

(2022) 12 SHI CK 0043

High Court Of Himachal Pradesh

Case No: Criminal Appeal No.578 Of 2019

Subhash Chand @
Bhashu

APPELLANT

Vs

State Of H.P

RESPONDENT

Date of Decision: Dec. 13, 2022

Acts Referred:

- Constitution Of India, 1950 - Article 21
- Code Of Criminal Procedure, 1973 - Section 107, 151, 161, 164, 313, 374(2)
- Protection Of Children From Sexual Offences Act, 2012 - Section 4, 6, 7, 9(m), 10
- Indian Penal Code, 1860 - Section 376, 506

Citation: (2022) 12 SHI CK 0043

Hon'ble Judges: Sabina, J; Sushil Kukreja, J

Bench: Division Bench

Advocate: Rajiv Rai, Divya Sood

Final Decision: Disposed Of

Judgement

Sushil Kukreja, J

1. The instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, lays challenge to judgment of conviction dated 31.08.2019 and

order of sentence dated 23.09.2019, passed by the learned Special Judge, Kangra at Dharamshala, in R.B.T No.57-B/VII/19/2016, titled State of

Himachal Pradesh Versus Subhash Chand alias Bhashu, whereby the appellant/accused was convicted for commission of the offence under Section

9(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the Act") and

Section 506 of the Indian Penal Code (for short, "IPC") and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of

Rs.50,000/- (rupees fifty thousand only) and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one year for

commission of the offence under Section 6 of the Act and he was further sentenced to undergo imprisonment for six months under Section 506 of

IPC.

2. Briefly stated the facts of the case are that on 14.07.2016, on receipt of a telephonic information from the complainant (name withheld) at Police

Station Baijnath, regarding committing of rape of her daughter by the accused, Inspector/SHO Kamal Kant, the Investigating Officer, alongwith other

police officials went to village (name withheld) and at the spot, he recorded the statement of the complainant, wherein she had stated that on

14.07.2016 at about 8: 00 a.m., when she left for work in the nearby area, her youngest daughter i.e. child victim was alone in the house as her other

two daughters had gone to Barot to the house of her parents and when she returned home in the evening at about 6:15 p.m., the child victim told her

that in the morning after she (complainant) left the house, while she was sitting on the entrance (Deodi) of the house, the accused came there,

dragged her inside to the room of the house and committed wrongful act with her and thereafter threatened to kill her if she disclosed the incident to

anyone.

3. On the basis of the statement of the complainant, FIR No.96, dated 14.07.2016, was registered against the accused at Police Station Baijnath,

District Kangra, H.P., under Section 4 of the Act and Sections 376 and 506 of IPC.

4. During investigation, the statement of the child victim was recorded and the Investigating Officer also moved an application before Ld. JMIC,

Baijnath for recording the statement of the child victim under Section 164 Cr.P.C., consequently the statement was recorded. The Investigating

Officer prepared the site plan of the spot, recorded statements of the witnesses and also got the child victim as well as the accused medically

examined.

5. On the completion of the investigation and receipt of the RFSL report, the Investigating Officer submitted the charge-sheet to the then SHO Duni

Chand, who presented the charge-sheet as well as the supplementary charge-sheet in the Court.

6. Vide order dated 29.08.2019, charge was framed by the learned trial Court against the accused under Section 9(m) punishable under Section 6 of

the Act and Section 506 of IPC, to which, the accused did not plead guilty and claimed trial.

7. In order to prove its case, the prosecution examined as many as 20 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C.,

wherein he denied all set of incriminating evidence led by the prosecution against him, besides pleaded that as he stood surety for father of the child

victim in a criminal case and when her father jumped over the bail, he used to visit the house of the child victim in search of her father, the mother of

the child victim used to threaten him not to search her husband, otherwise she would rope him in a false case. However, the accused did not examine

any witness in his defence.

8. On the basis of evidence led on record by the prosecution, the learned trial Court convicted the accused, vide the impugned judgment and sentenced

him as per the description given hereinabove.

9. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence passed by the learned trial Court, the appellant/accused

approached this Court by way of an appeal, praying therein for his acquittal after setting aside the aforesaid judgment of conviction and order of

sentence.

10. The learned counsel for the appellant contended that the charge against the accused has not been proved beyond reasonable doubt. He further

contended that the learned trial Court has not appreciated the statement of the child victim made under Section 164, Cr.P.C., wherein she had not

averred a single word with regard to penetrative sexual assault and, as such, the appellant was wrongly convicted for the offence of aggravated

penetrative sexual assault defined under Section 6 of the Act.

11. On the other hand, the learned Deputy Advocate General supported the judgment of the learned trial Court and contended that since the charge

against the accused has been duly proved by the prosecution beyond all reasonable doubt, the learned trial Court has rightly convicted him on the basis

of proper appreciation of evidence.

12. We have heard learned counsel for the appellant as well as the learned Deputy Advocate General and also gone through the record carefully.

13. The case of the prosecution mainly rests upon the statements of PW-2 Dr. Nandita Katoch, PW-3, the child victim, PW-4, mother of the child

victim and PW-18 Rashmi (friend of the child victim).

14. The child victim, while appearing in the witness-box as PW-3, deposed that on 14.07.2016 she alongwith her mother was at home as her other two

sisters had gone to the house of their maternal grandfather and at 8 a.m., her mother had gone for work and thereafter about 10-15 minutes of her

mother having left the house, the accused had come there while she was sitting on the 'Deodi' (entrance) of her house, he dragged her inside the

house from the 'Deodi' and in the room, he had opened his trousers/pyjamas and kept the same alongside the wall of the house and thereafter he had

opened her 'Salwar' and put his penis in her vagina, but he was not in a position to penetrate. The accused touched her private part with his penis and

in the meantime, some white material came out of his penis, which remained on her private part and then he told her not to disclose about this

happening to anyone and threatened to kill her in case she would disclose it to anyone. The child victim also deposed that in the meantime her friend

(PW-18) also came inside their house and after opening the door, she had seen her and the accused in a naked condition and then she had gone to

bring her maternal grandmother. At about 6 p.m., her mother (PW-4) came there and then she had narrated the incident to her also and thereafter her

mother had telephonically informed the police about the occurrence and the police had come to their house at about 8-8.30 p.m. Her mother had given

statement to the police about the occurrence and the police had also made enquiries from her about this occurrence and had taken her to the hospital

for her medical examination, but her medical could not be done on that night as no female medical officer was present in the hospital at Baijnath and

she was taken to Palampur, where her medical examination had been conducted during night time and on the next day, she had shown the place of

occurrence to the police and the police had taken the photographs Mark A-1 to Mark A-4 of that place and had also conducted videography of the

proceedings. The police had also taken her to the Court of Judicial Magistrate, who had recorded her statement Ext. PW3/A and the police had also

got her blood sample preserved from the spot.

15. PW-4, who is the mother of the child victim, deposed that on 14.07.2016 she had left the house at 8 a.m. to go to her place of work and the child

victim remained at home, as her other two daughters namely Nisha and Laxmi had gone to Barot to the house of her parents and when she had come

back at about 6 p.m., the child victim had met her on the road alongwith her friend Rashmi and her brother Rohit, who were grazing the animal, where

the child victim had told her that the accused had come to their house when she had left the house and taken the child victim inside the room,

undressed her Salwar and also undressed his pant and then he had tried to insert his private part in the private part of the child victim by making her

stand against the wall, but he could not penetrate his private part in her private part. At that time her daughter was about 11 years of age and the

accused was Ward Panch of the Panchayat. This witness further deposed that from the road she came to her house when the child victim had

disclosed to her about the occurrence and then from her house, she had gone to the house of the accused and had brought him to her house, where

she had asked him as to why he had tried to commit offence of rape with her daughter, on which, he had told that he had not done anything with her

daughter and thereafter he had left the place by saying that she could not dare to do anything against him, on which, she had telephonically informed

the police about the occurrence and thereafter the police had come to her house and recorded her statement Ex.PW4/A and during night, the police

had taken her alongwith her daughter to Civil Hospital, Baijnath for medical examination of her daughter, but the lady doctor was not there, therefore,

her medical examination could not be conducted and then the police had taken them to Civil Hospital, Palampur, where medical examination of her

daughter was conducted.

16. PW-18 Rashmi, who is the friend of the child victim, fully corroborated the statement of the child victim on material particulars. This witness

deposed that on 14th July, 2016 at around 8:10-8:15 a.m., she had gone to the house of child victim and saw that the accused was inside the room who

had put off his pant and the child victim was not wearing her salwar and thereafter she returned to the house of her Nani/maternal grandmother and

told her about the incident. She alongwith her Nani came to the house of the child victim, where the accused was standing on the door of the house

and the child victim was inside the room and after about 10-15 minutes, the accused came to her Nani's house and her Nani asked him whether he

had done any wrong act with the child victim and the accused told that he had done nothing. Thereafter, the child victim came to her Nani's house

and she asked her why she was not wearing the Salwar, on which, the child victim told that the accused had put off her Salwar and then done the

wrong act with her.

17. Dr. Nandita Katoch appeared in the witness box as PW-2 and deposed that on 15.07.2016 the victim was produced before her with the alleged

history of sexual assault by one Subhash Chand on 14.07.2016 at around 8 -10 a.m., when she was alone at her home. According to the victim, the

accused had come to her house when she was alone, he opened her clothes and his pyjamas and touched his private part with her private part and

masturbated in front of her, but no penetration was done and the accused had done similar activities earlier also (5-10 times) since last one year. This

witness has further deposed that on examination of the victim, no scratches, bruises and lacerations were found on her body and she had issued MLC

EX.PW-2/B. She had also referred the victim to dental examination for her age determination and on receipt of the RFSL report Ex.PX, she had

opined that the possibility of sexual assault cannot be ruled out.

18. The law on Section 376 of the IPC has been categorized and reiterated by the Courts time and again. Testimony of a victim of such an offence, if

found cogent and credible by itself, is sufficient to nail the accused. No other supportive evidence is required. A prosecutrix of a sex related offence

cannot be treated at par with an accomplice. She is in fact, a victim of the crime. She is undoubtedly, a competent witness and her evidence must

receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation

of her evidence, as in the case of an injured. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there

is no rule of law or practice that her statement requires corroboration.

19. The Rule of appreciation of evidence of prosecutrix in cases relating to sexual assault has been considered in several cases by Hon'ble Supreme

Court. In Dilip and another vs. State of M.P., (2001) 9 SCC 452, the Hon'ble Apex Court has held that prosecutrix in a sexual offence is not an

accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material

particulars. The relevant portion of the aforesaid judgment reads as under:-

“12. The law is well-settled that prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted

upon and made basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be

present to the mind of the Judge. In State of H.P. Vs. Gian Chand-, on a review of decisions of this Court, it was held that conviction for an offence

of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of

chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on.

20. In *Jugendra Singh Vs. State of UP*, (2012) 6 SCC 297, Hon'ble Apex Court has held that rape or an attempt to rape is a crime not against an

individual, but a crime which destroys the basic equilibrium of the social atmosphere. The relevant portion of the judgment reads as under:-

“49. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social

atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and

mars her reputation. It is said that one's physical frame is his or her temple. So, the courts should deal with such cases sternly and severely. No one

has any right of encroachment.

21. In *Lillu @ Rajesh & another Vs. State of Haryana*, (2013) 14 SCC 643, the Hon'ble Apex Court has observed that rape is violative of victim's

fundamental right under Article 21 of the Constitution, therefore, the courts should deal with such cases sternly and severely. The relevant portion of

the judgment is reproduced as under:-

12. In *State of Punjab v. Ramdev Singh*: AIR 2004 SC 1290, this Court dealt with the issue and held that rape is violative of victim's fundamental right

under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing

act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem

and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic

experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour,

reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against

basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.

22. In *State of Himachal Pradesh Versus Sanjay Kumar alias Sunny*, (2017) 2 Supreme Court Cases 51, the Hon'ble Supreme Court held that the

Courts should find no difficulty to act on the testimony of the victim of a sexual assault, if it inspires confidence and seeking corroboration to her

statement before relying upon the same would literally amount to adding insult to injury. The relevant portion of the judgement is reproduced as under:-

“31.....By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons

which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault

alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as

a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to

reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than

an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to

her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to

a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is

corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of

rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of

corroboration has no substance”

23. Therefore, the testimony of the child victim is required to be considered, keeping in mind these principles of appreciation of evidence of the rape

victim. We have minutely gone through the statement of the child victim and found the same to be trustworthy and confidence inspiring. Her statement

is consistent right from the time when she had made initial statement under Section 161, Cr.P.C. before the police and thereafter under Section 164

Cr.P.C. before the learned Judicial Magistrate 1st Class, Baijnath till the time of her deposition before the trial Court. Her statement is quite natural

and is also consistent with the case of prosecution. She was cross-examined at length by the learned defence counsel, however, nothing favourable

could be elicited from her lengthy cross-examination. She had successfully withstood the test of her cross-examination and there are no material

discrepancies and contradictions in her statement, which go to the root of the case or which may affect the core of prosecution case in any manner.

Even after being subjected to a lengthy cross-examination, the child victim's statement made in the examination-in-chief regarding sexual assault

made by the accused remained totally un-impeached. She emphatically denied all the suggestions put forth by the defence counsel to probabalise non-

complicity of the accused.

24. Learned counsel for the appellant has vehemently contended that there are material contradictions in the statement of the Child victim. However,

after going through her statement minutely, we could not find any material contradiction therein, which may affect the core of the prosecution case. In

Sham Singh Versus State of Haryana, (2018) 18 Supreme Court Cases 34, it has been held by the Hon'ble Supreme Court that\ while trying an

accused on charges of rape, the Courts should not get swayed by minor contradictions or insignificant discrepancies in the statement of the

prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. The relevant para of the judgement is reproduced as

under:-

“6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases

with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant

discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence

of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason

the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of

corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and

the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults.”

25. We may refer to a decision of the Apex Court in State of Andhra Pradesh vs. Gangula Satya Murthy, 1997(1) SCC 272, wherein it has been held

that the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies in the

statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. The relevant portion of the judgment reads as under:-

27”.....Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost

sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies In

the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more Important because of late crime

against women in general and rape in particular is on the Increase. It Is an irony that while we are celebrating woman's rights in all spheres, we show

little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost

sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation"".

26. The minor contradictions, which have been pointed out by the learned counsel for the appellant, are of no consequence as they do not go to the

heart of the matter and shake the basic version of the prosecution case. We have also gone through the statement of the accused under Section 313,

Cr.P.C., wherein he stated that he had been falsely implicated in the case as he stood surety for father of the child victim in a criminal case and when

her father jumped over the bail, he used to visit the house of the child victim in search of her father, then the mother of the child victim used to

threaten him not to search her husband, otherwise she would rope him in a false case. However, he did not lead any evidence in his defence, despite

opportunity granted to him. We have also examined the statement of child victim as well the other prosecution witnesses to satisfy ourselves as to

whether there was any likelihood of false implication or motive of false accusation. However, except for the bald statement of the accused under

Section 313, Cr.P.C., no witness has been examined by him that may probabalise that the parents of the child victim had motive to falsely implicate the

accused. The accused had placed on record various documents Ext.D-1 to D-10, pertaining to the proceedings before the SDM, Baijnath, initiated on

17.01.2016 under Section 107/151, Cr.P.C., in which the accused stood surety for the father of the child victim. It may not be out of place to mention

here that the proceedings under Section 107/151, Cr.P.C. automatically come to an end within a period of six months from the date of initiation of the

proceedings and when the incident had taken place on 14.07.2016, by that time, the period of six months had already elapsed. From the perusal of the

proceedings, it appears that though the father of the child victim did not appear in the Court of SDM, Baijnath, but no notice had been issued to the

accused to produce the father of the child victim, which could show that the accused was directed by the Court of SDM, Baijnath to produce the

father of the child victim for which he had been visiting her house. There is no material on record to show that any punitive action was taken against

the accused by the Court of SDM, Baijnath. Even if the defence of the accused is accepted that he had been directed by the SDM, Baijnath to

produce the father of the child victim, in which the accused stood surety by executing bond in the sum of Rs.5,000/-, the same cannot be a ground to

falsely implicate him as for such a meagre amount of Rs.5,000/-, the complainant would not have implicated the accused in a case of this nature by

putting the reputation of her daughter at stake.

27. The learned counsel for the appellant lastly contended that the learned trial Court has wrongly convicted the appellant for the offence of

aggravated penetrative sexual assault defined under Section 6 of the Act as the entire statement of the child victim, coupled with the medical evidence

shows that the accused had only touched the private part of the child victim with his private part and there was no penetration of his penis into her

vagina. This contention of the learned counsel for the appellant deserves to be accepted as while appearing in the witness-box as PW-3, the child

victim categorically stated that the accused while entering inside the room, had opened his trousers/pyjamas and thereafter opened her salwar and had

put his penis in her vagina, but he was not in a position to penetrate and he had also touched her private part with his penis and in the meantime, some

white material came out of the penis of the accused.

28. The medical evidence lends support to the aforesaid statement of the child victim as the Medical Officer, who appeared in the witness-box as

PW-2, also deposed that when the child victim was brought for medical examination, the child victim disclosed to her that the accused had opened her

clothes and touched his private part with her private part and masturbated in front of her and no penetration was done. She had also stated that on

examination, no scratches, bruises and lacerations were found on the body of the child victim and the hymen was found intact and she had issued

MLC Ext.PW2/B. As per RFSL report Ext. PX, blood and semen were not detected in the vaginal smear slides and vaginal swabs of the child victim.

At this stage, it would be relevant to refer to Section 7 of the Act, which reads as under:-

“7. Sexual assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis,

anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said

to commit sexual assault.

29. Since the evidence on record shows that the accused had touched the private part of the child victim with his private part with sexual intent and

the same involved physical contact without penetration, hence, the accused had committed sexual assault on the child victim within the definition of

sexual assault as per Section 7 of the Act .

30. Now the next question, which arises for consideration, is as to what was the age of the child victim at the time of the occurrence. PW-2 Dr.

Nandita Katoch had referred the child victim for dental examination for her age determination. PW-16 Dr.Kalpana Mahajan, Radiologist, deposed that

on 15.07.2016 the child victim was referred to her for ossification test and as per test and X-Ray reports, the age of the child victim was between

8½ to 12½ years and to this effect, she had issued report Ext.PW16/A. The mother of the child victim, while appearing on the witness-box as PW-

4, disclosed that at the relevant time, the age of the child victim was 11 years. PW-5, the then Up-pradhan of the Gram Panchayat, stated that as per

birth entry recorded in the register Ext. PW5/A, the date of birth of the child victim was recorded as 22.11.2005. PW-11, the then Secretary of the

Gram Panchayat, deposed that he had issued the date of birth certificate of the child victim Ext. PW11/B as per record and as per this certificate, the

date of birth of the child victim was 22.11.2005. Thus, the perusal of date of birth certificate of the child victim Ext.PW11/B shows that her date of

birth was 22.11.2005. The date of occurrence was 14.07.2016, meaning thereby that at the time of the occurrence, the age of the child victim was

about 10 years and 8 months and, as such, she was below 12 years of age at the time of the incident. As per Section 9(m) of the Act, whoever

commits sexual assault on a child below twelve years will come under the definition of aggravated sexual assault. Thus, the perusal of the entire

evidence on record shows that the accused had committed aggravated sexual assault on the child victim within the definition of Section 9(m) of the

Act punishable under Section 10 of the Act.

31. Consequently, in view of the detailed discussion made hereinabove, the judgment of conviction dated 31.08.2019 and order of sentence dated

23.09.2019 passed by the learned trial Court is modified to the extent that the accused is found guilty of having committed the offence of aggravated

sexual assault and, as such, he is convicted under Section 10 of the Act and Section 506 of IPC and sentenced to undergo rigorous imprisonment for

seven years and to pay a fine of Rs.10,000/- (rupees ten thousand only) and in default of payment of fine, he shall further undergo rigorous

imprisonment for a period of one year under Section 10 of the Protection of Children from Sexual Offences Act, 2012 and he is further sentenced to

undergo imprisonment for six months under Section 506 of the Indian Penal Code. Both the sentences shall run concurrently.

32. Accordingly, the appeal is disposed of in the above terms. Pending miscellaneous application(s), if any, shall also disposed of.