
(2019) 07 UK CK 0120

Uttarakhand High Court

Case No: Criminal Jail Appeal No.31 Of 2015

Nihal Singh @ Naresh

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision: July 15, 2019

Acts Referred:

Prevention Of Children From Sexual Offences Act, 2012 " Section 6#Indian Penal Code, 1860 " Section 363, 365, 366, 376#Protection Of Children From Sexual Offences Act, 2012 " Section 3, 4#Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act, 1989 " Section 3(iii)(xi), 3(iii)(xii) Code Of Criminal Procedure, 1973 " Section 164, 313

Citation: (2019) 07 UK CK 0120

Hon'ble Judges: Lok Pal Singh, J

Bench: Single Bench

Advocate: G.S. Negi, Sandeep Tandon, Lalit Miglani

Final Decision: Allowed

Judgement

Lok Pal Singh, J

1. This criminal jail appeal is directed against the judgment and order dated 31.08.2015 passed by Special Judge, POCSO/F.T.C./Additional Sessions

Judge, Haldwani, Haldwani, District Nainital in S.T. No.15/2015, whereby the accused/appellant Nihal Singh @ Naresh has been convicted under

Section 6 of Prevention of Children from Sexual Offences Act, 2012 (for short, POCSO) and Sections 376, 363, 365, 366 of The Indian Penal Code,

1860 (for short, IPC). He has been sentenced to rigorous imprisonment for a period of ten years along with a fine of Rs.10,000/- u/s 376 IPC, rigorous

imprisonment for a period of five years along with a fine of Rs.5,000/- u/s 363, rigorous imprisonment for a period of five years along with a fine of

Rs.2,000/- u/s 365 IPC and rigorous imprisonment for a period of seven years along with a fine of Rs.3,000/- u/s 366. All the sentences were directed

to run concurrently.

2. Prosecution story, in brief, is that the complainant (name withheld) submitted a report at P.S. Chorgalia, Haldwani, District Nainital stating that on

18.11.2014 his daughter, who is 17 years old and is studying in Girls Inter College in class X, after having dinner, had gone to sleep. On 19.11.2014 in

the morning he found that she is not in the house and had gone somewhere. He tried his best to search her but all in vain. He further stated that his girl

is 17 years old and had taken her clothes with her. On the basis of report, a case was registered under Section 365 of IPC against unknown.

Investigation was entrusted to Sub Inspector Bhagwan Singh Rana. The matter was investigated. On 17.12.2014, accused/appellant Nihal Singh was

arrested and the prosecutrix was recovered. Thereafter, the investigation was handed over to Sub Inspector Arun Kumar verma. The Investigation

Officer recorded the statements of prosecutrix and the accused, took into possession clothes of the accused and prosecutrix, got conducted medical

examination of the prosecutrix, got recorded statement of the prosecutrix u/s 164 of Cr.P.C. As the offence was related to POCSO Act, investigation

was transferred to Sub Inspector Smt. Puneeta Balaudi, who recorded the statement of prosecutrix, obtained caste certificate of father of prosecutrix

as well as that of the accused. The prosecutrix was a member of Scheduled Caste community. On completion of investigation, charge-sheet was filed

against the accused/appellant under Sections 365, 363, 366, 376 of IPC, Section 3/4 of POCSO Act and Section 3(iii)(xii) of SC/ST Act. After hearing

the parties, charge was framed against the accused/appellant under the aforesaid sections.

3. In order to prove its case, prosecution got examined as many as eight witnesses. PW1 father of prosecutrix, PW2 prosecutrix, PW3 mother of

prosecutrix, PW4 Dr. Alpana Mishra, PW5 Constable Pradeep Singh, PW6 1st Investigation Officer Bhagwan Singh, PW7n d2 Investigating Officer

Arun Kumar Verma, PW8 3rd Investigating Officer Circle Officer Bachan Singh.

4. PW1 complainant is the father of the prosecutrix. He reiterated the averments made in the FIR lodged by him. In cross-examination, he stated that

in the FIR he had not mentioned as to who has taken his girl. He further stated that his daughter had taken clothes with her.

5. PW2 stated on oath that she knows the accused/appellant Nihal Singh for about one and a half years. Her date of birth is 16.7.1997 and she is 17

years old. She met the accused in a marriage function. She got acquainted with the accused. He asked her mobile number. As she was not having any

mobile phone, she gave her father's number to the accused. He used to call her. Two-three months after the marriage, the accused called

her on telephone and asked her to come in the forest. She went in the forest where the accused committed rape on her. Thereafter they met several

times and the accused committed rape with her against her wish. She stated that she did not disclose the incident to her parents because of the threat

given by the accused. She further stated that on 18.11.2014 accused had called her in the night and asked her to meet him outside her house. Accused

used to ask for marriage. When she went outside to meet him, accused asked her to sit on the motorcycle. She refused to sit but the accused forcibly

made her sit on the motorcycle and took her towards Sitarganj from where he took her to Delhi. Accused stayed with her in a room in Delhi and made

physical relations with her against her volition. Thereafter, accused took her to Allahabad and took a room on rent. She further stated that as

unmarried girl and boy are not allowed to live together in Allahabad, accused put vermilion (Sindoor) on her head and told her to disclose herself as his

wife if anyone would ask her about their relationship. After a month, her father came in her house along with police. She and the accused were taken

to Police Station Chorgalia. She was taken for medical examination and her clothes were taken into possession by the police. On 20.12.2014, her

statement was recorded before the Magistrate and thereafter she was given in the supardagi of her mother.

In cross-examination, she stated that she and her other family members had gone to sleep at 07:00 pm. Accused called her at about 09:00 or 10:00 pm.

She talked with him for about five to ten minutes and thereafter immediately she went to meet him. Accused was standing at a distance of about 100-

150 mts. from her house. When she was talking with the accused, accused had hold her hand. She did not raise any hue or cry. He took her to

Sitarganj where they stayed for one night. Thereafter, they went to Delhi by bus where also they stayed for one day in someone house. Thereafter,

they went to Allahabad by bus and train. They stayed in friend's house in Allahabad for 2-3 days and then took a room on rent where they stayed

for one month. During this period, she never went outside the house.

6. PW3 mother of prosecutrix has corroborated the statement of PW1.

7. PW4 Dr. Alpana Mishra has stated that on 18.12.2014 she was posted as Medical Officer in Government Women Hospital, Haldwani. On the said

date, she conducted medical examination of the prosecutrix.

She stated that there was no injury present on the body of the prosecutrix. During examination, prosecutrix told her that sexual intercourse has been

done with her with her consent and will. Hymen was found torn. Vaginal swab was taken for detection of spermatozoa. According to her, no definite

opinion regarding rape can be given.

8. PW5 Constable Pradeep Singh Garbyal is a formal witness. He has proved chik F.I.R. Ext. A11. He stated that the complainant has filed a missing

report of his daughter. In the report, the complainant had stated that his daughter has gone somewhere without telling them.

9. PW6 Sub Inspector Bhagwan Singh Rana, PW7 Sub Inspector Arun Kumar Verma and PW8 Bachan Singh Rana are the Investigating Officers of

the case.

10. Thereafter, the statement of the accused/appellant was recorded under Section 313 of Cr.P.C. He replied that the evidence are false and that he

was called by the police in the police station and was then arrested. In reply to last question, he stated that on 20.11.2014 a waybill was got prepared

by him in order to take the truck from Sitarganj and in the evening he himself has driven the truck to Faridabad and Haryana. He also stated that there

is an entry in the records of Faridabad Tata Motors regarding entry of truck on 24.11.2014. In defence, accused/appellant produced DW1 Sukhdev

Singh, DW2 Rohit Pathak and DW3 Satnam Singh.

11. DW1 Sukhdev Singh has proved the fact that on 20.11.2014 mini truck UP 26 T-0543 was sent from Sitarganj to Faridabad. DW2 Rohit Pathak

has proved the fact of preparing permit regarding transportation of truck from one state to another on the said date. DW3 Satnam Singh has stated

that he is the owner of the said truck and the accused Nihal Singh is the driver. He has also proved the factum of booking of truck on the said dates as

alleged by the accused.

12. The trial court, after hearing the prosecution and defence, found the accused/appellant guilty of offence punishable under Section 6 of POCSO and

Sections 376, 363, 365, 366 of IPC and sentenced him accordingly. However, he was acquitted of the charge of offence punishable under Section

3(iii) (xi) of SC/ST Act.

13. Heard learned counsel for the parties and perused the entire record.

14. Learned Amicus Curiae appearing for the accused/appellant would submit that the impugned judgment of conviction and order of sentence is

against the weight of evidence available on record. He would submit that the medical report also does not support the prosecution case regarding the

charge of rape. He would further contend that the arrest of accused and recovery of prosecutrix from Allahabad is also doubtful, inasmuch as, the

appellant and the prosecutrix were not produced before the Magistrate at Allahabad. It is contended that the police called the appellant in the police

station and challenged him. He invited attention of the Court to the statement of prosecutrix and contended that the prosecutrix left the house of her parents with her own will.

15. Having given my anxious consideration to the evidence on record, and in particular to the testimony of the prosecutrix, I find considerable merit in

the submission of the learned Amicus Curiae. Record reveals that although the prosecutrix, in her statement recorded before the Magistrate u/s 164 of

Cr.P.C. and before the trial court, has deposed that she went with the accused/appellant under threat but the fact remains that the prosecutrix has

disclosed to the Medical Officer that she had gone with the accused/appellant with her consent. Medical Officer Dr. Alpana Mishra, who conducted

medical examination of the prosecutrix, in the Description of incident in the words of the narrator, has recorded the version of the prosecutrix as

follows:

“As per Deepti,” She knows very well to Nihal because everyday she talk to Nihal by Phone. She wants to live with Nihal and because she love

him and she herself runaway with that boy.

Sexual contact with her consent.

16. As per own version of the prosecutrix, she travelled a number of cities with the appellant viz. Sitarganj, Delhi and Allahabad by bus and train and

remained in his company for a number of days, but it may be noted that she did not raise any hue or cry at any point of time neither while travelling

nor while staying with the accused/appellant. It is not the case of the prosecutrix that she was confined by the accused/appellant secretly in an isolated

place. According to the prosecutrix, during this period, she stayed in the house of accused friend and thereafter in Allahabad she stayed in a rented

accommodation amidst thick population but she never tried to flee away. This conduct of the prosecutrix also strengthens the fact that she was in love

affair with the appellant and she was the consenting party. Furthermore, one more thing which gives benefit to the accused is that the father of the

prosecutrix, at the very first instance, while submitting the missing report, had stated that the prosecutrix has gone somewhere from house without

telling anyone and that she has taken her clothes with her. This version made in the missing report also shows that prosecutrix voluntarily left the

house under a pre-planned scheme. Furthermore, from the medical report of the prosecutrix, no charge of rape is made out against the

accused/appellant. The prosecutrix in the medical report has disclosed to the Medical Officer regarding her consent and will in the incident, which was

recorded by the Medical Officer in the medical report, which this Court has already adverted to. Thus, it is established that the prosecution has utterly

failed to prove its case beyond reasonable doubt against the appellant that the prosecutrix was forcibly taken away by the appellant from the

guardianship of her parents and that she was confined secretly and was subjected to rape.

17. In support of age of the prosecutrix, prosecution produced Class V mark-sheet of the prosecutrix and the Pariwar Register, which reflects the

date of birth of the prosecutrix as 16.7.1997, according to which the prosecutrix was aged about 17 years and 4 months on the date of incident. Thus,

it can be safely concluded that the prosecutrix had attained the age of discretion and was on the verge of attaining majority on the date of incident.

She was not a child of tender years who was unable to think for herself. She was mature enough and was capable of knowing what was good and

what was bad for her.

18. Having re-appreciated the entire evidence on record, this Court is of the view that the prosecution has been miserably failed to prove the charge of

offence punishable under Sections 363, 365, 366 and 376 of IPC and Section 6 of POCSO against the appellant beyond reasonable doubt. The trial

court has not considered the prosecution evidence in proper perspective and has recorded its findings, thereby convicting and sentencing the appellant,

on the basis of presumption and surmises. Therefore, the impugned judgment and order is unsustainable in the eyes of law and is liable to set-aside.

19. Consequently, the criminal jail appeal is allowed. Impugned judgment and order dated 31.08.2015 passed by Special Judge,

POCSO/F.T.C./Additional Sessions Judge, Haldwani, Haldwani, District Nainital in S.T. No.15/2015, is hereby set-aside. Appellant Nihal Singh @

Naresh is acquitted of the charge framed against him. He is in jail. He shall be released forthwith if not wanted in any other case. His bail bonds are

cancelled and sureties are discharged.

20. Let a copy of this judgment be immediately sent to the Superintendent of Jail where the appellant is currently lodged as well as to the trial court,

for ensuring compliance.

21. Lower court record be also sent back.