IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No.410 of 2018

Judgment reserved on: 18.12.2020

Date of Decision: 23.12.2020

Anil Bhardwaj ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Coram:
The Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?[1] *Yes*

For the appellants: Mr. Balwant Singh Thakur, Legal Aid Counsel.

For the respondent: Mr. Anil Jaswal and Mr. Nand Lal Thakur, Additional Advocate Generals with Mr. Ram Lal Thakur, Deputy Advocate General and Mr. Rajat Chauhan, Law Officer.

HEARD THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

FIR NUMBER	13 of 2014 dated 4.2.2014, Registered in Police Station Lambagaon, District Kangra, HP
TRIAL NUMBER	Sessions Trial Number 27-P/VII/2017/2014, R.B.T.S.C No. 12-P/VII/2017/2014; Instituted on 5.3.2014, Decided on 11.1.2018 by Special Judge, Kangra at Dharamshala, (HP).

CHARGES & TRIAL COURT'S VERDICT

Accused Anil Bhardwaj	S. 363, IPC	Convicted	Sentence of rigorous imprisonment for three years and fine of Rs. 20,000/-, and in default of payment of fine, further simple imprisonment for 2 months.
	S. 366 IPC	Convicted	Sentence of rigorous imprisonment for four years and fine of Rs.

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

			30,000/-, and in default of payment of fine, further simple imprisonment for 4 months.
	S. 506, IPC	Convicted	Sentence of rigorous imprisonment for one year and fine of Rs. 10,000/- and in default of payment of fine, further simple imprisonment for 2 months.
	S.4 of POCSO Act, 2012	Convicted	Sentence of rigorous imprisonment for seven years and fine of Rs. 75,000/-, and in default of payment of fine, further simple imprisonment for one year.

1. Appellant, when he was aged 24 years, allured and took with him a girl aged fifteen and half years to Shimla, made her stay in a hotel, where during the night committed forcible coitus with her on 3-4 times and now, having been convicted for kidnapping, threatening, and rape and is in judicial custody for the last more than 5 years and 6 months, had come up before this Court seeking acquittal.

2. On 4.2.2014, the mother of the victim informed the police that her minor daughter has been allured by the appellant Anil Bhardwaj. She further alleged that on 3.2.2014, she had gone to the house of the elder brother of her husband (Jeth) and at that time, her husband was not present at home. In her house, her son aged 18 years, and daughter-victim aged fifteen and half years were present. She further stated that in the evening, when she returned home at about 6.00 p.m., then she enquired from her son Ajay about the victim. Her son Ajay told her that the victim must be nearby. On further search, when the victim could not be traced, then Ajay told his mother that on 2nd Feb 2014, convict-Anil Bhardwaj had visited their home and told them that there was a scheme from a company and in case they were able to sell 15 SIMs, then they would get a monthly salary of Rs.4500/-. He further told them that for that purpose, they would have to open a bank account and once the bank account is opened, the company would transfer Rs.1000/- to such account. He further told that he would bear all expenditure of opening the account and told to accompany him, along with the victim, for opening such account. He also told them to carry their certificates. After that at 11.30 a.m., Ajay, his sister and Anil Bhardwaj reached Sujanpur. Anil told Ajay to bring an IPO from the bank and when he reached the bank, the staff told him that

IPOs are sold at the post office. After that, he went to post office and when he reached Sujanpur, then he noticed that neither Anil Bhardwaj nor his sister were present there. After that, he made frequent phone calls to Anil Bhardwaj and after sometime, Anil Bhardwaj took the call and told him that he has sent his sister along with his sister to Anil Bhardwaj's home. The victim further told Ajay that he was in Hamirpur. After that, the complainant sent Ajay to the house of the Anil Bhardwaj to find out about the victim. On reaching there, Ajay met sister of Anil Bhardwaj, who feigned ignorance about her brother and the victim. After that, the complainant frantically searched the victim, but could not find her. Thus, she informed the police.

3. Since these allegations revealed commission of cognizable offence and as such, the police officials of Police Chowki Thural recorded DDR (Ext.PW-14/A) and forwarded the same to police Station Lambagaon for registration of FIR. It led to registration of FIR No.13 of 2014 (Ext.PW-12/A) under Sections 363 and 366 IPC.

4. On the night of 4.2.2014, the accused dropped the victim in her house. On 5.2.2014, the police brought the victim for her medical examination.

5. Vide MLC, Ext.PW1/B, Dr. Abha Gautam examined the victim, who told the Doctor her age to be fifteen and half years. The doctor obtained consent of the mother of the victim for examining her genitals. On clinical examination, the doctor did not find any fresh injury. The doctor obtained swabs from vaginal canal and after preserving it, handed over the same for chemical analyses. The doctor opined that there was nothing to suggest that the victim had not undergone sexual intercourse. The report of the chemical analyst was received, which did not find any blood or semen from clothes as well as from vaginal swabs. However, based on the physical examination, the doctor affirmed her initial opinion.

6. The police produced the victim for her examination under Section 164, CrPC before the learned Addl. CJM, Palampur. On 6.2.2014, the victim made her statement under Section 164 Cr.PC before the learned Addl.CJM, Palampur. She also stated the same facts, which her brother had told to her mother and which had led to registration of FIR. Apart from that, she stated that after the convict had

sent her brother to bring IPOs, the accused pretended to have searched for her brother, and after 10 minutes returned and told the victim that her brother Ajay has gone to Hamipur in connection with the work. After that, he brought the victim to Hamirpur. On reaching there, he told the victim that he has already spoken with her brother and her mother and they have told him that he could take her to Shimla. He took the victim to Shimla and told her that she has nothing to fear because she was just like his sister. On reaching Shimla, after taking food, he took her to a hotel. During the night, he forcibly undressed her and committed coitus with her. The victim gave 2-3 slaps to the convict, but he over-powered her. She scolded the convict that would he behave with his real sister also in similar fashion and on that, he gagged her mouth and committed sexual intercourse with her. When the victim told the convict that she would reveal the incident to her family member, then he threatened her that he would commit suicide, for which she would be responsible. After that, he brought her back and dropped her near her home. During the investigation, the police obtained evidence of age of the victim from her school. As per Ext.PW5/B, 8th class certificate, the date of birth of the victim was 13.6.1998. The investigator also obtained birth certificate of the victim Ext.PW16/A, which revealed her date of birth as 13.6.1998.

7. The investigator also visited Shimla and recovered blanket from the hotel, where the accused had subjected the victim to forcible sexual intercourse. The investigator also recovered the register of hotel, wherein the accused had stayed during the intervening night of 3rd and 4th February, 2014. The total number of persons, who had stayed in the said room of the hotel were two, impliedly one of them was accused and the other was victim.

8. After the completion of the investigation, the police launched prosecution by filling report under Section 173 CrPC. The Trial Court found a prima facie case and charged the accused for commission of offences punishable under Section 363, 366, 506 IPC and Section 4, POCSO Act, 2012 i.e., for penetrative sexual assault. The accused did not plead guilty and claimed to be tried. Although in the charge-sheet, first letter of the name of the victim is wrongly written, which appears to be a typographical error.

9. In examination-in-Chief, before administration oath, when the victim disclosed her identity, she mentioned her age as 18 years. She had appeared in Court on 7.4.2016 and the incident was of 3rd/4th February, 2014. On oath, in her examination-in-Chief, the victim told her date of birth as 15th June, 1998. Thus, on 3rd February, 2014, she was 15 years, 7 months and 19 days.

10. The mother of the victim, who testified as PW-4 also told that in the year 2014, the age of her daughter was 15 years and 6 months. This also corroborates the date of birth given by the victim. Another corroboration to the age of the victim being born on 15.6.1998, comes from the age of her elder brother, who was born on 11th November, 1996. The victim, in her cross-examination, told that in the year 2016, age of her elder brother was 19 years.

11. The prosecution tendered in evidence, the birth certificate of the victim as Ex.PW-16/A, through Panchayat Secretary of the concerned Gram Panchayat. He also produced the original birth and death register, before the Court. According to PW-16, as per the record, the birth entry of the victim was disclosed by one Sulekha. He further testified that as per Ext.PW-15/D, the date of birth of the victim was 13.6.1998. There is minor contradiction of one day, in the date of birth of the victim. It might have come because the victim must be born in the night. Even otherwise, this contradiction would not throw away the other corroborating evidence about her age. The defence, while cross-examining the victim and her mother did not challenge the victim being minor. On the other hand, their case has been denial and false implication.

12. The victim stated that the accused had taken her to Shimla and had stayed in a hotel, where he had forcibly committed rape upon her. This fact is proven from Ext.PW8/A, the extract of hotel register, duly proved by the concerned person of the hotel. In the said hotel register, it is mentioned that appellant and the victim had arrived in the hotel on 3.2.2014 and had departed on 4.2.2014. According to the victim, such two persons were Anil Bhardwaj and her. Thus, the stay of victim, in a hotel in Shimla, which is at a considerable distance from her parental house is established.

13. The doctor PW/1 who had clinically examined the victim corroborated sexual intercourse. Simply because the laboratory did not find evidence from semen, would not lead it to the conclusion that she was not subjected to coitus. The definition of rape under Section 375, CrPC is penetration and not ejaculation inside the vaginal canal or any orifice. The victim testified in her testimony that she was subjected to sexual intercourse on 3-4 times during the night. The doctor also noticed the absence of hymen, which may point out towards penetration. In the trial, the doctor, who had clinically examined the victim testified as PW/1 and re-iterated her findings as she had mentioned in medico-legal certificate, which she tendered as Ext.PW1/B.

14. The case of the prosecution is that the accused had allured her, and under a false pretext, took her to Shimla, where he concocted a story and made her stay in a hotel, and during the night he committed forcible coitus with her for 3-4 times.

15. The case set up by the defence is of total denial. In statement under Section 313 CrPC, the accused has put up a strange defence of enmity. The accused explained this enmity in answer to question No.33, which is extracted as follows:

> " The father of the prosecutrix is a drunkard person and his wife was under the impression that I and my friend were the person, who had made her husband drunkard. Once the father of the prosecutrix had come to my father and at that time he was not in a position to walk due to consumption of liquor and my father had asked me and my cousin to leave him in his house and when we had reached his house, at that time his wife Anita was at home and she started abusing us as if we had supplied liquor to her husband and due to this reason, this case has been made out against me. My family is on inimical terms with the family of the prosecutrix.

16. This explanation appears to be false on its face. However, the accused, in his statement under 313 Cr. P.C., has mentioned his age as 26 years. The incident pertains to the years 2014, when the accused was 24 years of age. Even in FIR, the prosecution has conducted the medical of the accused, he has mentioned his age as 24 years. There is no evidence that the accused was married person.

17. What the prosecution was required to prove, they have proved. The evidence establishes beyond reasonable doubt that the victim had coitus with the

accused. The testimony of the victim that the accused had subjected her to sexual intercourse on 3-4 times during their stay in a hotel in Shimla is sufficient. The mere fact that the FSL did not detect semen from the vaginal swabs and other articles obtained from the victim, is not sufficient to dis-believe the carnal act. The absence of semen may be due to multiple factors, as the accused might have used latex sheath or ejaculated outside the vaginal canal. The absence of semen despite having coitus for 3-4 times would point out towards the precautions taken by the accused not to impregnate the girl. What Section 375 prohibits is penetration. The fact remains that the girl at that point of time was under 18 years of age and sexual intercourse performed with a person under 18 years of age or with a mentally challenged person irrespective of age, would amount to a statutory rape, even if such person consented to the said act. It is not the case of the accused that victim had consented to coitus nor does the victim say so. Even if it was the position, it would have amounted to the statutory rape, the victim being a minor could not have legally consented for sexual intercourse.

18. Although the contents of FIR about the presence of the elder brother of the victim is at variance with the testimonies of the complainant, i.e., his mother, but the Defence did not confront the contents of the FIR to the witness in her cross-examination. Be that as it may, the conduct of the elder brother of the victim in leaving her alone and his non-examination is somewhat shady. Although in the FIR, the complainant stated that the brother of the victim had also accompanied her yet the testimony of the victim and her mother do not point out towards that fact. Furthermore, the prosecution did not examine the elder brother of the victim and the presumption is that such examination did not suit them.

19. A perusal of the MLC and the statement of doctor reveal that PW-1 Dr. Abha Gautam, examined the victim on the next date and she did not find any injury on her privates. She also admitted the suggestion of the defence that she did not notice any sign of struggle marks. However, the accused being unmarried boy aged 24 years and the victim although minor but aged 15 and half years, role of the elder brother; victim accompanying the accused to Shimla and not drawing anyone's attention, absence of any injuries pointing out towards absence of resistance, would be very significant factors for determining the sentence.

20. Given the conduct of the victim, who was more than 15 years of age and was a school going girl coupled with the fact that she travelled up to Shimla, stayed in the hotel for the night and absence of injury on her privates and anywhere in the body and the accused being unmarried and aged 24 years, would at least justify the reduction of the sentence.

21. Hence, for all the aforesaid reasons, conviction is upheld and the substantive sentence as well as sentence in default of payment of fine, is reduced to the imprisonment already undergone, given the fact that the accused has incarcerated for more than five years. The appellant is undergoing the sentence and is confined in prison, as such he shall be released forthwith, if not required in any other case, and subject to compliance of Section 437-A of Cr.PC to the satisfaction of concerned Sessions Judge/Additional Sessions Judge. Amount of fine, if deposited by the appellant, be refunded to him. Release warrants be prepared accordingly. All pending applications, if any, are also closed.

(Anoop Chitkara),
Judge.

December 23, 2020 (*mamta*)