363 of the IPC to rigorous imprisonment for a period of seven years and a fine in the sum of Rs. 10,000/- in default of payment of which, he shall undergo rigorous imprisonment for a period of six months;

(2) for offence under Section 376 of the IPC to rigorous imprisonment for ten years and a fine in

the sum of Rs. 50,000/- in default of payment of which, he shall undergo rigorous imprisonment for a period of one year; and

(3) for offence under Section 377 of the IPC to rigorous imprisonment for a period of seven years and a fine in the sum of Rs. 50,000/- in default of payment of which, he shall undergo rigorous imprisonment for a period of six months.

All the substantive sentences were directed to run concurrently, hence the present appeal.

6. Mr. Suresh Kumar Thakur, learned counsel for the appellant has argued that there is no proof with respect to the age of the prosecutrix and PW-2 and PW-3 were not the persons, who recorded the age of the prosecutrix, as PW-3 has stated that it is Veena Devi whose name is entered in the Parivar Register, not the prosecutrix. He has further argued that the prosecutrix in her cross-examination has not stated that she has disclosed the identity of the accused to the police and he was shown to her by the lady constable in the jail. He has referred to the statements of PW-1, PW-7 and PW-18 and argued that there is no identity of the accused. He has argued that incident took place in the year 2006 and the accused was arrested in the year 2013, so it is difficult to say how the prosecutrix identified the accused after almost seven years and the fact of false implication of the accused in this case cannot be ruled out. He has further argued that there are contradictions in the statement of the prosecutrix with respect to her's being taken to Dharamshala and from Dharamshala to

Sheela Chowk by bus and thereafter to the nearby field and in these circumstances, her statement cannot be believed.

7. On the other hand, learned Additional Advocate General has argued that taking into consideration the statements of PW-9 and PW-10 and the fact that the accused has committed heinous crime, the present appeal be dismissed, as the accused by alluring the prosecutrix that she will be taken in the car and making the prosecutrix believed that he is in her relations, committed rape upon the prosecutrix.

8. In rebuttal, learned counsel for the appellant has argued that offence under Sections 376 and 377 of IPC is not at all made out against the accused, as no semen was detected from the vaginal and anus swabs of the prosecutrix. Lastly, learned counsel for the appellant argued that the judgment of learned trial Court be set aside and accused be acquitted for the commission of offences, he was charged with.

9. In order to appreciate the rival contentions of the parties, we have gone through the record carefully and in detail.

10. Sh. Rajmal, father of the deceased, while appearing in the witness box as **PW-1** has deposed that on 30.03.2006, he alongwith brother-in-law and nephew of the prosecutrix went to Police Station Kangra and reported the matter that her daughter was taken by a man who pretended to be uncle of prosecutrix's

nephew. On the basis of which, FIR, Ext. PW-1/B, was registered. In his presence nephew of the prosecutrix handed over one carry bag containing Jeans and T-Shirt (Exts. P-3 to P-5) to the police, which was taken into possession vide seizure memo, Ext. PW-1/A. This witness, in his cross-examination, has deposed that he did not raise any suspicion at the time of reporting the matter to the police, as to by whom her daughter was taken. He admitted that he does not know the accused personally and reported the matter to the police, only on the basis of information given to him by brother-in-law and nephew of the prosecutrix.

11. **PW-2**, Sh. Ram Krishan, has deposed that on application (Ext. PW-2/B) moved by the police, he handed over birth certificate (Ext. PW-2/A) of the prosecutrix to the police, which was taken into possession vide seizure memo, Ext. PW-2/C. This witness, in his cross-examination, has admitted that the entry in birth register was made on 08.03.1994 and at that time he was not posted as Secretary to the Gram Panchayat of the prosecutrix. He further admitted that entry at Sl. No. 9 of the birth register brought by him is in the name of someone else than of the prosecutrix and it was not made at the instance of her father.

12. **PW-4**, Shri Rimpal Kumar, has deposed that his father runs a tea shop outside the Kangra, Bus Stand. On 30.03.2006, he was present in the shop and at that time the prosecutrix was

accompanied by two boys. They remained there for 25 minutes. As per this witness, the accused was the same person who came with the another boy and the prosecutrix in his shop on the relevant day. In cross-examination, he deposed that he had not seen the accused prior to the incident.

13. **PW-6**, Sh. Satpal, has deposed that the prosecutrix is his sister-in-law and visited his house with his younger son on 20.03.2006 and stayed there till 30.03.2006. On 30.03.2006, around 3:30 p.m., she left the house alongwith his elder son for her house. His son returned home around 7:30 p.m. and disclosed that when he was standing with the prosecutrix at Bus Stand Kangra, around 4:00 p.m. a boy aged 21 years came to them and introduced himself by saying that the father of the prosecutrix is his uncle and offered tea to them in a nearby shop. Thereafter, he took the prosecutrix with him. He also deposed that as per his son, the accused handed over to him a polythene bag (Ext. P-2) having two jeans and T-Shirt, which was handed over to the police in his presence.

14. The prosecutrix appeared in the witness box as **PW-7** and deposed that on 30.03.2006, when she returned from the house of her sister and waiting for the bus with her nephew at Kangra Bus Stand, the accused came there and introduced himself to be her relative. Thereafter, the accused took them to a nearby

tea shop, where they had refreshment. The accused was carrying a polythene bag, which he handed over to her nephew. The accused told her that his sister is coming and he will drop her to her house in his vehicle. Her nephew remained there in the bus stand with polythene bag and the accused took her in three wheeler to the bus stand, from where he took her to Gaggal. Thereafter, the accused took her to Dharamshala and from Dharamshala to Sheela Chowk by bus, from where she was taken to the nearby field and accused forcibly committed the bad act with her behind the bushes and left her there and went away. She returned home by foot and disclosed the details and identity of the accused to the police. She further deposed that she was medically examined at Dharamshala and had shown the place of incident to the police. She identified the accused in District Jail Dharamshala in the presence of learned Magistrate. In cross-examination, she admitted that she does not know the name of accused and she did not disclose the name of the accused to the police during investigation.

15. **PW-8**, nephew of the prosecutrix, has deposed that on 30.06.2006, he accompanied the prosecutrix from his house. At 3:30 p.m., they reached at Kangra Bus Stand and were waiting for bus. In the meantime, accused came there and introduced himself to be uncle of his grandfather. Thereafter, the accused took them

to nearby sweet shop, where they had snacks. The accused handed over his polythene bag to him. The accused took the prosecutrix to bus stand and asked him to wait at Zamanabad road. He waited there till 7:00 p.m. and thereafter his uncle came there in his tractor and he disclosed him the entire story. On returning home, he disclosed the entire incident to his father, on which, his father made a call to the father of the prosecutrix. Thereafter, they went to police station and handed over that polythene bag containing two jeans and a T-Shirt to the police. In the year 2013, he identified the accused in the police station. In cross-examination, he admitted that he was not knowing the name of the accused in the year 2006. He denied that he identified the accused at the instance of police.

16. **PW-9**, Dr. Swati Aggarwal, has deposed that on an application (Ext. PW-9/A) moved by the police, she medically examined the prosecutrix on 31.03.2006 and issued MLC, Ext. PW-9/B and opined that there was possibility of sexual intercourse and sodomy with the prosecutrix. In cross-examination, she admitted that she had not given the history of alleged occurrence in MLC. She denied that semen and blood was not detected in the vaginal swab of the prosecutrix.

17. **PW-10**, Dr. Neelam Mahajan, has deposed that on 31.03.2006, the prosecutrix was referred to her by PW-9 for

Gynecological opinion. She opined that there was possibility of sexual intercourse and sodomy and in this regard she gave her opinion (Ext. PW-10/A).

18. **PW-18**, Sh. Naresh Kumar, has deposed that as per the orders of learned JMJC Kanagra, he visited District Jail Dharamshala on 30.03.2013 for TIP (Test Identification Parade), where with the help of Superintendent Jail Dharamshala, he arranged seven persons of similar height and statures as that of accused and thereafter the victim was put to test identification, whereby she without hesitation identified the accused for three times. He submitted his detailed report (Ext. PW-18/B) and recorded the statements of prosecutrix (Ext. PW-18/C) and accused (Ext. PW-18/D) and attached the details of persons, who were associated in TIP. In cross-examination, he feigned ignorance as to how many times the prosecutrix was called to police station for TIP. He deposed that no physical features were described to him by the victim prior to TIP. He further deposed that he had not made any inquiry as to the fact that whether the accused was shown to the prosecutrix prior to TIP or prosecutrix had an opportunity to see the accused through media reports and informal communications.

19. **PW-19**, S.I. Ashok Chauhan, has deposed that on 30.03.2013, case was entrusted to him for investigation by SHO

Kangra. As per the orders of learned JMJC, Kangra, he took the prosecutrix in the company of LC Raksha Devi to District Jail Dharamshala for TIP and thereafter he handed over the victim to her father. On 01.04.2013, he obtained police remand of the accused and took the accused to Medical Officer, CHC, Kangra, where blood samples of the accused were taken on FTA Card, which he handed over to MHC. In cross-examination, he denied that the accused was shown to victim and her nephew prior to TIP.

20. **PW-20**, Sh. Mohinder Singh, SHO Kangra, has deposed that on 19.03.2013, he received information about the accused, on which he arrested the accused from his house. On 20.03.2013, the accused got the place of crime identified, accordingly, spot map (Ext. PW-20/B) was prepared and spot was photographed and thereafter the accused was sent to Judicial custody. In cross-examination, he denied that the identity of the accused was disclosed to the prosecutrix and her nephew prior to TIP.

21. **PW-22**, Sh. Kamaljeet Singh, Investigating Officer of the case, has deposed that on 30.03.2006, as per the directions of SHO, Police Station Kangra, he entered into the investigation of this case. On presentation by the father of the prosecutrix, he seized a polythene bag, having Jeans and T-Shirt and sealed it in a parcel, Ext. P-1, vide seizure memo, Ext. PW-1/A. On 31.03.2006, the prosecutrix came to the police station alongwith her mother

and after verifying the facts from prosecutrix, he moved an application (Ext. PW-9/A) for her medical examination and procured MLC, Ext. PW-9/B. On advise of Medical Officer, gynecological opinion (Ext. PW-10/A) was taken. Medical Officer, SDH, Kangra handed over to him five parcels having vaginal swabs, blood and cloth pieces etc. of the prosecutrix, which he deposited in Malkhana. After procuring MLC of the prosecutrix, he incorporated Sections 376, 377 and 506 of IPC. On 01.04.2013, on identification of the prosecutrix, he prepared spot map. On 04.04.2006, he moved an application (Ext. PW-2/B) and obtained birth certificate of the prosecutrix (Ext. PW-2/A). The police made search of the accused, but he could not be traced, as such, untraced report was filed. In cross-examination, he could not tell as to why he had not got the accused declared proclaimed offender, when identification of the accused was known to him.

22. Besides aforesaid witnesses, the prosecution has also examined PW-3, Sh. Mohan Lal, PW-5, Smt. Sunita Devi, PW-11, Dr. Arvind Kumar Sharma, PW-12, HHC Supinder Kumar, PW-13, ASI Kuldeep Kumar, PW-14, HHC Kultar Singh, PW-15, HHC Arjun Singh, PW-16, HC Sampuran Singh, PW-17, SHO Gurdas Ram and PW-21, HC Vinod Kumar, who are formal witnesses.

23. In the instant case, there is medical evidence with regard to sexual intercourse and sodomy, because as per MLC

issued by PW-9, prosecutrix's posterior fourchette had torn and fresh blood was oozing out of it. Hymen was also torn in the middle line and its margins were sharp and red and area around it was tender, even area around anal region was also red and tender having two posterior linear abrasions. However, as far as identity of the accused is concerned, the same was not proved, as the accused was apprehended only when he was arrested in another case of the similar nature after many years. In these circumstances, whether the accused was identified rightly by the prosecutrix or it was just on the basis of suspicion and he was roped in a false case, is a question to be considered before this Court. Secondly, the DNA of the accused did not match with the semen found on the salwar of the prosecutrix, which also makes the prosecution case doubtful. Now coming to the evidence of the prosecution, as far as PW-1 is concerned, he was hear say witness, whereas PW-2 is formal witness. PW-4, though stated that the accused is the same person who came to his shop on the day of occurrence, however, it is difficult to say that how after approximately ten years he can say with certainty that the accused was the same person who came to his shop, when he has not seen the accused prior to occurrence.

24. In answer to aforesaid questions/suspensions, this Court has gone through the material, which has come on record in detail

and finds that the evidence of the prosecutrix that it is the accused who had committed rape with her and her's identifying the accused in jail complex, when test identification parade was carried out by Sh. Naresh Kumar, shows that she remembered the accused even after seven years of occurrence and how can she forget a person, who had committed rape and sodomy with her during the intervening night of 30.03.2006 and traveled with her from Kangra to Gaggal, Gaggal to Dharamshala, Dharamshala to Charan Ghat on foot and thereafter from Charan Ghat to Sheela Chowk. So, this Court finds that the prosecutrix has rightly identified the accused. At the same point of time, the son of shopkeeper, who served tea to the accused, the prosecutrix and her nephew, has an opportunity to remember the accused, as he was interrogated by the police with respect to the accused and definitely he would have remembered the identity of the accused for the years, thus, there is no doubt that the identity of the accused is not established. This Court finds that the statements of the prosecutrix, her nephew, who took tea with the accused and to whom the accused has given his clothes in a polythene bag, the statement of shop owner's son, who served tea to the accused, the prosecutrix and her nephew, coupled with the statement of Sh. Naresh Kumar, who got test identification parade conducted, leaves no doubt with respect to the identity of the accused that

the accused was the same person who had committed the crime. Further, the medical evidence of the prosecutrix clearly proves the guilt of the accused beyond the shadow of reasonable doubt, as the statement of the prosecutrix is wholly reliable, believable and trustworthy, even otherwise also she identified the accused. The medical evidence shows that the accused has committed rape, as well as unnatural offence with the prosecutrix, who was only weighing 20 kgs and was not fully development at that time and her age was only 12 years. It is clear from the record that the accused allured the prosecutrix, made her believe that he is her relative and he will drop her in his vehicle, as he is having two vehicles, took the prosecutrix with him towards Gaggal and from Gaggal to Dharamshala, Dharamshala to Charan Ghat and finally to a place Sheela Chowk, where in the field, during the night hours, he has committed unnatural sex and rape with the little girl and left her there on the pretext that he is going to bring a blanket and thereafter remained underground for many years. The clear cut testimony of the prosecution witnesses has led to no other conclusion, but the one that it is that accused who had committed the offence. This Court has also taken into consideration the fact that the case is quite old and now sufficient time has elapsed, as also the sentence awarded to the accused and after going through the statements of the prosecution witnesses, medical evidence, as

well as act of the accused, this Court finds that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and the sentence awarded to the accused is also not required to be interfered with, as the same has been awarded after correctly appreciating the circumstances which have come on record.

25. So, in the given facts and circumstances of the case, the present appeal, which sans merit, deserves dismissal and is accordingly dismissed. Consequently, the appeal, so also pending application(s), if any, stands disposed of.

(Chander Bhusan Barowalia)
Judge

July 25, 2019
(raman)

High Court