

[2008] 13 S.C.R. 1

STATE OF H.P.

v.

SURESH KUMAR @ CHHOTU
(Criminal Appeal No. 973 of 2002)

AUGUST 28, 2008

[DR. ARIJIT PASAYAT, P. SATHASIVAM AND AFTAB
ALAM, JJ]

Penal Code, 1860:

ss. 363, 368 and 376 – Kidnapping and rape – HELD: High Court has rightly concluded that accusations were not established and prosecutrix was more than 16 years of age at the time of occurrence – Findings of High Court about age of prosecutrix cannot be said to be without any basis – High Court was justified in its conclusions about the prosecutrix having accompanied the accused on her own and being a consenting party to the sexual acts.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 973 of 2002

From the final Judgment and Order dated 5.11.2001 of
the High Court of Himachal Pradesh at Shimla in CrI. Appeal
No. 507 of 1999

Naresh K. Sharma and Meenakshi Arora for the Appellant

The Order of the Court was delivered by

Dr. ARIJIT PASAYAT, J. Challenge in this appeal is to the judgment of a learned Single Judge of the Himachal Pradesh High Court directing acquittal of the respondent (hereinafter referred to as the 'accused'). Learned Sessions Judge, Kangra at Dharamshala had found the accused guilty of offences punishable under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (in short 'IPC') and sentenced him to undergo rigorous imprisonment for seven years and two years and fine with default stipulation.

A The prosecution version as unfolded during trial is as follows:

B Prosecutrix (PW-2) daughter of Nirmala Devi (PW-1) and Jagar Nath (PW-3) was, on 23.3.1996 present in her house in village Sadwan. The accused and Ishwar Dass alias Sheru (who was a co-accused before the trial court and will be referred to as such hereafter) came to her house. Accused asked her to marry him. On her refusal, the accused and the said co-accused threatened to kill her brother. They made her to accompany them at the point of a knife and was taken to different houses and finally to the house of Ashok Kumar (who was also a co-accuse before the trial court and is referred to as such hereafter). From there, she was brought to Kunalpathri temple for performing marriage with the accused. But she refused and the priests also refused to perform the marriage. The accused and the co-accused then took the prosecutrix to the Court premises at Dharamshala where she was forced to sign an affidavit regarding solemnization of her marriage with the accused and such affidavit alongwith affidavit of the accused to the same effect were attested by R.S.Rana, Advocate (PW-5). She was then taken back to the house of co-accused Ashok Kumar at Shahpur where she stayed for five days and during this period, the accused subjected her to sexual intercourse.

F When the mother of the prosecutrix (PW-1) returned home from the fields, she found the prosecutrix missing and started searching for her in the neighbourhood and also at her parents' house and finally reported the matter to the police on 26.3.1996 on the basis of which formal Ex. PW-1/A was registered at Police Station, Nurpur by ASI Sharif Mohammad (PW-10). The father of the prosecutrix (PW-3) who was, at the material time, working at Kullu was informed about the occurrence whereupon he returned home. On the basis of information received, the police alongwith PW2 recovered the prosecutrix from the house of co-accused Ashok Kumar vide memo Ex.PW3/A and she was handed over to PW-2 vide memo Ex PW-/B. The prosecutrix was got medically examined and Dr. D.R.Royal (PW12) who

examined her issued the MLC Ex.PW-12/B and opined that the possibility of sexual intercourse qua the prosecutrix could not be ruled out. At the time of medical examination of the prosecutrix, PW12 took in possession the underwear which the prosecutrix was wearing at the relevant time and also collected vaginal swab, prepared the slides and after sealing, handed them over to the police to get them analyzed from the Chemical Examiner. After arrest, accused was also got medically examined and Dr. Praveen Bhardwaj who examined him vide MLC Ex.PW13/A opined that the accused was capable of performing sexual intercourse. At the time of medical examination, his underwear was also taken in possession by PW13 and handed over to the police for chemical analysis. As per the report regarding chemical analysis of the aforesaid articles Ex.PX, nothing incriminating was found in the articles so analysed, except the underwear of the prosecutrix which was found stained with human blood. During the course of the investigation, the police also took possession of the age certificate Ex.PW14/A of the prosecutrix and the abstract of the register Ex.PW14/B. On completion of the investigation, a charge sheet under Sections 363, 366, 368 and 376 IPC was submitted by the officer in charge, Police Station, Nurpur against the accused and his co-accused.

The accused abjured guilt and took the stand that he has been falsely implicated. The co-accused Ashok Kumar was tried in respect of a charge under Sections 368 and 109 read with Section 376 IPC and co-accused Ishwar Dass @ Sheru was charged for offences relating to Sections 363, 376 read with 34 and Section 109 read with Section 376.

In order to establish the accusations, fifteen witnesses were examined. The accused and the co-accused were examined under Section 313 of the Code of Criminal Procedure, 1973 (in short 'Code'). Learned Trial Judge acquitted the co-accused of the charges but convicted the accused and imposed sentences as aforesaid.

A The High Court noted that there was inconsistency in the
evidence of the prosecutrix. She appeared to have accompa-
B nished the accused of her own accord and the sexual intercourse
alleged to have been committed was done with her consent.
The stand of the prosecutrix was that as she was below 16 years
C of age, her consent, if any, was of no consequence. The High
Court referred to the evidence of PWs. 1,2,3, and 14 and the
documents relied upon i.e. the birth certificate. The High Court
D noted that those documents apparently were not relatable to
the prosecutrix and therefore the date of birth indicated in the
documents could not be that of the prosecutrix. It referred to the
evidence of the mother. It was concluded that the documents
could not be also relatable to the prosecutrix in view of the state-
ment of the mother about her own age. That being so, the High
Court held that the accusations were not established and the
prosecutrix, as evident from the documents was more than 16
years of age at the time of occurrence.

In support of the appeal, learned counsel for the appel-
lant-State submitted that the evidence of the prosecutrix ought
not to have been rejected. The documentary evidence, though
E there appear to be some inconsistencies in the documents as
regards the name of the child born, and her caste in a village
area should have been considered to be of no consequence.

Learned Amicus Curiae supported the judgment of the
High Court.

F We find that the High Court was justified in its conclusions
about the prosecutrix having accompanied the accused on her
own and being a consenting party to the sexual acts. As rightly
contended by learned counsel for the State, if the age of the
G prosecutrix was below 16 years, the consent would be of no
consequence. But the High Court's findings as regards the age
of the prosecutrix cannot be said to be without any basis. The
High Court has analysed the oral evidence and the documen-
tary evidence to come to a conclusion that the date of birth of
H the prosecutrix as claimed by the prosecution has not been

established. That being so, we find no merit in this appeal which is accordingly dismissed. A

We record our appreciation for the assistance rendered by learned Amicus Curiae.

R.P.

Appeal dismissed. B