

**State of H.P. Vs. Sunil Kumar**

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**SooperKanoon Citation :** [sooperkanoon.com/891516](http://sooperkanoon.com/891516)

**Court :** Himachal Pradesh

**Decided On :** Feb-28-2008

**Reported in :** 2008(3)ShimLC86

**Judge :** Surjit Singh and; Surinder Singh, JJ.

**Appellant :** State of H.P.

**Respondent :** Sunil Kumar

**Disposition :** Appeal allowed

**Judgement :**

**Surjit Singh, J.**

1. This appeal by the State is directed against the judgment of the Additional Sessions Judge, whereby appeal of the respondent against the judgment of the trial Court convicting and sentencing him for offences, under Sections 366 and 354 IPC, was accepted and the respondent was acquitted.

2. First, we may notice the facts. Respondent was sent up for trial for an offence punishable, under Section 354 IPC for allegedly outraging the modesty of a child girl, aged about 7 years, on 15.6.1988. The respondent was alleged to have allured the girl when she was returning home from the school, to a lonely place behind his shop by offering her a toffee and to have put his male organ (penis) into

her mouth. The girl was seen crying and vomiting near the place of the incident by PW-4 Mast Ram, who took her to her house in village Palthi and entrusted her to her mother. Since the girl was crying and vomiting, her mother PW2 Geeta Devi enquired from her as to what had happened, upon which she narrated the incident to her. The father of the girl was not at home that day, as he had gone to visit some relatives in a different village. He returned home on 17.6.1988. Matter was brought to his notice by the mother of the child. Thereafter the father of the child went to the Deputy Commissioner, who directed him to go to the police station. The father of the child PW-1 Pyare Lal then went to the police station and lodged the report, copy Ext.PW1/A. Police investigated the matter and challaned the respondent, under Section 354 IPC.

3. Trial Court initially put the substance of accusation for an offence, under Section 354 IPC to the respondent, in accordance with the procedure required to be followed for trial of summons cases and fixed a day for recording the evidence of prosecution. On the date so fixed, three witnesses of the prosecution were present. It was brought to the notice of the Presiding Officer of the trial Court that in fact the act of the respondent prima-facie amounted to an offence, under Section 377 IPC and, therefore, a charge under that provision of law was also required to be framed, besides a charge under Section 354 IPC. Prayer was made for framing the charge under the aforesaid two provisions of Indian Penal Code and adopting the procedure laid down for trial of warrant cases. Trial Court accepted the plea and charged the respondent with the offences, under Sections 377 and 354 IPC. Immediately after framing the charge, the trial Court recorded the statements of three witnesses, who were in attendance and adjourned the case to a future date for recording the evidence of the remaining witnesses.

4. At the end of the trial, the respondent was found guilty of offences under Sections 377 and 354 IPC and sentenced as follows:

(a) Under Section 377 IPC 3 years rigorous imprisonment and fine of rupees 2,000; in default of payment of fine simple imprisonment for a further period of one month;

(b) Under Section 354 IPC 2 years simple imprisonment and fine of Rs. 1,000; in default of payment of fine simple imprisonment for a further period of one month.

5. Respondent went in appeal to the Sessions Court. The learned Additional Sessions Judge, to whom the appeal was assigned for disposal, set aside the conviction of the respondent and acquitted him. State has appealed against the judgment of acquittal of the first Appellate Court.

6. We have gone through the record and heard the learned Additional Advocate General as also the learned Counsel representing the respondent.

7. The lower Appellate Court has acquitted the respondent giving the following reasons:

(a) Before lodging the report at the Police Station, PW-1 Pyare Lal, the father of the girl, and the girl went to the Deputy Superintendent of Police, where their statements were recorded, but those statements, which were technically in the nature of FIR, had been withheld;

(b) There was delay of two days in lodging the FIR and that the explanation for the delay viz., the father of the girl returned home two days later, was proved to be false by the testimony of the girl, who was examined as PW-3;

(c) The victim was a child and there was no independent corroboration to her testimony, as regards the allegation of sodomy;

(d) The trial Court committed illegality in proceeding to record the evidence of the prosecution witnesses present in the Court immediately on the date of the amendment of the substance of accusation and framing of the charge, inasmuch as it did not record its opinion, as per requirement of Section 216(3) Cr.P.C. that the recording of the evidence immediately after the framing of the charge, after amendment of the substance of accusation, was not going to cause any prejudice to the respondent in his defence or to the prosecutor in the conduct of his case.

8. None of the aforesaid reasons recorded by the first Appellate Court is well founded and supported by the material on record.

9. As regards reason (a) above, no doubt PW-1 Pyare Lal, in his cross-examination, stated that he and his daughter, the victim of the crime (PW3), went to the Deputy Superintendent of the Police who recorded their statements, but he nowhere stated that he went to the Deputy Superintendent of Police before lodging the report Ext.PW1/A at the Police Station. On the contrary, in the examination-in-chief he very categorically stated that first he went to the Deputy Commissioner, who directed him to lodge the report at the Police Station and, therefore, he went to the Police Station and lodged the report Ext.PW1/A. Had the first Appellate Court bothered to read the aforesaid portions of the statement appearing in the examination-in-chief and the cross-examination cumulatively, it would not have come to the conclusion that before lodging the report Ext.PW1/A at the Police Station, the statements of the victim of the crime and her father Pyare Lal (PW1) had been recorded by the Deputy Superintendent of Police and the said statements being in the nature of FIR and having not been produced, the report Ext.PW1/A could not be treated as FIR.

10. Reason (b) given by the first Appellate Court is based on the testimony of PW-3, the victim of the crime. The first Appellate Court has read the statement of PW-3 in isolation. PW-3 was a child of about six years at the time when the offence was committed, because her age is recorded to be seven years at the time of the recording of her statement in the Court. She was examined as a witness on 2.3.1989. The incident had taken place on 15.6.1988. There is every likelihood that PW-3 might have forgotten, on account of her tender age, whether her father returned home on the very day of the incident or two days later. The father of the girl, namely PW-1 Pyare Lal, very categorically stated that he had gone out of station and returned home on 17.6.1988. There is no reason to disbelieve this part of the statement of PW-1 Pyare Lal, particularly when no suggestion was put to him that he returned home on the very day of the incident. Therefore, reasons (b) given by the first Appellate Court is also unfounded.

11. Reason (c) recorded by the first Appellate Court for setting aside the judgment of the trial Court is also not borne out from the evidence on record. Testimony of a prosecutrix alone is sufficient to convict a person of an offence of sexual assault or sodomy, provided the same inspires confidence. In this case, it is not only the

prosecutrix viz.; the victim child, who has testified about the act of sodomy and her testimony appears to be quite natural and credible, but she is corroborated in material particulars by her mother PW-2 Geeta Devi and an independent witness, namely PW-4 Mast Ram. Mast Ram (PW4) categorically stated that when he was returning home from Bilaspur hospital and reached near a clinic close to the school, he saw the girl crying and vomiting and on being asked as to what had happened, she told that the respondent had taken her on the back side of his shop and put his male organ into her mouth and kept the organ in her mouth for quite some time. The witness does not have any motive to falsely implicate the respondent. The fact testified by the witness that the girl child was vomiting also corroborates the testimony of the victim that the offence of sodomy was committed. PW-2 Geeta Devi, the mother of the victim, testified that the girl was brought home by PW-4 Mast Ram and that she was crying and vomiting, and on inquiry, she told that the respondent had put his male organ into her mouth. The girl and her parents as also PW-4 Mast Ram do not have any enmity with the respondent nor do they have any other reason to falsely implicate him. Thus, the reason (c) given by the first Appellate Court is also unfounded.

12. Coming to reason (d), it is true that the trial Court initially adopted the procedure prescribed for trial of summons cases, taking the case to be one of assaulting a female child with intent to outrage her modesty, but it appears from the substance of accusation itself that the respondent was made aware of all the particulars of the accusations against him. The substance of accusation reads that the respondent outraged the modesty of the prosecutrix by putting his male organ into her mouth. The substance of accusation thus contains complete particulars of the charge of carnal intercourse against the order of nature, as defined and made punishable, under Section 377 IPC. Under these circumstances, no prejudice can be said to have been caused to the respondent on account of the trial' Court having proceeded to record the statements of the three witnesses, who were present in the Court, immediately after amending the substance of accusation, which was initially for an offence under Section 354 IPC and framing the charge under Sections 377 and 354 IPC.

13. We find from the record of the trial Court that no objection was raised on behalf of the respondent when the trial Court proceeded to record the statements of the said three witnesses immediately after amending the substance of accusation.

14. We have reappraised the entire evidence of the prosecution. The prosecutrix, in her deposition as PW-3, categorically testified that the respondent had committed the crime he had been charged with. She stated that she was allured to go on the back side of the shop of the respondent with offer of a toffee and there the respondent put his male organ into her mouth. Her testimony is corroborated by the fact that she had been found crying and vomiting by PW4 Mast Ram near the site of the incident as also by the fact of her telling said Mast Ram PW4 as also her mother PW2 Geeta Devi, soon after the occurrence, that the respondent violated her person by putting his male organ into her mouth.

15. In view of above stated position, we hold that the judgment of the lower Appellate Court is unfounded and is based on imaginary reasons. Consequently, the appeal is accepted and the judgment of the lower Appellate Court is set aside and that of the trial Court, is restored. Respondent is given fifteen days time to surrender to the trial Court for serving the sentence, failing which the trial Court shall take appropriate steps to send the respondent to jail, to serve the sentence and also to recover the amount of fine.