

Sunil Kumar Vs. State of Himachal Pradesh

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Court : Himachal Pradesh

Decided On : Jan-02-2012

Reported in : 2012CrLJ1743

Judge : Surinder Singh

Appeal No. : Cr.A. No. 565 of 2004

Appellant : Sunil Kumar

Respondent : State of Himachal Pradesh

Advocate for Pet/Ap. : Shri. Ashwani Kumar Sharma

Judgement :

Surinder Singh, J:

1. The appellant has laid a challenge to his conviction and sentence passed by the learned trial Court in Sessions trial No.2 of 2004 decided on 27/29.11.2004, whereby he has been sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of `5,000/-, in default of payment of fine, to further undergo simple imprisonment for a period of one year and three months, for attempted rape on the prosecutrix, aged about 16 years, who was deaf and dumb.

2. In brief, the prosecution story can be stated thus. On 4th August, 2003, around 7 p.m., the prosecutrix was alongwith her sister and mother Kiran Bala (PW1)

while returning from their fields. PW1 aforesaid was ahead of all, followed by her daughters. When PW1 aforesaid reached near her house, she noticed that the prosecutrix was not with them, thus, she started searching for her on the way and in and around the agricultural fields. During search, the father of the prosecutrix also met them, who was returning from the Bazaar. Kiran Bala informed him about missing of their daughter. He also joined them for locating her.

"(ii) Around 8.30 p.m., when they reached the place known as Suyar, near the house of Roshan Lal, father of the accused, the prosecutrix was found lying naked in an unconscious condition in the field near the house of the accused. Her Salwar was at a distance. Her mother (PW1) put on Salwar on the body of the prosecutrix and lifted her to her house.

(iii) On 5.8.2003, around 5 a.m., prosecutrix regained senses. Since she being deaf and dumb, by signs and gestures, she told her grandmother Rattni Devi that she was raped. Thereafter, the prosecutrix is alleged to have been taken her to the house of Roshan Lal, father of the accused, where she identified the accused.

(iv) A meeting was convened by the elders of the village. A compromise Ext.PW1/A was arrived at which was allegedly signed by the accused and the other witnesses whereby the accused admitted having committed the blunder and took responsibility of the consequences arises there-from, had the prosecutrix carried pregnancy.

(v) Later, Kiran Bala her mother decided to report the matter to the police, which culminated into FIR Ext.PW1/B.

(vi) Police got the prosecutrix medically examined. Her Medico Legal Certificate is Ext.PW7/B. Clothes worn by the prosecutrix alongwith cut pubic hair were sealed and sent for forensic examination. Police took photographs of the incident and also prepared site plan Ext.PW15/A. Prosecutrix also produced her clothes to the police alleged to have worn at the time of alleged incident, which were taken into possession vide memo Ext.PW1/C.

(vii) During the investigation, compromise Ext.PW1/A was taken into possession vide Memo Ext.PW3/A from PW4 Ramesh Chand father of the prosecutrix.

(viii) Accused also produced his pant and underwear which were sealed and taken into possession. He was also subjected to the medical examination. His Medico Legal Certificate is Ext.PW13/A. Doctor found him fit for performing the sexual intercourse.

(ix) On completing the evidence, accused was found to have been involved in the episode, as such, challan under Section 376 of the Indian Penal Code was presented in the Court for his trial.

(x) Finding a prima-facie a case for the offence under Section 376 of the Indian Penal Code, he was accordingly charge-sheeted and tried, but convicted and sentenced only for attempt to rape, as aforesaid hence the present appeal."

3. Shri Ashwani Kumar Sharma, learned counsel for the appellant led me through the evidence on record and vehemently argued that the Compromise deed Ext.PW1/A is not worthy of credence at all as the alleged admission is neither voluntary nor signed by the accused of his own volition. Further that the statement of the prosecutrix was neither recorded by signs and gestures made by her before the Court with the aid of Shashi Bala, who claimed herself to be an expert in interpreting signs of deaf and dumb witness is of any consequence, as the prosecutrix was never her student nor she understood her signs as well. Even it is also not decipherable from the evidence as to how the questions were put to the prosecutrix and in what manner these were answered by the prosecutrix. Thus, relying upon such a statement has caused miscarriage of justice.

4. Contra, Shri P.M. Negi, learned Deputy Advocate General supported the impugned judgment of conviction and sentence and further ventilated that the learned trial Court had adopted reasonable and proper method to ascertain the competency of the witnesses to depose in the court and such observations are duly recorded. Therefore, the statement is worth inspiring confidence causing no prejudice.

5. I have given my thoughtful consideration to the rival contentions of the parties and have carefully and cautiously scanned the evidence on record.
6. As a matter of fact, Section 118 of the Indian Evidence Act, deals with the competency of a witness. By virtue of this Section, all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them or from giving rational answers. All grounds of incompetency have been swept away by this Section.
7. Only incompetency that section highlights is incompetency from premature or defective intellect, owing to various reasons. The competency of witnesses is the rule and their incompetency is an exception. Thus, the sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth.
8. Competency to depose is one thing, but what value should be attached to it is another thing. The moot question in law to ascertain it even when the witness is deaf or dumb?
9. In the instant case, the prosecutrix is not only mute, but at the same time, she is also deaf. During investigation, police did not record her statement under Section 161 Cr.P.C., rather after about two months of the incident. They associated and recorded the statement Ext.PG15/G of Smt. Shashi Bala, a sign and language teacher posted in the Government Rehabilitation Centre, Hamirpur, with respect to the incident alleged to be on the signs and gesture made by the prosecutrix.
10. Expert Shashi Bala was also examined in the instant case during the trial. She stated that she obtained one year diploma in deaf and dumb sign language from 'Ali Yavar Jung Institute for Hearing Handicapped', Delhi, thus she was able to understand what the deaf and dumb persons wants to convey and could interpret the sign language. Significantly, in cross-examination, she did not overrule the possibility of errors in understanding some signs. She also admitted that the prosecutrix did not take any training of the signs and language from her or anywhere else.

11. The record reveals that the learned trial Court also administered the oath to the prosecutrix through the assistance of Shashi Bala, interpreter and found the witness competent to depose in the Court without recording the signs in answer to the questions put to the prosecutrix. Pertinently, when the prosecutrix is deaf besides dumb what signs were made by the interpreter to ask what question and what signs/ gestures she conveyed her answer. The entire statement of the prosecutrix suffers from this vice. Further the prosecutrix is alleged to have stated that she could not identify that boy, who committed rape on her, but again she is alleged to have stated that it was the accused person present in the Court. How this was conveyed is quite unknown. Then, interpreter aforesaid stated that the prosecutrix was also frightened and was not disclosing anything. Thereafter her statement was deferred and the proceedings resumed after lunch. Then she is alleged to have stated that the prosecutrix was walking behind her mother at a distance. At that time, a boy came and caught hold of her and told that her father was calling her. She followed him to some distance where she was caught hold from her hands, her hands were twisted and then she was made to lie down on the ground, her Salwar was opened and thereafter she did not know what had happened as she became unconscious. She also stated that the accused was wearing a locket around his neck and identified his Pant Ext.P5. The prosecutrix was also declared hostile and in cross-examination conducted by the prosecutor, she admitted that the accused put off his pant and underwear, thereafter committed sexual act with her on account of which she suffered injuries on various parts of the body. She could not say whether she had made any statement to the police, but simultaneously stated to have been given the statement Mark-D to the police, whereas, this statement is not of the prosecutrix, but is that of the interpreter Shashi Bala. These questions were put by the learned defence counsel through the interpreter and answers were recorded as stated by the interpreter. Prosecutrix also alleged enmity inter se her family and the family of the accused.

12. PW1 Kiran Bala, mother of the prosecutrix stated that in the pursuit of searching the prosecutrix they also visited the house of accused where they met with his mother. She stated that the accused was sleeping inside his house. Ultimately the prosecutrix was found in the field in the aforesaid condition, but the following day she regained the consciousness, so her grandmother asked by

putting signs and gesture as to what had happened, it was then she revealed that she was subjected to rape by a person, who was wearing a locket. She did not point out by the signs and gestures referring to the accused and there is no iota of evidence that he used to wear locket. In absence of this, it is not understood as to how they could know that it was the accused facing trial. Although, she stated that the accused was identified by the prosecutrix in his house, but PW6 Arun Kumar contradicts her and the father of the prosecutrix (PW4) also stated on the same lines as that of PW1.

13. PW5 Virender Kumar is a witness to the compromise Ext.PW1/A. He stated that the father of the prosecutrix came to his house on 5.8.2003 complaining against the mis-behaviour of the accused with his daughter and requested him to accompany him to seek explanation of the accused. Around 8.30 a.m., many persons had gathered on the spot. The accused was also present and a compromise Ext.PW1/A was executed which was scribed by him where upon the accused had also appended his signatures. His cross-examination requires consideration. He admitted that whatever the father of the prosecutrix (Ramesh Chand) told him, he reduced into writing in the presence of 10- 15 persons. The accused did not admit having committed rape and he was reluctant to sign the said deed, but he was slapped by his brother and made him to sign. Even this fact was admitted by PW6 Arun Kumar, another witness to the said compromise. He also stated that the prosecutrix was sitting silent and neither she indicated or put her hand on the accused identifying him as the assailant nor the persons present there asked anything from her.

14. In his statement under Section 313 Cr.P.C., he also explained that said writing was got executed from him forcibly after giving beatings to him.

15. PW10 Babu Ram is also a witness to the agreement Ext.PW1/A. According to him writing of the compromise was decided by the persons present there. He was also declared hostile, but in cross-examination by the accused, he admitted that the accused had told the persons present there that he did not commit any mistake or rape. Admittedly he also did not enquire anything from the prosecutrix. Similar statement is made by DW2 Pawan Kumar, which fact has also been

admitted by other signatories to the agreements produced as defence witnesses.

16. PW15 Inspector Rajesh, Investigating Officer admitted that whatever was explained to him by the signs and language teacher, Smt. Shashi Bala, the same was jotted down by him.

17. PW9 Prithi Singh, is Panchayat Secretary to prove the date of birth of the prosecutrix. Her date of birth is recorded as 9.1.1989 as per the orders of S.D.M. Hamirpur. PW7 Dr. Sunita Galodha had medically examined the prosecutrix, her age in the MLC is recorded as 16 years.

18. The above discussion of the entire evidence, in my opinion, is not enough to link the accused with the crime. In fact, the entire case hinges upon the statement of prosecutrix. She may be a competent witness under Section 118 of the Indian Evidence Act to depose but what is its relevancy and value should be attached to her statement recorded in the manner stated above is entirely a different matter.

19. The prosecutrix besides the impairment of hearing and speech was also not educated, so as to enable to convey in writing other than by signs and gestures, for that Section 119 of the Evidence Act is quite relevant. It reads as under:-

“119. Dumb witnesses.- A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.”

20. Pertinently it says that where a witness is mute, he/ she may give his or her evidence in any other manner in which he/ she could make it intelligible, may be in writing or by signs, but such writings must be written or signs may be in the open Court and such type of an evidence is admitted to be an oral evidence.

21. Prosecution is relying upon the statements of the prosecutrix as having been interpreted by Smt. Shashi Bala, an alleged expert and also on the compromise deed Ext.PW1/A.

22. Insofar as the statement of the prosecutrix is concerned, the learned trial Court did not record the signs made by the prosecutrix in answer to the questions put to her and also the manner in which the prosecutrix was made to understand by the interpreter, but the learned trial Court appears to have recorded only the interpretation of such signs, thus, in my opinion, there is no compliance of Section 119 of the Indian Evidence Act. By not doing so, even this Court is handicapped to know whether the interpretation of the signs so made were correct or not. Further in the instant case, expert or the interpreter aforesaid was also not familiar with the prosecutrix. Learned trial Court cannot be expected to have anything more than a layman's knowledge in conversing with a deaf and dumb person. It was highly improbable on the learned trial Court to embark upon the examination of the prosecutrix with the help of an expert or a person not familiar with her mode of idea of day-to-day life. In my opinion, no other person than her parents and near relative conversant with the signs and gestures would have been a competent and relevant witness(s) to state about the signs and gesture made in answers to the queries put to her. Thus, the record of such signs and gestures, not the interpretation of the signs above must have been maintained by the learned trial Court as held in *Kumbhar Musa Alib vs. State of Gujarat* [AIR 1966 Guj 101], *Kadungoth Alavi v. State of Kerala* [1982 CrL.J. 94 DB] *Prakash Chand v. State of H.P.* [1998 (2) SLJ 1823 and *Mohan Singh vs. State of H.P.* [2001 (2) SLJ 1549]. In absence of such a record, the statement of the prosecutrix alone is not worth putting reliance to sustain the conviction of the accused in an offence of rape.

23. Secondly, the writing Ext.PW1/A can also not be made the basis for the conviction of the accused as it was dictated by the father of the prosecutrix and the accused was made to sign it under coercion as aforesaid. Even there is no evidence on record that the accused was wearing a locket and he was identified by the prosecutrix in the presence of the villagers who had gathered on the spot, when writing was executed.

24. Further the forensic examination report Ext.PW7/C is of no help to the prosecution as the articles examined did not find blood or semen stains on the pubic hair and clothes of the prosecutrix.

25. For the aforesaid reasons, in my considered opinion, the prosecution has not been able to prove the case against the accused beyond reasonable doubt. Accordingly appeal is allowed. The conviction and sentence passed by the learned trial Court against the accused is set-aside. He stands acquitted by giving him the benefit of doubt.

26. The accused is discharged of his bail bonds entered upon by him at any time during the proceedings of the case.

27. Send down the records.

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