



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 357 of 2010

Judgment Reserved on : 13.04.2016

Date of Decision: April 28, 2016

State of Himachal Pradesh

...Appellant

Versus

Pawan Kumar

...Respondent

Coram:

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

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General
with Mr. J. S. Guleria, Astt. Advocate
General.

For the respondent : Mr. Sanjeev Bhushan, Senior Advocate
with Ms. Abhilasha, Advocate.

Vivek Singh Thakur, J.

In the present case, the respondent-accused
had been acquitted of the offences punishable under
Section 376 of the Indian Penal Code by the learned
Sessions Judge, Solan, vide judgment dated 23.02.2010

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

after undergoing Sessions trial No. 13-S/7 of 2009, in case FIR No. 237, dated 05.11.2008, Police Station, Sadar Solan. The aforesaid judgment has been assailed by the State in the present appeal.

2. Shri V.S. Chauhan, learned Additional Advocate General has argued that there are sufficient grounds and evidence on record to punish the respondent-accused under Section 376 IPC and learned trial Court has failed to appreciate and consider the evidence on record in right perspective.

3. On the contrary, the learned counsel defending the respondent-accused has supported the judgment passed by the learned trial Court and has argued that no grounds have been made out in the appeal warranting the interference of this Court.

4. We have heard the respective counsel and have also gone through the record.

5. As per the prosecution, PW-11 prosecutrix and respondent-accused had developed proximity with each other after introduction through sister of the respondent-

accused in a visit to the house of the respondent accused in May, 2005. As per the prosecutrix, after 3-4 months the respondent-accused had committed sexual intercourse with her without her consent by administering alcohol in cold drink in a residence of his friend, near New Bus Stand, Solan where she had visited on invitation of the respondent-accused to attend birthday party of a friend of respondent-accused, whereas, no such party had been found by the prosecutrix on that place. As per prosecution story thereafter respondent-accused had promised and had been promising the prosecutrix to marry her and with such assurance had been continuing physical relations with the prosecutrix. The respondent-accused had been visiting the prosecutrix at her residence, in the beginning at Shimla and later on, at Chambaghat District Solan. Out of this relation, the prosecutrix had conceived pregnancy thrice prior to alleged last abortion in the month of September, 2008 allegedly caused by the respondent-accused administering some medicine in

golgappa on 25.09.2008, consumed by the prosecutrix in good faith which was offered by the respondent-accused. On a complaint of the prosecutrix in the month of October, 2008, the respondent-accused was called in the Police Station, Sadar, Solan and a compromise had been reduced into writing on 16.10.2008 according to which the respondent-accused had agreed to marry the prosecutrix on 02.11.2008. The said compromise had been signed and witnessed by the mother of the prosecutrix (PW-12) and Up Pradhan, Gram Panchayat Seri (PW-4) Shri Laxmi Dutt Sharma. It has been stated by the prosecution witnesses that the prosecutrix, her mother alongwith her friend and one Bittu had visited the house of respondent-accused with request to solemnize marriage of the respondent-accused with prosecutrix. However, the family of the respondent-accused and the respondent-accused had refused to marry the prosecutrix. Thereafter, the prosecutrix has lodged FIR No.237, dated 05.11.2008, in Police Station, Sadar Solan. After putting the challan in the trial Court, the

prosecution examined as many as 16 witnesses. Perusal of evidence indicates that PW-1 Shashi Bala the friend of mother of prosecutrix, PW-4 Laxmi Dutt Sharma Up Pradhan Gram Panchayat Seri, PW-11 Prosecutrix, PW-12 Vimla Devi, mother of the prosecutrix are the relevant witnesses for considering the merit of the appeal.

6. In her examination-in-chief, PW-11 prosecutrix has reiterated the version stated in the FIR. She has also stated in examination-in-chief that even prior to the last termination of pregnancy in September 2008, the respondent-accused had to suffer abortion three times. She had further stated that she wanted to save last pregnancy but the respondent-accused visited her house in the absence of her mother and offered golgappa and after consumption of golgappa, the prosecutrix had suffered stomach pain and bleeding resulting termination of pregnancy.

7. PW-12 Vimla Devi stated that she had found the prosecutrix receiving telephone calls during night in the year 2008 and on inquiry the prosecutrix had

disclosed that respondent-accused wanted to marry the prosecutrix. Lateron, she had found the respondent-accused at her residence but she had admonished him when he had touched her feet, wept and had sought time of six months to marry the prosecutrix. On avoiding marriage by respondent-accused and detecting pregnancy of the prosecutrix, she had visited the house of the accused-respondent alongwith prosecutrix, cousin of prosecutrix and her friend whose name was not known to her. According to her, father of the accused-respondent had conveyed that they will to visit her home for deciding the issue of marriage. She has stated that the respondent-accused, his father, two sisters and brother in law had visited her house in the evening on the same day at 8.00 PM and offered money to close the chapter refusing to marry the prosecutrix. However, the said offer was rejected by her as prosecutrix and the respondent-accused were in love with each other. It was also deposed by her that the respondent-accused had administered something to the prosecutrix in her absence

at her residence which had resulted bleeding to the prosecutrix and the prosecutrix had been taken to Dr. Maria, Maria Medical and Diagnostic Centre, the Mall, Shimla and thereafter abortion took place. Thereafter complaint was made to the police and the respondent-accused agreed to solemnize marriage on 02.11.2008 which was reduced into writing vide compromise dated 16.10.2008 Ex. PW-4/A. On failure to marry, the prosecutrix had lodged FIR against the respondent-accused on 05.11.2008.

8. PW-1 Shashi Bala has deposed that she was residing all alone at Sanjauli and the prosecutrix had come to her house about one and half years back followed by the respondent-accused in the evening. She has stated that after dinner, both the respondent-accused and prosecutrix had stayed in one room for night by stating that their marriage was likely to be performed. This witness was informed by the mother of the prosecutrix after 3-4 months that the prosecutrix was pregnant. She has stated that she had visited the house

of respondent-accused with PW-11 prosecutrix, PW-12 mother of prosecutrix and one driver of the car. From the statement of PW-1, a new fact has been introduced which had never been stated by PW-11 or PW-12 at the time of making complaint to the police or during the investigation or while deposing during trial.

9. PW-12 Shashi Bala claims her to be friend of PW-12 Vimla Devi and visiting to house of the respondent-accused with PW-12 whereas PW-12 has stated that she did not know the name of friend accompanying her to the house of respondent-accused. It is also unnatural and unbelievable that PW-12 Vimla Devi does not know the name of her friend accompanying her to the house of the respondent-accused especially when so called friend had also been examined as witness as PW-1 in support of prosecution case.

10. Prosecutrix PW-11 and PW-12 her mother have deposed that that the respondent-accused and his family members were refusing to marry and offering money to close the chapter and threatening to change the

DNA report. However, the conduct of the prosecutrix enjoying the company of respondent-accused voluntarily and accepting golgappa offered by him, without any hesitation despite alleged previous history of unwilling abortion, is unbelievable in normal course, particularly, in strained relations.

11. The prosecution is relying on the compromise Ex. PW-4/A, signed by the respondent-accused in presence of witness PW-12 mother of the prosecutrix and PW-4 Up Pradhan of the Panchayat. PW-4 is an independent witness. On scrutiny of statement of witnesses the said compromise cannot be said to be executed with free consent and possibility of signing the said compromise under pressure cannot be ruled out as the PW-4 Shri Laxmi Dutt Sharma has admitted in the cross-examination that prosecutrix was threatening to the respondent-accused not to permit him to solemnize marriage with the girl with whom the engagement of the respondent-accused had taken place and the prosecutrix was pressurizing the respondent-accused for marriage,

whereas, the respondent-accused was not willing to marry with the prosecutrix. PW-4 has further stated that the respondent-accused had told him that he was not having sexual relations with the prosecutrix but was only known to her on account of her visits in his house with his sister. PW-4 has further admitted that the compromise had been executed under pressure of police and others. Therefore, this compromise cannot be considered as a valid piece of evidence for convicting the respondent-accused.

12. It also transpires from scrutiny of evidence that the respondent-accused had been called to Police Station on some complaint by the prosecutrix and her mother in October, 2008 and thereafter matter was compromised vide compromise dated 16.10.2008 Ex. PW-4/A. No such complaint has been placed on record by the prosecution nor any Police Official present at that time had been cited as witness nor disclosed or examined in the Court. These circumstances are also against prosecution.

13. In statements Ex. D-3 made by PW-12 before the police, she has clearly stated that when they were asking the respondent- accused and his family to marry the prosecutrix, then, the family members had clearly stated that they will not solemnize the marriage with prosecutrix and they had threatened to perform DNA test which reflects that the respondent-accused and his family was sure that pregnancy is not on account of physical relations of respondent-accused and prosecutrix.

14. The facts as narrated by the prosecutrix to the PW-2 Dr. Anju Maddan, PW-3 Dr. Anita Sood and PW-14 Asha Maria are also cast doubts on the prosecution story. The prosecutrix had visited PW-3 Dr. Anita Sood on 29th October, 2008 and had stated that she was having pregnancy but the development of the child was not proper. However, on ultra soundgraphy no pregnancy was found whereas while reporting to PW-14 Dr. Asha Maria on 26.09.2008, prosecutrix had complained missing of period and slight bleeding and on sonography

pregnancy was detected and missed abortion was doubted. However prosecutrix had not reported back to the Doctor as advised. On 5.11.2008, the prosecutrix had stated to Dr. Anju Maddan that she had suffered abortion around 26.09.2008. From perusal of deposition of PW-2, PW-3 and PW-14, it appears that immediately after detection of abortion, the same had been managed to be aborted and to verify the termination PW-3 Dr. Anita Sood had been approached pretending no knowledge of abortion, whereas before PW-2 Dr. Anju Maddan, she had specifically stated that abortion had taken place around 26.09.2008. Possibility of aborting herself after threatenings of the family of the respondent accused to get the DNA test conducted cannot be ruled out to wash away the best evidence available to ascertain the truth. In such facts and circumstances, it is also suspicions that who was interested in abortion and who had caused the same.

15. PW-13 had investigated the matter who has admitted that prosecutrix had failed to identify the spot

and house where she was allegedly assaulted after administering alcohol in cold drink. As per him, the prosecutrix had taken the police to a building known as Anand Complex, saying that the place of occurrence was one quarter inside the said Complex. However, in cross-examination, he has admitted that on the Top Floor of Anand Complex, there is a Shopping Complex, below that Commercial Hall, below that a Marriage Hall and on the Ground Floor, there is a paid parking. At the time of alleged incident, the prosecutrix being young girl of 22 years, was having enough prudence to identify the place of alleged occurrence. Therefore, failure to identify the alleged place of occurrence also goes against the prosecution.

16. It has come on record that the prosecutrix had not complained for almost three years despite conceiving and suffering three abortions during this period. Such a conduct casts serious doubt on the prosecution story. It appears that FIR against respondent-accused lodged after due deliberations by

arranging the facts and story as per suitability of the prosecutrix on not succumbing of the respondent-accused to pressurize the prosecutrix to marry her.

17. Rape is not only crime against the basic human right of victim violating her right guaranteed under Article 21 of the Constitution of India but also a crime against the entire Society. It is well settled law that unblemished and reliable statement of prosecutrix is sufficient to convict an accused. However, in case of rape, onus is always on prosecution to prove the guilt of accused by leading credible evidence. It is also cardinal principles of Criminal Jurisprudence that when two views are possible, the view beneficial to the accused is to be followed.

18. The testimony of prosecutrix should be appreciated in background of entire case. In the present case, in the testimony of prosecutrix, it has been come on record that she has alleged that she was in relationship with the accused and had been allowing access to the accused at her residence in the absence of

her mother without any resistance and had even stayed over night with him and the prosecutrix had been continuing to do so despite knowing that the accused was duping her. A woman of the age of prosecutrix i.e. around 21 years is prudent enough to understand the consequences of relationship as alleged by her. It was not a single instance that the prosecutrix was pregnant and the respondent-accused had not been marrying her despite alleged assurances. Conviction of an accused on the testimony of prosecutrix must be based upon a testimony inspiring confidence. As discussed supra, it is un-believable that despite bitterness in relation and denial to marry her, the prosecutrix had been enjoying company of the accused and accepting golgappa. On the basis of the conduct of prosecutrix and other material on record including the statements of doctors, there are sufficient grounds to discredit the statement of prosecutrix. In these circumstances, it can be safely presumed that relationship as alleged was not being continued by the prosecutrix for assurance of marriage

but for other reasons, which do not constitute an offence. In entire circumstances of the present case, the testimony of the prosecutrix is un-believable and is not of worth credence.

19. Other official witnesses are of no help to prosecution case as the depositions of the prosecutrix and other relevant witnesses do not inspire confidence to establish the committal of alleged offence against the respondent-accused.

20. Having perused the testimony of the prosecution witnesses on record, it cannot be said that prosecution has been able to prove its case, beyond reasonable doubt, by leading clear, cogent, convincing and reliable material on record. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice. Therefore, acquittal

of respondent-accused cannot be said to have resulted into travesty of justice, hence, no interference is warranted in instant case.

For all the aforesaid reasons, present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

**(Sanjay Karol),
Judge.**

**(Vivek Singh Thakur),
Judge.**

April 28, 2016
(brb)