

**Pala and Others Vs. State of Uttarakhand**

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**Court :** Uttaranchal

**Decided On :** Apr-30-2013

**Judge :** U.C. Dhyani

**Appeal No. :** Criminal Appeal No. 154 of 2006

**Appellant :** Pala and Others

**Respondent :** State of Uttarakhand

**Judgement :**

U.C. Dhyani, J.

A complaint was written by victim Naheeda Nasreen, on 06.06.1997, to Station Officer, Kankhal, District-Haridwar, as regards offences punishable under Sections 363, 376 and 511 of I.P.C. The occurrence took place on the self same day at 00.30 p.m. (12:30 p.m.). According to complaint, when the victim was going to Haridwar in a bus on 05.06.1997 during day hours, accused Pala sat by her side. He got her alighted from the bus at Kankhal. Pala took her to the house of one Rafal Singh in village Jageetpur. She was served with eatables. Sukkar tried to sexually assault her. She (victim) started weeping. Rafal and Pala scolded her. She cried. The village Chaukidar and two constables came and rescued her. They arrested Rafal, Pala and Sukkar and took them to the police station concerned. The first information report was lodged within a space of 1:30 hours by Naheeda Nasreen.

2) The criminal law was set into motion on the basis of said first information report. The victim was medically examined. Her vaginal smear was taken for pathological examination. She was also referred for x-ray for determination of her age. No spermatozoa was found in the vaginal smear as per pathological report. No definite opinion about rape could be given. On the basis of the radiological report, the age of the girl was found to be between 10-12 years.

3) The investigation officer inspected the place of occurrence, prepared site plan, took the statement of the victim and accused persons, effected their arrest and after being satisfied that the accused committed the offence, submitted charge sheet against them as regards offences punishable under Sections 363, 376 and 511 of I.P.C. The case was committed to the Court of sessions. When the trial started and prosecution opened its case, charges against the accused persons were framed in respect of offences punishable under Sections 363, 376/511 of I.P.C., read with Section 109 of I.P.C., who pleaded not guilty and claimed to be tried. The amended charge against of Sukkar was framed in respect of offence punishable under Section 376 of I.P.C., read with Section 109 of I.P.C. Charge in respect of offence punishable under Section 376/34 of I.P.C. was framed against the accused Pala, Sukkar and Rafal, to which they pleaded not guilty and claimed to be tried.

4) Six witnesses, namely, PW1 Naheeda Nasreen (victim), PW2 Dr. R.K. Pandey (Radiologist), PW3 Constable Rajpal Singh, PW4 Constable Om Pal Singh, PW5 Dr. Indira Sarabhai and PW6 Inspector M.R. Dusaal were examined on behalf of the prosecution. Incriminating evidence was put to the accused persons under Section 313 Cr.P.C., in reply to which they said that they were falsely implicated in the case. No evidence was given in defence. After hearing both the sides, learned Additional Sessions Judge convicted the accused Pala, Sukkar and Rafal Singh in respect of offence punishable under Section 363/34 of I.P.C. They were exonerated of other charges framed against them. Each of the convict was sentenced to undergo rigorous imprisonment for a period of two years and a fine of Rs. 5,000/-. Aggrieved against the said conviction and sentence, present criminal appeal was preferred.

5) As has been said earlier, that, according to radiologists report, the age of the victim was of 10-12 years. Her radiological report indicated Epiphysis around the elbow were not fused. Epiphysis at the distal end and radials and ulna bones were not fused.

6) The medical officer did not give any definite opinion that the rape has actually occurred or not. No spermatozoa, dead or alive, was seen. There was no mark of injury on the body. Considering the infirmity in the prosecution story as regards rape, the learned Court below acquitted the accused persons in respect of charge of rape, but convicted all the three accused under Section 363/34 I.P.C. on the ground that the victim was taken away by the accused persons from her lawful guardianship.

7) It will be worthwhile to go into the examination-in-chief and cross-examination of PW1 Naheeda Nasreen in great detail. This court will concentrate only upon the allegation of kidnapping against the accused persons, as no useful purpose will be served by discussing the evidence of rape, on account of the fact that the accused persons have been acquitted of the charge of rape and no state appeal is filed against the same. In other words, this Court will concentrate only upon the evidence tendered by the prosecution in respect offence punishable under Section 363/34 of I.P.C. The question therefore, is-whether the victim was taken away by the accused persons out of keeping of the lawful guardian of such minor?

Section 361 of I.P.C. is reproduced here in below for ready reference:-

**Kidnapping from lawful guardianship-** Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent for such guardian, is said to kidnap such minor or person from lawful guardianship. [The victim, in the instance case, was undisputedly between 10 to 12 years].

Explanation The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor or other person.

[in the instant case, brother and mother of the victim were the lawful guardians. They were not examined, which was not necessary]

Exception This section does not extend to the act of any person who, in good faith, believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. [This exception is not applicable to the present case.]

8) PW1 (victim) said, in no uncertain terms, that she was residing with her brother at Saharanpur for the last two years (from the date of deposition). She was going to Dehradun but accused persons sat by her side and started talking to her. They took her to the house of one Rafal Singh in Jageetpur village. Rafal, Pala and Sukkar took her to the upper storey of the house in village Jageetpur. While Sukkar committed rape with her, the others kept on standing there. When she raised an alarm, the chaukidar and two constables came rushing and rescued her. Police arrested them. She did not know the accused persons before the said incident. PW1 said that she got the complaint (Ex.Ka-1) lodged through some literate person. She (victim) was illiterate. She was medically examined by the lady medical officer in Haridwar. She was aged 12-13 years when the incident took place. The incident occurred at around 11.30 a.m.

9) In the cross-examination, she said that her fathers name was Mansab Ali, who died six years ago. Her mother was alive and came along with her when PW1 came to depose. When the incident took place, she was residing with her brother Mansoor in Saharanpur. She was alighted by the accused in the bus stand. Accused persons told her that she will be got seated in Dehradun bound bus. One accused sat by her right hand side and the other sat in the left hand side of the victim. The bus was not crowded. It was around 11.00 a.m. She was taken to Jagjeetpur in a scooter. When she was sexually assaulted, she raised an alarm but was threatened with dire consequences. Many other irrelevant and inadmissible questions were asked in the cross-examination of the PW1 (victim), but she withstood the ignominy of cross-examination. It was already indicated above that this Court will not discuss the evidence relating to sexual assault on the victim,

is as much as, the accused persons have already been exonerated for the said offence and no state appeal was preferred against such acquittal.

10) PW2 Dr. R.K. Pandey proved report (Ex. Ka-2) and x-ray plate (Ex.-1) and opined, on the basis of Ex. Ka-2, that the victim was between 10 to 12 years of age (Ex.Ka-6). PW3 was a formal witness. PW4 was one of the two constables, who heard the cries of the victim and came to her rescue. PW4 (constable) was also cross examined, but nothing came in his cross examination, so as to indicate that he was telling a lie. The evidence of PW4 too was believable, as that of prosecutrix PW1. PW5 Dr. Indira Sarabhai proved medical report Ex. Ka-5 and Ex. Ka-6. It was PW5 who opined that PW1 was between 10 to 12 years of age. Regular Medical Officer indicated the age of victim on the basis of opinion expressed by the Radiologist.

11) PW6 M.R. Dusal was the investigating officer, who proved prosecution documents and also submitted chargesheet against the accused persons. PW6 also mentioned that the victim was produced before the Magistrate for recording of her statement under Section 164 Cr.P.C. The victim was also sent to Nari Niketan as per the orders of City Magistrate.

12) Much emphasis was laid by learned Amicus Curiae on the fact that the mother and brother of the victim were not been examined on behalf of the prosecution. It has come in evidence that the victim was residing with her brother when the incident took place. She mentioned the name of her father, who was died. She came to the Court with her mother on the date when she deposed. It was not necessary for her mother or brother to have come and deposed before the Court below to show that the victim was under their legal guardianship. It is sufficient, if the prosecution was able to prove that the accused persons took away or enticed the minor, who was under 18 years of age, out of the keeping of the lawful guardian of such minor without consent of such guardian. The word lawful guardian included any persons lawfully entrusted with the care and custody of such minor. It was clearly indicated that she was residing with her brother when the occurrence took place and she was going to Dehradun to meet her mother. It was proved that the accused persons kidnapped her from the bus. The consent, if

any, of the minor girl was immaterial.

13) Learned court below has also appropriately dealt with the matter holding that in Muslim Law the mother is the lawful guardian of her minor daughter. The same was discussed in para 14 of the impugned judgment.

14) Learned amicus curiae also submitted that PW5 Dr. Indira Sarabhai has said in the cross-examination that the victim could be between 18 to 20 years of age. But the Doctor has also said in the same breath that the victim looked to be a minor. It may be pointed out here that PW5 opined about the age of the victim on the basis of the radiological report, which indicated, in no uncertain terms that epiphysis at the distal end and radius and ulna bones were not fused. PW5 has also mentioned that victims breasts were not developed. The auxiliary hair and pubic hair were not present, which clearly indicated that she was approximately between 10 to 12 years of age.

15) The prosecution was able to prove the case against the accused/appellant in respect of offence punishable under Section 363/34 of I.P.C., beyond reasonable doubt. There is no occasion to interfere with the impugned order. The Criminal appeal fails and is liable to be dismissed.

16) The criminal appeal is dismissed. The judgment and order, as also the conviction and sentence under appeal, are upheld and affirmed. Accused/convicts Pala, Rafal and Sukkar are on bail. Their bail is cancelled. The appellants are directed to surrender before the Court below to serve out the sentence as was awarded to them by the trial court and affirmed by this Court.

17) Let a copy of this judgment along with Lower Court Record be sent back to the Court below for causing surrender of the convicts Pala, Rafal and Sukkar and sending them to prison for serving out the sentence.

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