

**IN THE HIGH COURT OF UTTARAKHNAD AT NAINITAL****Criminal Jail Appeal No. 18 of 2016**

Dalip S/o Sri Vishnu
R/o Majra Shiv Mandir wali gali,
Patelnagar, DehradunAppellant

Vs.

State of UttarakhandRespondent

Ms. Manisha Bhandari, Advocate / Amicus Curiae for the
appellant.
Mr. P.S. Bohara, A.G.A. for the respondent

Hon'ble Lok Pal Singh, J.

This criminal jail appeal arises out of the Judgment and Order dated 14.09.2015, passed by Fast Track Court/ Special Judge, POCSO Act / Additional District and Sessions Judge, Dehradun, whereby the appellant was convicted under Section 377 of IPC and sentenced to undergo rigorous imprisonment for a period of 07 years along with a fine of ₹5000/. In default of payment of fine, the appellant / accused was directed to undergo further one month simple imprisonment. The appellant / accused was convicted under Section 354-A IPC and sentenced to undergo rigorous imprisonment for a period of 03 years. The appellant / accused was convicted under Section 354-B IPC and sentenced to undergo rigorous imprisonment for a period of 03 years along with a fine of ₹3000/. In default of payment of fine, the appellant / accused was directed to undergo further 15 days' simple imprisonment. The appellant / accused was convicted under Section 8 of the Protection of Children From Sexual Offences Act, 2012 and sentenced to undergo rigorous imprisonment for a period of 03 years along with a fine of ₹1000/. In default of payment of fine, the appellant / accused was directed to undergo 15 days simple imprisonment. It was directed that all the



sentences shall be run concurrently and the period already undergone by the appellant / accused shall be adjusted.

2. Smt. Kamla Devi W/o present appellant / accused gave a complaint to the Police Station Patel Nagar, Dehradun on 14.04.2014 at about 12:15 a.m. stating therein that on 13.04.2014 at about 09:00 p.m. she went to deliver the milk at N.C.R. Residency. When she returned her house, she saw that her husband Dalip was doing obscene act with her elder daughter in bathroom. When she called them, Dalip and her daughter came out from the bathroom. Her daughter told her that the appellant was trying to commit obscene act with her. On the said complaint, a Case Crime No. 106 of 2014 under Sections 354-A, 354-B I.P.C. and Section 7/8 of the Protection of Children From Sexual Offences Act, 2012 was lodged at Police Station Patel Nagar, Dehradun. The victim was medically examined at Emergency of District Female Hospital, Dehradun. The prosecutrix was medically examined on 14.04.2014 at about 12:55 a.m. at Doon Women Hospital Dehradun and supplementary report was also prepared on 17.04.2014. The accused / appellant was arrested on 14.04.2014 at about 10:30 a.m. from his house but it is not mentioned in the arrest-memo whether it was 10:30 a.m. or 10:30 p.m. The undergarments of accused / appellant were taken into custody by the police on 14.04.2014. The Investigating Officer sent the clothes & undergarments of accused as well as of the prosecutrix for Forensic Science Laboratory and prepared the spot map and after investigation submitted the charge-sheet to the Special Judge, Dehradun, who in turn, took cognizance of the offences punishable under Sections 377, 354-A, 354-B read with Section 7/8 of POCSO Act, 2012. The report of Forensic



Science Laboratory, Uttarakhand suggests that the semen and blood could not be detected at Ext. 1 & 2 sent for its examination. The Special Judge, Dehradun framed charges against accused / appellant for the offenses punishable under Sections 377, 354-A, 354-B of I.P.C. and Section 7/8 of POCSO Act, 2012.

3. The prosecution adduced as many as 09 witnesses. Complainant Smt. Kamla Devi was produced as PW1, who deposed that the prosecutrix was aged about 14 years and was studying in Class VII in Maheshanand Junior High School Majra, Dehradun. The incident took place on 13.04.2014 at about 8:30 p.m. when she went to supply the milk. When she came back at 9:00 p.m. to her house, she called her daughter. Upon her call, appellant came out from the bathroom and her daughter was weeping and she was naked. On asking from the girl, she told that her father has done something on her back and she was crying and saying that she is feeling pain. On asking from the accused / appellant, he said that he did nothing. Then, he was beaten and handed over to the police.

4. On cross-examination, she stated that her sister Vimla was living near her house. She further said that they are living together along with her sister Vimla, sister-in-law Nirmala Devi and uncle Ramesh. The house of his uncle Sohan Lal and Hari Lal is near to her residence and some houses of Muslims are also there and she is living there since her birth. On cross-examination, she deposed that she got married 14-15 years ago and at that point of time the age of the prosecutrix was about 02 years. She further deposed that in School record, she mentioned the father's name of the prosecutrix as Dalip (appellant) and also admitted the



fact that earlier she got married with someone but she does not know the name of her husband, but further stated that his name was Laxman. But on cross-examination, she failed to describe the details of her previous husband Laxman and marriage with him and when her previous husband Laxman died.

5. The statement of prosecutrix was recorded as PW2. She stated that she is studying in Class VIII in Maheshanand Balika Junior High School, Majra and also narrated the incident and stated that her father took her to bathroom and tried to penetrate on her carnal intercourse. In the meantime, her sister and mother came back to the house and the accused pushed her out and hid himself behind the machine. She also stated that there was only one room and her uncle and aunt also reside in the house and, at that point of time, her father, aunt and grandmother were in the house. She also deposed that she did not shout and further stated that the T.V. was installed in the cowshed by her father and it was the dispute between mother and father. Her father used to fight with her mother, therefore, her mother remained angry with him (father). She further stated that the accused is her real father. She also stated that she did not know whether any blood-stained was available on the clothes or not. She further stated that her mother called the police in the night and the police took her father to Police Station and he was beaten by her mother. She further stated that Police came about 9:00 p.m. and the mother lodged F.I.R. on the same day at Police Station. She further admitted the fact that at that point of time, her sister, aunty, uncle and mother were examined by the Police and thereafter the Police never came to the place. She was put a question that



she is making false statement on the instigation of her mother.

6. PW3 Constable Anoop Aswal was a formal witness, who registered the F.I.R. on the complaint made by the complainant.

7. PW4 Dr. Archana Pandey, P.H.C. Thano Block, Raipur, Dehradun is the witness to prove the medical examination report as well as the age of the prosecutrix.

8. PW5 is the real younger sister of the prosecutrix, who also narrated the same story as narrated in the F.I.R.

9. PW6 Kiran Aswal is the witness of arrest of the accused/appellant.

10. PW7 Dr. N.S. Khatri is the paediatric, who conducted X-ray of the prosecutrix.

11. PW8 Smt. Rajni Bhatt is the officiating Principal of Maheshanand Junior High School, Majra, Dehradun to prove the School Leaving Certificate and the age of the prosecutrix.

12. PW9 Balwant Veer Vikram Singh Bhandari was the Radiologist, who conducted the X-ray of prosecutrix to ascertain the age of prosecutrix and found that the age of prosecutrix is between 15-17 years at that point of time.

13. Learned Fast Track Court / Special Judge, POCSO Act / Additional District and Sessions Judge, Dehradun convicted the appellant under Section 377 of IPC and sentenced to undergo rigorous imprisonment for a period of 07 years along with a fine of ₹5000/. In default of payment of fine, the appellant / accused was directed to undergo one month simple imprisonment. The appellant/



accused was convicted under Section 354-A IPC and sentenced to undergo rigorous imprisonment for a period of 03 years. The appellant / accused was convicted under Section 354-B IPC and sentenced to undergo rigorous imprisonment for a period of 03 years along with a fine of ₹3000/. In default of payment of fine the appellant / accused was directed to undergo 15 days simple imprisonment. The appellant / accused was convicted under Section 8 of the Protection of Children From Sexual Offences Act, 2012 and sentenced to undergo rigorous imprisonment for a period of 03 years along with a fine of ₹1000/. In default of payment of fine the appellant / accused was directed to undergo 15 days simple imprisonment.

14. PW1 Kamla Devi, PW2 Prosecutrix and PW5 younger sister of the prosecutrix are said to be the witness of the alleged incident, while PW4 Dr. Archana Pandey had medically examined the prosecutrix. From the ocular evidence of PW1, PW2 and PW4, medical examination report, Forensic Science Laboratory, no evidence is made out against the accused / appellant so far as the offence punishable under Section 377 of I.P.C. is concerned.

15. From the evidence of PW7 Dr. M.S. Khatri, PW8 Ms. Rajni Bhatt, Principal, Maheshanand Junior High School, Majra, Dehradun and PW9 Dr. Balwant Veer Vikram Singh Bhandari, it is proved that the age of the prosecutrix is less than 16 years at the time of incident. Thus, the prosecutrix has been held to be minor at the time of incident.

16. From perusal of evidence available on record, it is proved that the complainant has some dispute with her husband (appellant/accused) herein as she is living at



her parental house and had married to the present appellant / accused after the death of her previous husband Laxman. Though, the complainant and prosecutrix tried to prove the fact that the prosecutrix is the real daughter of the accused / appellant but from perusal of statement of PW1 complainant, it is clear that the prosecutrix is not the real daughter of appellant / accused rather she is the step daughter of the appellant/ accused and the false implication of the appellant / accused by the complainant at the hands of prosecutrix cannot be ruled out.

17. From the perusal of the under Section 377 and to protect the provisions of under Section 377 of IPC the following ingredients are required.

1. Carnal intercourse and against the order of nature from the perusal of the FIR. It is nowhere mentioned that the accused ever penetrated of the carnal of the prosecution. The statement of any of the witness does not suggest, the statement of the complainant (victim) and other witnesses as well as medical evidence does not support, the prosecutrix version that there was any carnal intercourse and the against the order of nature. Thus, the trial court has without recording its findings that in regard to the carnal intercourse with the victim of the accused against the order of nature. Thus, the findings recorded by the trial court are without any evidence available on record and conviction of the appellant under Section 377 of IPC is not sustainable.

18. Prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant / accused



for the offence punishable under Section 377 of I.P.C. as neither there was evidence to commit unnatural intercourse and nor was penetration as is evident from the report of Forensic Science Laboratory Report according to which the semen and blood could not be detected at Ext. 1 & 2 sent for its examination. As far as conviction of the appellant under Section 354-A, 354-B of IPC and Section 7/8 of POCSO Act, 2012 are concerned, the appellant has already served the sentence/punishment awarded to him more than three years. Thus, this Court find no illegality in convicting the appellant under Section 354-A, 354-B of IPC and Section 7/8 of POCSO Act, 2012. Thus the judgment of the trial court on the conviction the appellant under Section 354-A, 354-B of IPC and Section 7/8 of POCSO Act, 2012 is upheld.

19. The appellant / accused is languishing in jail since 14.04.2014 and he has been convicted for the offences punishable under Section 354-A, 354-B of IPC and Section 7/8 of POCSO Act, 2012.

20. After considering the evidence of the prosecution witnesses, this Court is of the opinion that since the offence punishable under Section 377 IPC is not made out against the appellant / accused and he is in judicial detention for more than 3 years, therefore, he should be released forthwith.

21. In view of the above, criminal jail appeal preferred by the appellant / accused is therefore, partly allowed. The conviction and sentence awarded to the appellant under Sections 354-A, 354-B IPC and Section 7/8 of POCSO Act, 2012 is affirmed. The conviction and sentenced awarded to the appellant under Section 377 IPC is set aside. Since, the appellant has served out the



sentence for more than 03 years, it is directed that appellant / accused be released forthwith, if his custody is not required in any other case.

22. Let a copy of this judgment along with the lower court record be sent back to the lower court for ensuring compliance of this order.

(Lok Pal Singh, J.)

04.10.2017

Sanjay