

**(2016) 09 SHI CK 0085**

**High Court of Himachal Pradesh**

**Case No:** Criminal Appeal No. 194 of 2016.

Hem Raj - Appellant @HASH  
State of Himachal Pradesh

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** Sept. 23, 2016

**Acts Referred:**

- Protection of Children from Sexual Offences Act, 2012 - Section 30, Section 4

**Citation:** (2017) 1 CriCC 302 : (2017) 1 JCC 364 : (2016) LatestHLJ(HP) 1578 : (2017) 1 RCRCriminal 96

**Hon'ble Judges:** Sanjay Karol, J.

**Bench:** Single Bench

**Advocate:** Anoop Chitkara, Advocate, for the Appellant; M/s Vikram Thakur and Puneet Rajta, Deputy Advocate Generals, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

**Sanjay Karol, J.** - In this appeal filed under Section 374 Cr.P.C., convict Hem Raj has assailed judgment dated 10.02.2016, passed by Special Judge, Hamirpur, H.P., in Sessions Trial No.21 of 2014, titled as State of H.P. v. Hem Raj, whereby he stands convicted for having committed offences punishable under the provisions of Section 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) and Section 506 Part-II of the Indian Penal Code and sentenced to serve rigorous imprisonment for a period of seven years and to pay fine of Rs. 20,000/- and in default thereof, further to undergo simple imprisonment for a period of one year for commission of offence punishable under the provisions of Section 4 of the POCSO Act. Also he was sentenced to undergo rigorous imprisonment for a period of one year for the commission of offence punishable under the provisions of Section 506 Part-II of the Indian Penal Code and to pay fine of Rs. 5000/- and in default thereof, further to undergo one month simple imprisonment.

2. It is the case of prosecution that prosecutrix aged approximately ten years was subjected to sexual assault by the accused. Such act was committed by extending threats and with criminal intimidation. Last of such acts was committed on 22.06.2014 and the matter reported to the police on 13.07.2014, when FIR No.104/2014 (Ex.PW.20/A) came to be registered. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, Challan was presented in the Court for trial.
3. The accused was charged for having committed offences punishable under the provisions of Section 4 of POCSO Act and Sections 376(2)(i) and 506(2) of the Indian Penal Code, to which he did not plead guilty and claimed trial.
4. In order to establish its case, in all, prosecution examined as many as twenty two witnesses and statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the plea of innocence and false implication. No evidence in defence was led.
5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted the accused of having committed offences punishable under the provisions of Section 4 of the POCSO Act and Section 506 Part-II of IPC and sentenced as aforesaid. Hence the present appeal by the convict.
6. Challenge is laid to the judgment passed by the trial Court, on the grounds that (a) testimony of the prosecutrix and her mother cannot be said to be inspiring in confidence or the witnesses reliable and trustworthy; (b) there is inordinate delay in lodging the FIR and also on this aspect, there is material contradiction with regard to the date of narration of the incident.
7. Having heard learned counsel for the parties as also perused the record, one finds that trial Court has clearly appreciated the material on record in its entirety and in consonance with the settled principles of law. There is neither any illegality nor any perversity therein, warranting interference by this Court. Also reasons assigned are based on clear, cogent, consistent and reliable piece of evidence.
8. Record reveals that with the registration of FIR dated 13.07.2014, prosecutrix was got medically examined from Dr.Sunita Galoda (PW.16), who issued MLC (Ex.PW.16/A). Clearly the doctor was of the opinion that prosecutrix was subjected to sexual assault. But by whom? That is the question for determination.
9. That prosecutrix was born on 02.08.2004, stands established through Birth Certificate (Ex.PW.18/B), issued under the Registration of Births and Deaths Act, 1969 as also Rules framed thereunder. Significantly, all throughout, age of the prosecutrix is disclosed to be ten years. Such fact also stands corroborated by the prosecutrix, her mother Promila Devi (PW.2) and HC Hem Raj (PW.18).
10. That prosecutrix was studying in Class 6th in Government Senior Secondary School, Mundkhar, District Hamirpur, stands established through the testimony of

Hem Raj (PW.8).

11. One finds that statement of the prosecutrix, under Section 164 Cr.P.C. (Ex.PW.22/D), came to be recorded before the Judicial Magistrate, 1st Class, Court No.II, Hamirpur, wherein she disclosed that she would leave her house for school in the vehicle of Hem Raj, who before the school hours would take her alone in the vehicle towards Nehli side and after committing sexual assault drop her back to the school. On her crying, accused would gag her mouth. She was threatened and intimidated not to disclose the incident to anyone, lest she and her parents be killed with Darat. Lastly it was so done on 20th/21st June. Noticing red and white stains on her clothes, her mother made inquiries but on account of threats, initially she did not disclose the incident.

12. When examined in Court, one finds such version to have been clearly deposed. She is clear that she would travel to her school in a jeep driven by the accused, who would sexually assault her inside the vehicle. At that time she would be alone. Accused would drag her inside the vehicle and gag her mouth. Also she was threatened and intimidated not to disclose the incident either to her parents or the police, lest she and her parents would be killed with darat. Last of such act was done on 20/21.06.2014. Finding her clothes to be stained with red and white stains, on 22.06.2014, her mother made queries when out of fear she did not disclose the incident. However, on 07.07.2014, when her mother, with affection, inquired again, she divulged everything. Thereafter, matter came to be reported on 13.07.2014. Prior thereto, her mother repeatedly made inquiries for ascertaining as to whether she was telling the truth or not.

13. This witness has totally withstood the test of cross-examination. It cannot be said that her credit stands impeached. It is not a case of an isolated incident. Repeatedly, she was subjected to sexual assault over a period of time. Out of fear, she did not divulge the incident to anyone, till her mother affectionately made inquiries, finding her clothes to be stained.

14. Her version stands materially corroborated by her mother Smt. Promila Devi (PW.2), who is also categorical that probably on 22.06.2014, while she was bathing the prosecutrix, she noticed tenderness and swelling on the private part and blood stains on the salwar worn by the prosecutrix. By taking her daughter into confidence, affectionately she inquired reasons thereof, and only on 07.07.2014, prosecutrix disclosed that accused used to take her towards village Nehli and sexually assault her. Prosecutrix also disclosed that accused had threatened to kill her and her parents with a Darat. When confronted accused denied having committed such an act. The incident also came to be narrated to the Pradhan, who advised to remain silent, as any disclosure of such fact would have brought insult to the family. On 12.07.2014, when her husband returned from Rampur, matter came to be reported to the police with the recording of her statement (Ex.PW.2/A). One finds that even her version is clear on the issue of sexual assault.

15. Pradhan Smt.Veena Devi (PW.4), corroborates version of the prosecutrix and her mother. Even she had made inquiries from accused Hem Raj, who denied the allegations. She is categorical that mother of the victim had informed her that she would verify the allegations and take action on the return of her husband.

16. Kamlesh Kumar (PW.3), father of the prosecutrix, simply states that on his return from Rampur to his village on 12.07.2014, his wife informed him that prosecutrix had been subjected to sexual assault by the accused on 20/21.06.2014.

17. Now significantly, in his statement under Section 313 Cr.P.C., accused admits to have been called by Veena Devi, in connection with the allegations in issue when he had expressed his innocence and false implication.

18. At this juncture, it would be relevant to deal with the defence taken by the accused in his statement under Section 313 Cr.P.C., which reads as under:-

"In the month of January 2014 marriage of daughter of PW.2 Promila Devi named Santosh Kumari was fixed and PW.2 being my co-villager had demanded money from me i.e. Rs. 50,000/- on credit basis. I and my father refused to advance loan to PW.2 Promila Devi and her husband PW.3 Kamlesh Kumar. On our refusal PW.2 and PW.3 got annoyed with us and the result is that I have been roped in a false case. PW.3 Kamlesh Kumar had threatened me to get my jeep impounded as I had not advanced loan to them. As a matter of fact the case has been lodged against me at the instance of one Budhi Singh and Mehar Singh, residents of our village. My father had purchased a piece of land from Harnam Singh for constructing a temple of Baba Bhairbhag Singh. With the purchase of land and construction of temple, passage of tractor to their fields was blocked. Therefore, they got annoyed with us and father-in-law of PW.2 Promila Devi works in the fields of Budhi Singh and at the instance of Budhi Singh I have been implicated in this false case. Budhi Singh etc. had ganged against me."

19. Significantly the said defence cannot be said to have been probablized at all either through the testimony of prosecution witnesses or by examining any defence witness.

20. From the testimony of prosecutrix (PW.1) and Promila Devi (PW.2), unrebutedly, and yes, it has come on record that prosecutrix was a student of 6th Class in Government Senior Secondary School, Mundkhar, Hamirpur. She used to travel to the school in a vehicle owned by accused Hem Raj. When one peruses the testimony of the prosecution witnesses, on the issue of sexual assault, one does not find any contradiction at all. On the question of sexual assault, threats and intimidation, version is clear and consistent.

21. Perusal of testimony of Promila Devi (PW.2) does reveal certain improvements to have been made in Court and that being with regard to her noticing tenderness on the private part of the prosecutrix and the Pradhan having advised the parties to

remain silent, till things clear out. But then such fact in itself, in no manner, renders the genesis of the prosecution story to be doubtful. After all, medically prosecutrix was found to have been subjected to sexual assault and the Pradhan having been told by this witness that she would verify the allegations and take action on the return of her husband. Also accused admits to have been called by the Pradhan and inquiries made.

22. One cannot forget the fact that accused is a close relative of the prosecutrix.

23. The only noticeable and as argued, relevant contradiction is of the disclosure of exact date of the incident by the prosecutrix to her mother; by her mother to her father; and by her mother to the Pradhan.

24. Prosecutrix states that despite the fact that her mother made inquiries from her on 22.06.2014, she disclosed the incident only on 07.07.2014, whereas, according to Pradhan Veena Devi (PW.4), mother had told her that victim had narrated the incident to her on 20.06.2014. Further according to the mother, she disclosed the incident to her husband only on his return to the village on 12.07.2014, whereas, according to the husband, his wife had already disclosed the incident on 22.06.2014. Based on these contradictions, it is argued that there is inordinate delay in lodging the FIR, which came to be so done only on 13.07.2014.

25. Can it be said that the contradictions are material or the delay fatal? In the given facts and circumstances, no. Court is dealing with the witnesses, who hail from rural areas. Father of the prosecutrix is a small businessman doing business at a far-off place. Mother is a rustic villager. There is none else in the house except for one elder daughter. The accused is none else, but her close relative. The incident which the husband is talking about is not clearly that of sexual assault. After all, on 22.06.2014 itself, mother had found clothes of the prosecutrix to be stained with blood. Also statements of the witnesses came to be recorded in Court not immediately but after a period of 7/8 months. As such, some leeway is required to be given to the witnesses in not remembering the exact dates. This contradiction alone has not impeached the credit of the witnesses who with regard to the actual occurrence of the incident, are clear and consistent and their deposition reliable and trustworthy. Delay in lodging the FIR, in the given facts and circumstances, considering the nature of offence, cannot be said to be fatal. Uncontrovertedly, it has come on record that father of the prosecutrix returned only on 12.07.2014 and promptly, matter came to be reported to the police.

26. The Apex Court in **Satpal Singh v. State of Haryana, (2010) 8 SCC 714**, held as under:-

14. In a rape case the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family

remains concern about its honour and reputation of the prosecutrix. After only having a cool thought is it possible for the family to lodge a complaint in sexual offences. Vide (**Karnel Singh v. State of MP., 1995 AIR (SC) 2472**; and **State of Punjab v. Gurmeet Singh & Ors., 1996 AIR (SC) 1393**).

15. This Court has consistently highlighted the reasons, objects and means of prompt lodging of FIR. Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same for the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety. [Vide (**State of Andhra Pradesh v. M. Madhusudhan Rao, (2008) 15 SCC 582**).

16. However, no straight jacket formula can be laid down in this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the Court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that:

"Ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon".

[vide (**Satyapal v. State of Haryana, 2009 AIR (SC) 2190**).

17. In **State of H.P. v. Prem Singh, (2009) 1 SCC 420**, this Court considered the issue at length and observed as under: (SCC p. 421, para 6)

"6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

18. Thus, in view of the above, the delay in lodging the FIR in sexual offences has to be considered with a different yardstick. If the instant case is examined in the light of the aforesaid settled legal proposition, we are of the considered opinion that the delay in lodging the FIR has been satisfactorily explained."

27. Further the Apex Court in **State of Uttar Pradesh v. Manoj Kumar Pandey, (2009) 1 SCC 72**, has held that:-

"3... ..Apart from that normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape."

28. In **State of Rajasthan v. Roshan Khan and others, (2014) 2 SCC 476**, Court has observed that complainant would not come forward to lodge a false report pertaining to the character and chastity of his daughter. As such, prosecution story on the ground of delay per se cannot be said to be false.

29. Testimonies of prosecution witnesses, more so that of minor cannot be said to be unbelievable. Witnesses are trustworthy, and in the opinion of the Court, have deposed truthfully. Safely it can be held that prosecution has discharged the initial burden of establishing its case and the statutory burden, so required by the accused under Section 30 of the POCSO Act. Ocular evidence stands materially corroborated by other evidence on record.

30. The ocular version as also documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable.

31. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convict is guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The guilt of the convict stands proved beyond reasonable doubt to the hilt. It cannot be said that convict is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

32. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convict committed penetrative sexual assault on the child/prosecutrix and criminally intimidated her to do away with her life.

33. For all the aforesaid reasons, I find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

34. Records of the Court below be immediately sent back.