
(2016) 03 SHI CK 0119

High Court of Himachal Pradesh

Case No: Cr. Appeal No. 412 of 2008

State of H.P.

APPELLANT

Vs

Sri Ram son of Roop
Lal

RESPONDENT

Date of Decision: March 22, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154
- Penal Code, 1860 (IPC) - Section 341, 342, 376, 506

Citation: (2016) ILRHP 854

Hon'ble Judges: Sanjay Karol and P.S. Rana, JJ.

Bench: Division Bench

Advocate: Mr. V.S. Chauhan, Addl. Advocate General with Mr. Kush Sharma, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General, for the Appellant; Mr. Anand Sharma, Advocate and Ms. Ranjana Parmar, Senior Advocate as Amicus Curiae, for the Respon

Final Decision: Disposed Off

Judgement

P.S. Rana, J.—Present appeal is filed against the judgment dated 4.1.2008 passed by learned Sessions Judge Bilaspur District Bilaspur HP in sessions trial No. 41 of 2005 titled State of HP v. Siri Ram.

Brief facts of prosecution case:

2. Brief facts of the case as alleged by prosecution are that on dated 19.11.2004 at about 3.30 PM at village Patta police station sadar District Bilaspur minor prosecutrix aged nine years was on her way and accused aged twenty three years wrongfully and illegally restrained minor prosecutrix from proceeding further and thereafter accused illegally and wrongfully confined minor prosecutrix aged nine years in his house. It is further alleged by prosecution that accused made attempt to commit rape of minor prosecutrix aged nine

years and also intimidated minor prosecutrix to cause her death. It is further alleged by prosecution that FIR Ext PW7/A was filed and minor prosecutrix was medically examined by PW1 Dr. Savita Mehta and MLC Ext PW1/A was issued. It is further alleged by prosecution that site plan was prepared. It is further alleged by prosecution that clothes of minor prosecutrix salwar Ext PW2 and shirt Ext PW3 took into possession vide seizure memo Ext PW5/A. It is further alleged by prosecution that birth certificate of minor prosecutrix obtained. It is further alleged by prosecution that medical examination of accused was conducted and MLC of accused is Ext PW2/A. Learned trial Court framed charges against accused on 28.9.2006 under Sections 341, 342, 506 and 376 IPC read with Section 511 IPC. Accused did not plead guilty and claimed trial.

3. Prosecution examined thirteen oral witnesses and also tendered documentary evidence. Accused also examined one oral witness in his defence. Learned trial Court acquitted the accused.

4. Feeling aggrieved against the judgment passed by learned trial Court, appellant State of HP filed present appeal.

5. We have heard learned Additional Advocate General appearing on behalf of State and learned Advocate appearing on behalf of accused and also gone through the entire record carefully.

6. Following points arise for determination in present appeal:

1. Whether appeal filed by State is liable to be accepted and whether learned trial Court did not appreciate oral as well as documentary evidence placed on record properly and whether learned trial court caused miscarriage of justice and whether judgment of learned trial Court is perverse as alleged in memorandum of ground of appeal?.

2. Final order.

7. Findings on point No.1 with reasons:

7.1 PW1 Dr. Savita Mehta has stated that she is posted as medical officer in regional hospital Bilaspur since 1996. She has stated that on 24.11.2004 at 10.30 AM she examined minor prosecutrix aged nine years resident of village Patta District Bilaspur. She has stated that prosecutrix was conscious and normal. She has stated that there was no mark of injury on the body of minor prosecutrix and there was no mark of injury on private parts of minor prosecutrix and hymen of minor prosecutrix was intact. She has stated that there was no possibility of penetration. She has stated that she identified minor prosecutrix in Court. She has stated that she issued MLC Ext PW1/A.

7.2. PW2 Dr. Satish Sharma has stated that he is posted as medical officer in regional hospital Bilaspur HP since 2001. He has stated that on dated 25.11.2004 at about 5.10 PM he examined accused Siri Ram son of Roop Lal aged 23 years. He has stated that he

identified accused in Court. He has stated that pubic hairs of accused was fully grown, genitals well developed. He has stated that there was no bite marks or scratch marks on the body of accused. He has stated that there was no smegma found on glans of accused. He has stated that there is no evidence to suggest that accused could not perform sexual act. He has stated that he issued MLC Ext PW2/A.

7.3 PW3 Mehar Chand Sub Registrar gram panchayat Kallar has stated that he was associated in investigation of case. He has stated that date of birth certificate of minor prosecutrix is Ext PW3/A and the same is correct as per original record. He has stated that he could not state on which date the entry of minor prosecutrix was entered in birth register.

7.4. PW4 Shankuntala Devi has stated that she is posted as head teacher in Government primary school Patta since November 2003 and she was associated in investigation of case. She has stated that she has brought original register of admission and withdrawal of students. She has stated that minor prosecutrix was admitted in Government primary school on 16.4.2001 and her date of birth is 24.2.1996. She has stated that she issued certificate Ext PW4/A.

7.5 PW5 Chet Ram has stated that he remained associated with police. He has stated that in his presence mother of minor prosecutrix produced clothes which were sealed in a parcel. He has stated that shirt of minor prosecutrix is Ext P2 and salwar is Ext P3. He has stated that shirt and salwar of minor prosecutrix took into possession vide memo Ext PW5/A which bears his signature.

7.6 PW6 Balbir Singh has stated that he partly investigated the case. He has stated that during investigation he obtained date of birth certificate of minor prosecutrix from Secretary gram panchayat Kallar. He has stated that he did not try to ascertain the entries in whose handwriting the entry was made.

7.7. PW7 minor prosecutrix has stated that in the year 2004 she was student of class IV. She has stated that on 19.11.2004 she returned from school along with her younger brother Adarsh at about 3.30 PM. She has stated that when she returned home from school along with her younger brother then her mother had gone to cut grass in the field and her father was also not present in home and was out of residential house in connection with his work. She has stated that after dropping school bags in residential house she and her brother were in the process to move towards fields where her mother had gone to cut grass. She has stated that when he and her brothers were proceeding towards fields then accused present in Court came from behind and caught her arm and took her inside the room of accused situated on the ground floor of house. She has stated that thereafter accused asked her brother Adarsh to bring water which he brought. She has stated that thereafter accused asked her brother Adarsh to leave the place and change his school uniform. She has stated that thereafter her brother left the place and thereafter accused bolted the door of room from inside. She has stated that thereafter

accused aged twenty three years opened his pant and underwear and thereafter opened her salwar. She has stated that thereafter accused laid upon her and started performing indecent activities. She has stated that thereafter she started crying and in the meanwhile someone knocked the door of room from outside. She has stated that accused threatened her to kill her in case she would narrate the incident to anybody. She has stated that thereafter accused put up his clothes and she also put up her salwar. She has stated that thereafter accused opened the door. She has stated that outside the door one Hariya electrician was present. She has stated that thereafter she came back to her house. She has stated that after four days she told her mother about the incident. She has stated that she was brought to police station and FIR Ext PW7/A was lodged. She has stated that she was medically examined in District hospital Bilaspur. She has stated that MLC Ext. PW1/A was prepared which bears her signature. She has stated that her mother had produced her salwar Ext 2 and shirt Ext P3 to investigating agency. She has identified her salwar Ext P2 and shirt Ext P3 in Court. She has denied suggestion that in the evening on 19.11.2004 the mother of accused was also called. She has denied suggestion that on 23.11.2004 her parents had quarrelled with accused and his parents regarding tethering of cattle. She has denied suggestion that accused did not touch any part of her body. She has denied suggestion that she had not gone to see her mother in the fields. She has denied suggestion that accused had not caught her from arms. She has denied suggestion that accused did not take her inside the room. She has denied suggestion that her family members have a dispute with the father of accused relating to house in abadi. She has denied suggestion that at the instance of her family members she has filed a false case against accused. She has stated that she did not disclose to Hariya because accused had threatened to kill her if she would disclose the incident to anyone. She has stated that after four days the fear of threat went away automatically.

7.8 PW8 Rattani Devi has stated that she has two children. She has stated that the age of minor prosecutrix is 11 years and the age of her son Adarsh is nine years. She has stated that on 23.11.2004 minor prosecutrix told her that on 19.11.2004 when she came from school along with her brother Adarsh at about 3.30 PM then minor prosecutrix found none in her residential house. She has stated that after dropping school bag in the residential house minor prosecutrix along with her brother Adarsh were proceeding towards fields where she was cutting grass. She has stated that when minor prosecutrix was proceeding accused caught arms of minor prosecutrix and took minor prosecutrix inside room situated on the ground floor of house of accused. She has stated that inside the room accused asked brother of minor prosecutrix Adarsh to bring water and thereafter Adarsh brought water. She has stated that thereafter accused asked minor Adarsh to change his school uniform and thereafter minor Adarsh left the place of incident. She has stated that when minor Adarsh left the place of incident then accused bolted the door of room from inside. She has stated that thereafter accused aged twenty three years opened his pant and underwear and thereafter opened salwar of minor prosecutrix aged nine years. She has stated that thereafter accused aged twenty three years laid upon the body of minor prosecutrix aged nine years and started performing indecent activities. She

has stated that thereafter prosecutrix cried and raised alarm and in the meantime one Hariya electrician knocked the door of residential house of accused. She has stated that accused threatened minor prosecutrix not to narrate the incident to anybody otherwise minor prosecutrix would face dire consequences. She has stated that thereafter accused and prosecutrix put up their clothes and thereafter accused opened the door. She has stated that prosecutrix did not narrate incident prior to 23.11.2004 due to fear. She has stated that she narrated incident to her husband and thereafter went to police station and FIR Ext PW7/A was recorded. She has stated that minor prosecutrix was also medically examined. She has stated that she produced salwar Ext P2 and shirt Ext P3. She has stated that Devi Ram and Lekh Ram are real brothers. She has stated that Devi Ram is the grand father of accused and Lekh Ram is her father-in-law. She has stated that half share of house situated on abadi-deh is owned by her relative and half share is owned by the father of accused. She has denied suggestion that on 23.11.2004 there was a fight between the families of accused. She has denied suggestion that in order to pressurise the family of accused false case is planted against accused.

7.9 PW9 Vijay Pal has stated that on 23.11.2004 when he reached at home during evening from Nalagarh his wife told him about the incident occurred on 19.11.2004. He has stated that when minor prosecutrix came from school at about 3.30 PM along with her brother Adarsh minor prosecutrix did not found her mother in house and thereafter minor prosecutrix after dropping her school bag in residential house proceeded towards field where his wife was cutting grass. He has stated that when minor prosecutrix was on the way she was caught by accused and was brought in the room of accused. Thereafter accused asked minor brother of minor prosecutrix to bring water and thereafter asked minor brother of prosecutrix to leave the place and to change his school uniform. He has stated that when minor brother of minor prosecutrix left the place of incident thereafter accused bolted the room from inside and thereafter accused opened his pant and underwear and thereafter accused opened salwar of minor prosecutrix and laid upon her. He has stated that when prosecutrix cried then someone knocked door from outside. He has stated that accused threatened minor prosecutrix not to disclose the incident to anyone otherwise minor prosecutrix would face dire consequences. He has stated that thereafter accused put up his clothes and minor prosecutrix put her salwar and thereafter accused opened the door. He has stated that one Hariya electrician was standing outside the room of accused. He has stated that FIR Ext PW7/B was filed in police station. He has stated that minor prosecutrix was also medically examined. He has stated that investigating agency also investigated the place of incident. He has denied suggestion that quarrel took place on 23.11.2004. He has denied suggestion that after filing FIR he pressurised the father of accused to vacate the possession of joint house. He has denied suggestion that no incident took place on 19.11.2004. He has denied suggestion that false FIR was filed against accused.

7.10. PW10 Hari Ram has stated that on 19.11.2004 at about 3.34 PM he went to remove electric fault in the house. He has stated that accused present in court was present at the

place of incident. He has stated that minor prosecutrix was also present. He has stated that father of accused is T-mate in the electricity department. He has denied suggestion that he did not knock the door. He has denied suggestion that door was not opened by accused. He has stated that when he was cited as prosecution witness he filed an affidavit in Hon^{ble} High Court of HP in bail proceedings filed by accused.

7.11 PW11 minor Adarsh aged eight years has stated that on dated 19.11.2004 at about 3.30 PM he reached his house along with minor prosecutrix. He has stated that there was none in the residential house because his mother had gone to field and his father was away in connection with his work. He has stated that after dropping school bag in residential house he and minor prosecutrix proceeded towards fields where his mother had gone. He has stated that when he and minor prosecutrix were proceedings towards fields then accused present in Court caught minor prosecutrix from her arm and took her inside room. He has stated that accused asked him to bring water and thereafter he brought water and thereafter accused asked him to leave the place and to change his school uniform. He has stated that thereafter he came out from room of accused and started playing. He has denied suggestion that on reaching house from school students of village Patta started playing in the court yard. He has stated that the house of accused aged twenty three years is adjacent to the house of minor prosecutrix. He has denied suggestion that there is dispute relating to house which is in the possession of family members of accused. He has denied suggestion that on 23.11.2004 there was dispute between his family and the family of accused relating to tethering of cattle. He has denied suggestion that he deposed falsely at the instance of his mother.

7.12. PW12 Bansi Lal has stated that in the year 2004 he was posted as Sub Inspector in police station sadar Bilaspur HP. He has stated that minor prosecutrix aged nine years came to police station along with her parents and FIR Ext. PW7/A was recorded. He has stated that after registration of case investigation was conducted. He has stated that he filed application for medical examination of minor prosecutrix aged nine years and he also visited the spot and prepared site plan Ext PW12/B. He has stated that salwar and shirt were took into possession vide memo Ext PW5/A. He has stated that shirt Ext P2 and salwar Ext P3 were produced by Rattani Devi. He has stated that sample of seal was took on a piece of cloth. He has stated that application for medical examination of accused was filed. He has stated that underwear of accused took into possession. He has stated that record relating to birth of minor prosecutrix also obtained. He has denied suggestion that false case has been filed against accused. He has stated that FIR was recorded by him. He has stated that he does not know that complainant party has quarreled with accused parents.

7.13 PW13 Inspector Manoj Kumar has stated that from September 2004 till April 2007 he remained posted as SHO police station sadar Bilaspur HP. He has stated that on receipt of FSL report Ext PW13/A final report under Section 173 Cr.PC was prepared by him and challan was presented in Court. He has stated that he does not remember that Sukh Dei filed rapat No.11 mark D1 in police station.

8. Following documentaries evidence produced by prosecution. (1) Ext PW1/A is medical report of minor prosecutrix aged nine years. (2) Ext PW2/A is the MLC of accused aged twenty three years (3) Ext PW3/A is the certificate issued by sub registrar gram panchayat wherein it has been specifically mentioned that prosecutrix was born on 24.2.1996 (4) Ext PW4/A is the certificate issued by head master Government primary school Patta relating to minor prosecutrix wherein it has been specifically mentioned that prosecutrix was born on 24.2.1996.(5) Ext PW5/A is the seizure memo of clothes of minor prosecutrix aged nine years i.e. shirt and salwar. (6) Ext PW7/A is the FIR. (7) Ext PW12/A is the application filed by investigating officer for medical examination of prosecutrix aged nine years. (8) Ext PW12/B is the site plan of the place of incident. (9) Ext PW12/C is the application filed by investigating officer for medical examination of accused (10) Mark D1 is the copy of rapat No.11 dated 24.11.2004 filed by Smt. Sukh Dei wife of Roop Lal. (11) Ext DA is the statement of Meena Kumari. (12) Ext PW13/A is the report of chemical analyst. (13) Ext D1 is the proceeding of gram panchayat dated 25.12.2004.

9. Statement of accused recorded under section 313 Cr.PC. He has stated that abadi deh land measuring 1.4 bigha is in the name of Lekh Ram grand father of minor prosecutrix in revenue record. He has further stated that house has been constructed by his father upon land which is in the ownership of Lekh Ram grand father of minor prosecutrix. He has stated that there is dispute upon abadi deh land. He has stated that on 23.11.2004 family members of prosecutrix gave beatings to his mother in the evening and a report in this regard was lodged in police station sadar Bilaspur HP. He has stated that he has been falsely implicated in present case.

10. DW1 Roop Lal father of accused has stated that accused is his son. He has stated that name of his grand father was Massadi Ram. He has stated that Massadi Ram died in the year 1974. He has stated that property of Massadi Ram was inherited by his three sons namely Lehnu, Devi Ram, Lekh Ram and his daughter Bhutto Devi and widow Banjaru Devi in equal shares. He has stated that consolidation proceedings took place in the year 1978-79. He has stated that his uncle Lekh Ram was literate person and consolidation proceedings conducted in his presence. He has stated that during consolidation proceedings Lekh Ram got entered khasra No. 105 in his name and in name of Banjaru Devi and Bhutto Devi. He has stated that two storeyed building belonging to joint family is situated in khasra No. 105. He has stated that all members of joint family are residing in the same building since long time. He has stated that he is in possession of 1/3rd share of building. He has stated that in lieu of land comprising in khasra No. 105 no other land was allotted to his father Devi Ram. He has stated that in November 2004 Lekh Ram and his family members asked him to vacate the possession from building situated in khasra No. 105. He has stated that in November 2004 he came to know that land comprising in khasra No. 105 has also been entered in the name of Banjaru and Bhutto Devi. He has stated that Lekh Ram claimed that Banjaru had given her share to Lekh Ram vide Will. He has stated that Bhutto Devi was also called in the

village and she was asked to relinquish her share in favour of Lekh Ram. He has stated that Lekh Ram asked his father Devi Ram to vacate the possession of house and his father refused to do so. He has stated that complainant party Lekh Ram quarreled with them w.e.f. 19.11.2004 till 23.11.2004. He has stated that on 23.11.2004 his wife Sukh Dei and his son Siri Ram were beaten by Lekh Ram and his family members. He has stated that report was lodged. He has stated that police did not take any action and on the contrary counter case was registered against his son. He has stated that Lekh Ram is harassing his family members and panchayat was also convened and document Ext D1 was prepared. He has stated that Lekh Ram has filed false case against his son in order to compel him to vacate his possession from building situated in khasra No. 105. He has stated that during trial Lekh Ram continued to compel him and his father to vacate the possession of house but they have refused to do so. He has denied suggestion that on 19.11.2004 when minor prosecutrix was proceeding with her minor brother towards fields then accused caught minor prosecutrix from her arms and took her inside the room situated in the ground floor of house of accused. He has denied suggestion that minor brother of minor prosecutrix was asked to bring water. He has denied suggestion that after bringing water accused asked minor brother of minor prosecutrix to leave the place and to change his school uniform. He has denied suggestion that accused bolted the door of room from inside and thereafter opened his pant and underwear. He has denied suggestion that thereafter accused opened salwar of minor prosecutrix and committed indecent activities with the intention to commit rape. He has denied suggestion that one Hariya electrician came in the house of accused and knocked the door. He has denied suggestion that thereafter accused put up his clothes and threatened minor prosecutrix not to disclose the incident to anybody. He has admitted that victim was medically examined. He has admitted that accused was also medically examined. He has denied suggestion that being father of accused he deposed falsely in Court.

11. Submission of learned Additional Advocate General appearing on behalf of appellant that learned trial Court has not properly appreciated oral as well documentary evidence placed on record and miscarriage of justice has been caused to minor victim aged nine years who was student of 4th class at the time of incident and submission of learned Additional Advocate General that judgment of learned trial Court is perverse is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of minor prosecutrix aged nine years. PW7 minor prosecutrix has specifically stated in positive manner that in the year 2004 she was student of 4th class and on dated 19.11.2004 when minor prosecutrix aged nine years returned from school along with minor brother Adarsh at 3.30 PM there was none in her residential house because her mother had gone to cut grass in the fields and her father was also away in connection with his work. PW7 minor prosecutrix aged nine years has specifically stated that after dropping her school bag in residential house she and her minor brother Adarsh proceeded towards fields where her mother had gone to cut grass. PW7 minor prosecutrix has stated in positive manner that accused came from behind and caught arms of minor prosecutrix aged nine years and took minor prosecutrix inside his room situated in ground floor as mentioned in site plan

Ext PW12/B placed on record. PW7 minor prosecutrix further stated in positive manner that accused asked her minor brother Adarsh to bring water which he brought and thereafter accused consumed water and asked her minor brother Adarsh to leave the place and to change his school uniform. PW7 minor prosecutrix has specifically stated in positive manner that when her minor brother Adarsh went out of room then accused bolted door of room from inside and thereafter accused opened his pant and underwear and then opened salwar of minor prosecutrix. PW7 minor prosecutrix has specifically stated that thereafter accused laid upon her and started performing indecent activities. Minor prosecutrix has specifically stated that thereafter she started crying and in the meantime someone knocked door from outside and thereafter accused threatened minor prosecutrix not to disclose the incident to anybody otherwise he would kill minor prosecutrix. Minor prosecutrix has specifically stated that thereafter accused put up his clothes and thereafter minor prosecutrix also put up her salwar and thereafter door was opened and one Hariya electrician was present. Testimony of minor prosecutrix is trustworthy, reliable and inspires confidence of Court. In the present case incident took place inside the four walls of room and the testimony of minor prosecutrix is very material. There is no positive evidence on record that minor prosecutrix was tutored by any person. There is no reason to disbelieve the testimony of minor prosecutrix.

12. Testimony of minor prosecutrix is further corroborated by minor witness PW11 Adarsh aged eight years. PW11 Adarsh minor witness has specifically stated in positive manner that on dated 19.11.2004 at about 3.30 PM he reached his house along with minor prosecutrix and there was none in the residential house because mother of minor prosecutrix had gone to field and father of minor prosecutrix was away in connection with some work. PW11 Adarsh minor witness has stated in positive manner that he and minor prosecutrix after dropping their school bags in residential house moved towards the fields where their mother had gone. PW11 minor Adarsh has stated in positive manner that accused present in Court caught hold the arms of minor prosecutrix and took minor prosecutrix inside the room and asked him to bring water. PW11 minor Adarsh has specifically stated that thereafter he brought water and thereafter accused asked him to leave the place of incident. Testimony of minor prosecutrix that accused caught hold of minor prosecutrix from her arms and took her inside the room of accused is duly corroborated by testimony of PW11 Adarsh. Testimony of PW11 is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor witness PW11. There is no positive evidence on record in order to prove that PW11 Adarsh was tutored by any relatives.

13. Testimony of minor prosecutrix aged nine years is also corroborated by PW8 Rattani Devi mother of prosecutrix. PW8 has specifically stated in positive manner that accused caught hold minor prosecutrix from her arms and thereafter took minor prosecutrix inside the room and thereafter bolted room from inside and thereafter accused opened his pant and underwear and also opened salwar of minor prosecutrix and thereafter laid upon minor prosecutrix and started performing indecent activities. Testimony of PW8 Rattani

Devi is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW8 Rattani Devi who is the mother of minor prosecutrix.

14. Testimony of minor prosecutrix is also further corroborated by PW9 Vijay Pal who is the father of minor prosecutrix. PW9 Vijay Pal has stated in positive manner that on 19.11.2004 at about 3.30 PM accused caught minor prosecutrix from her arms and took minor prosecutrix inside the four walls of room and thereafter bolted the room from inside. PW9 Vijay Pal has specifically stated in positive manner that thereafter accused opened his pant and underwear and opened the salwar of minor prosecutrix and thereafter started performing indecent activities. Testimony of PW9 Vijay Pal is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve testimony of PW9 Vijay Pal.

15. Testimony of minor prosecutrix is also partly corroborated by PW10 Hari Ram who has specifically stated in positive manner that on 19.11.2004 at about 3.30 PM he had gone to repair electric fault in the house of accused. He has specifically stated that accused and minor prosecutrix were present in the house and he obtained a screw driver from minor prosecutrix.

16. Submission of learned Advocate appearing on behalf of accused that there is delay of four days in filing FIR and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In the present case victim was minor aged nine years and was student of 4th class at the time of incident. PW7 minor prosecutrix has specifically stated when she appeared in witness box that accused had threatened minor prosecutrix not to disclose the incident to anybody otherwise accused would kill minor prosecutrix. In view of the fact that fear was given to minor prosecutrix not to disclose incident to anybody and in view of the fact that minor prosecutrix was aged nine years and was student of 4th class at the time of incident we are of the opinion that delay in lodging FIR has been satisfactorily explained by prosecution.

17. Submission of learned Advocate appearing on behalf of accused that there is dispute between complainant party and accused family members relating to land situated in khasra No. 105 and due to enmity a false criminal complaint filed by minor prosecutrix is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that civil dispute and criminal dispute are independent disputes. It is well settled law that civil dispute is two edged weapons and same can be used by accused also upon minor prosecutrix in order to spoil the life of minor prosecutrix. In the present case criminal offence as alleged by prosecution is proved beyond reasonable doubt as per testimony of oral witnesses and as per documentaries evidence placed on record.

18. Submission of learned Advocate appearing on behalf of accused that independent witness namely PW10 Hari Ram did not support prosecution story and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons

hereinafter mentioned. We have carefully perused testimony of PW10 Hari Ram. It is proved on record that PW10 Hari Ram was posted in electricity department and it is also proved on record that the father of accused was also posted as T-mate in electricity department. It is proved on record that PW10 Hari Ram independent witness and father of accused were posted in same department at the time of incident. It is proved on record that even PW10 Hari Ram has given an affidavit in favour of accused during bail proceeding before Hon^{ble} High Court of HP. We are of the opinion that it is not the case of prosecution that PW10 is the eye witness of incident but on the contrary it is the case of prosecution that incident took place inside the four walls of room after bolting the door of room from inside by accused. Eye witness of the incident is only prosecutrix and accused because only minor prosecutrix and accused were present inside the four walls of room which was bolted from inside by accused. PW10 Hari Ram was not inside the four walls of room which was bolted from inside when alleged incident was committed by accused. On the contrary it is the case of prosecution that PW10 was standing outside the room which was bolted from inside. PW10 has admitted the presence of minor prosecutrix along with accused at the place of incident.

19. Submission of learned Advocate appearing on behalf of accused that in view of document mark "D" whereby rapat No. 11 dated 24.11.2004 was filed by Smt. Sukh Dai wife of Roop Lal appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the contents of rapat No.11 dated 24.11.2004. Rapat No. 11 dated 24.11.2004 was filed against Meena wife of Kuldip and Rattani wife of Vijay Pal. There is no evidence on record that Meena wife of Kuldip and Rattani Devi wife of Vijay Pal were convicted by competent Court of law on the basis of rapat No.11 dated 24.11.2004. We are of the opinion that mere filing of rapat No.11 dated 24.11.2004 by Sukh Dai against Meena wife of Kuldip and Rattani Devi wife of Vijay Pal will not exonerate accused qua criminal offence committed by accused upon minor prosecutrix prior to time of rapat No.11 dated 24.11.2004. Rapat No. 11 dated 24.11.2004 was not filed against minor prosecutrix but it was filed against Meena and Rattani Devi. Meena and Rattani Devi is not victim in the present case. In the present case victim is minor prosecutrix who was aged nine years and was student of 4th class at the time of incident. The age of the accused at the time of incident was twenty three years. We are of the opinion that major person cannot be allowed to commit sexual assault upon minor prosecutrix aged nine years otherwise anarchy would prevail in the society. We are of the opinion that rapat No. 11 dated 24.11.2004 and FIR No. 375 of 2004 dated 23.11.2004 were filed relating to different incidents and they could not be clubbed together. We are of the opinion that rapat No. 11 dated 24.11.2004 was filed subsequent to FIR No. 375/2004. It is proved on record that FIR No. 375 of 2004 Ext PW7/A was filed by minor prosecutrix on dated 23.11.2004 prior to rapat No. 11 dated 24.11.2004. In view of the fact that rapat No. 11 dated 24.11.2004 was filed relating to different incident subsequently to FIR No. 375/2004 dated 23.11.2004 it is not expedient in the ends of justice to dismiss the appeal filed by State simply on the ground that rapat No. 11 dated 24.11.2004 was filed by Smt. Sukh Dai against Meena Devi and Rattani

Devi.

20. Submission of learned Advocate appearing on behalf of accused that in view of document Ext D1 dated 25.12.2004 placed on record appeal filed by State be dismissed is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused document Ext D1. The signatories of document Ext D1 are not eye witnesses of incident of sexual assault upon minor prosecutrix aged nine years. In view of the fact that signatories of document Ext D1 are not eye witnesses of sexual assault upon minor prosecutrix it is not expedient in the ends of justice to dismiss the appeal filed by State simply on the ground of contents of document Ext D1 placed on record. It is well settled law that under Section 67 of Indian Evidence Act 1872 contents of document should be proved by way of testimony of person who is signatory to document. Accused did not examine any person in court who is signatory to document Ext D1.

21. Submission of learned Advocate appearing on behalf of accused that there are material contradictions and improvements in prosecution story and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimonies of oral eye witnesses examined by prosecution. There is no material contradiction in the testimony of prosecution witness which goes to the root of case. It is well settled law that minor contradictions are bound to come in a criminal case when the testimony of prosecution witnesses recorded after a gap of sufficient time. In the present case it is proved on record that incident took place on dated 19.11.2004 at about 3.30 PM and testimonies of prosecution witnesses were recorded on dated 2.12.2006, 26.3.2007, 28.3.2007, 16.7.2007 and 17.7.2007 after a gap of sufficient time. It is also well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trials. See **AIR 1980 SC 957 titled Bhe Ram v. State of Haryana**. Also See **AIR 1971 SC 2505 titled Rai Singh v. State of Haryana**.

22. Submission of learned Advocate appearing on behalf of accused that there is no recital in FIR that accused laid upon body of minor prosecutrix aged nine years and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the contents of FIR. It is well settled law that FIR is not substantive piece of evidence. It is well settled law that FIR can be used only for corroborative and contradiction purpose only. There is recital in FIR that accused caught minor prosecutrix from her arms and thereafter brought minor prosecutrix inside four walls of room and thereafter accused told minor brother of minor prosecutrix to leave place of incident and change his school uniform and thereafter accused bolted the door from inside the four walls of room and thereafter accused opened his pant and underwear and thereafter accused opened trouser of minor prosecutrix aged nine years and thereafter accused started performing indecent activities upon minor prosecutrix. We are of the opinion that there is positive recital in FIR that accused opened his pant and underwear and opened trouser of minor prosecutrix aged nine years and started performing indecent activities with minor prosecutrix within four

walls of room after bolting room from inside. Ingredients of attempt to rape was specifically mentioned by minor prosecutrix in the FIR. Sexual assaults upon minor girls are increasing day by day in the society. It is well settled law that every minor girl and women has legal right to live with honour and dignity in the society. In the present case it is proved on record that the age of minor prosecutrix was nine years and she was student of 4th class at the time of commission of offence and the age of accused was twenty three years at the time of commission of offence.

23. Submission of learned Advocate appearing on behalf of accused that hymen of minor prosecutrix was intact and no injury was found upon vagina of minor prosecutrix as per medical certificate given by medical officer and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that in the present case the age of minor prosecutrix at the time of incident was nine years and the age of accused was twenty three years. At the time of incident minor prosecutrix was student of 4th class and minor prosecutrix could not resist due to her tender age and due to the fact that age of accused was twenty three years at the time of incident. It was held by Hon^{ble} Apex Court of India in case reported in **Gurcharan Singh v. State of Haryana AIR 1972 SC 2661** that absence of injury or marks of violence on the private parts or elsewhere on the person of prosecutrix is of no consequence when the prosecutrix is minor and could not resist violence. Also see **Rafiq v. State of Uttar Pradesh AIR 1981 SC 559**. It is held that for offence of attempt to rape penetration of penis is not essential into vagina of prosecutrix. In the present case accused has gone beyond stage of preparation. Mere absence of penetration would not absolve accused from offence of attempt to commit rape. See **AIR 1998 Apex Court 386 titled Madan Lal v. State of J&K**. Attempt to commit criminal offence is third stage in the commission of offence.

24. Submission of learned Advocate appearing on behalf of accused that PW8 Rattani Devi, PW9 Vijay Pal and PW11 Adarsh are interested witnesses and conviction cannot be given to accused on the basis of interested witnesses is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that relative witnesses are not equivalent to the interested witnesses. See **State of Rajasthan v. Smt. Kalki and another AIR 1981 SC 1390**, See **State of Punjab v. Hari Singh and another AIR 1974 SC 1168**. Also see **Bhupendra Singh v. State of Punjab AIR 1968 SC 1438**.

25. Submission of learned Advocate appearing on behalf of accused that minor prosecutrix is a child witness and her testimony cannot be relied upon is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that under Section 118 of Indian Evidence Act 1872 child witness is competent witness. In the present case learned Sessions Judge has given certificate that child witness i.e. PW7 minor prosecutrix is mature enough to give statement under section 118 of Indian Evidence Act 1872. Even learned Sessions Judge has given certificate that PW11 Adarsh aged eight years is also competent to give statement under Section 118 of Indian Evidence Act 1872 and testimonies of minor witnesses were recorded on oath by learned

trial Court.

26. It is well settled law that testimony of minor prosecutrix must be appreciated in the background of entire case and court must be alive to its responsibility and court should be sensitive while dealing with cases involving sexual molestation. See **State of Punjab v. Gurmit Singh and others 1996 (2) SCC 384**, See **State of HP v. Lekh Raj and another 2000 (1) SCC 247**, See **Madan Gopal Khaker v. Naval Dubey and another 1992 (3) SCC 204**.

27. Rape is not only a crime against the victim but it is a crime against entire society which destroys the entire psychology of woman and pushes the woman into deep emotional crisis. It is crime against basic human right and it is also violative of victim fundamental right granted under Article 21 of Constitution of India. See **AIR 1996 S.C. 922 titled Bodhisattwa Gautam v. Miss Subhra Chakraborty**. It is well settled law that sole testimony of prosecutrix is enough to convict accused person if the testimony of prosecutrix is free from blemish and reliable such testimony does not need corroboration. It is well settled law that minor contradiction or insignificant discrepancy in the statement of prosecutrix should not be ground for throwing out an otherwise reliable prosecution case. See **AIR 2006 SC 381 titled State of HP v. Asha Ram**. It is well settled law that conviction can be based on the testimony of solitary witness. See **AIR 1973 SC 944 titled Jose v. State of Kerla**.

28. It is well settled law that commission of offence comprises four stages. (1) Forming intention to commit crime. (2) Making preparation for the commission. (3) Attempting to commit crime (4) Actual commission of crime. See. **Abhayanand Mishra v. State of Bihar AIR 1961 S.C. 1698**. It is well settled law that an attempt to commit an offence can be said to begin when the preparations are complete and culprit commences to do something with the intention of committing offence and which is a step towards the commission of offence. See. **2004 (3) SCC 602 titled Koppula Venkat Rao v. State of A.P.**. In the present case it is proved beyond reasonable doubt that (1) Accused bolted the door of room from inside the room after preparation. (2) Accused confined minor prosecutrix aged nine years in the four walls of room who was student of 4th class at the time of incident. (3) Accused removed his pant and underwear and also removed salwar of minor prosecutrix aged nine years. Hence it is held that attempt to commit rape by accused upon minor prosecutrix aged nine years is proved on record in the present case beyond reasonable doubt.

29. Submission of learned Advocate appearing on behalf of accused that on testimony of DW1 Sh. Roop Lal appeal filed by State of HP be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. DW1 is not eye witness of incident. DW1 was not present where criminal offence was committed by accused inside four walls of house shown in site plan Ext PW12/B. As per section 59 of Indian Evidence Act 1872 all facts except contents of documents can be proved by oral evidence. As per section 60 of Indian Evidence Act 1872 oral evidence must be direct. DW1 is not direct eye witness of

criminal offence as alleged by minor prosecution aged nine years. DW1 was not present inside four walls of room where criminal offence was committed by accused.

30. Submission of learned Advocate appearing on behalf of accused that accused aged twenty three years is cousin of minor prosecutrix and it is not possible that close relative will attempt to commit rape upon minor prosecutrix is rejected being devoid of any force for the reasons hereinafter mentioned. We have taken judicial notice of facts that close relatives of girls or women are committing sexual assaults as of today in society. In present case offence against accused is proved beyond reasonable doubt as per oral and documentaries evidence placed on record.

31. It is held that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and judgment of learned trial court is perverse and contrary to proved facts placed on record. It is held that learned trial Court has committed miscarriage of justice. It is held that offence punishable under Section 376 IPC read with Section 511 IPC (Attempt to commit rape) is proved against accused beyond reasonable doubt in present case. It is held that it is proved beyond reasonable doubt that accused has wrongfully restrained minor prosecutrix and offence under Section 341 IPC is proved beyond reasonable doubt as per oral testimony adduced by prosecution. It is held that criminal offence under Section 342 IPC wrongful confinement of minor prosecutrix in the four walls of room by accused is also proved beyond reasonable doubt as per oral as well as documentary evidence placed on record. It is held that offence punishable under Section 506 IPC is also proved beyond reasonable doubt against accused as per oral as well as documentary evidence placed on record. In view of above stated facts point No.1 is answered in affirmative.

Point No. 2(final order).

32. In view of findings on point No. 1 appeal filed by State of H.P. is allowed and judgment passed by learned trial.

Cr.Appeal No. 412 of 2008.

Quantum of Sentence:

5.4.2016

Present: Mr. V.S. Chauhan, Addl. Advocate General with Mr. Kush Sharma, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General for appellant.

Mr. Anand Sharma Advocate for convict.

Convict is in custody of C. Rakesh Kumar No. 459 under the supervision of ASI Rajender Kumar P.S. Sadar Bilaspur.

33. We have heard learned Additional Advocate General appearing on behalf of State and learned defence Advocate appearing on behalf of convict on quantum of sentence.

34. Learned Additional Advocate General appearing on behalf of State submitted before us that convict has attempted to commit rape upon minor prosecutrix aged 9 years who was student within four walls of room and heinous punishment be given to convict in order to maintain majesty of law.

35. On contrary learned defence Advocate appearing on behalf of convict submitted that convict is first offender and he has family to support and lenient view be taken.

36. We have considered the submissions of learned Additional Advocate General appearing on behalf of State and learned defence Advocate appearing on behalf of convict carefully.

37. In present case convict has attempted to commit rape upon minor prosecutrix aged nine years who was student within four walls of residential house. We are of the opinion that murder destroys the body of victim but rapist degrades the soul of victim. We are of the opinion that offence of rape is criminal offence against the Society at large. We are of the opinion that every minor girl has legal right to live in society with honour and dignity. We are of the opinion that it is fundamental right of minor girl to live in society with dignity and honour as per Constitution of India. It was held in case reported in **AIR 2015 SC 398 title State of M.P. v. Surendra Singh** that sentence should be commensurate with gravity of offence. Also see **(2016)1 SCC 463 title Raj Bala v. State of Haryana and others**. Also see **(2009) 15 SCC 635 title Gurmukh Singh v. State of Haryana**. Keeping in view the above stated facts we sentence the convict as follows:-

Sr. No.	Offence	Sentence imposed.
1.	Section 376 read with Section 511 IPC (Attempt to rape).	Rigorous imprisonment for five years and fine to the tune of Rs. 25000/- (Rupees twenty five thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one year.
2.	Section 506 IPC	Rigorous imprisonment for two years and fine to the tune of Rs. 5000/- (Rupees five thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one month.

3.	Section 342 IPC3	Rigorous imprisonment for one year and fine to the tune of Rs. 1000/-(Rupees one thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one month.
4.	Section 341 IPC	Simple imprisonment for one month and fine to the tune of Rs. 500/- (Rupees five hundred only). In default of payment of fine convict shall further undergo simple imprisonment for five days.

38. All sentences shall run concurrently. Period of custody during investigation, inquiry and trial will be set off. Case property will be confiscated to State of H.P. after expiry of period of limitation of filing further criminal proceedings and in case of further criminal proceedings as directed by Hon^{ble} competent Authority of law. Copy of judgment and sentence will be supplied to the convict forthwith free of cost. Record of learned trial Court be sent back forthwith along with certified copy of judgment and sentence. Learned Registrar (Judicial) will issue warrant of commitment of sentence of imprisonment to the Superintendent Model Central Jail Kanda forthwith in accordance with law. Criminal appeal No. 412 of 2008 stands disposed of. Pending application if any also disposed of.