

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**Criminal Jail Appeal No. 41/2018**

Akash Kumar *alias* Bhindi ... Appellant

Versus

State of Uttarakhand ... Respondent

Mr. Raman Kumar Sah, Amicus Curiae, for the appellant.

Ms. Manisha Rana Singh, AGA, for the State.

Judgment reserved on : 17.9.2020

Judgment delivered on: 28.9.2020

**Hon'ble Narayan Singh Dhanik, J.**

Appellant has preferred this appeal from the jail against the judgment and order dated 26.7.2018 whereby the appellant has been convicted for the offences under Section 376/511 IPC and Section 6 of the POCSO Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 25,000/- for the offence under Section 6 of the POCSO Act.

The allegation against the appellant was that at 6 o'clock in the evening of 13.3.2017, the appellant attempted to commit rape on the two and half years old daughter of the complainant and committed sexual assault on her. When the complainant did not find the victim on the said date and time, he along with his companion Subhash Kumar started searching her. During the course of search, the complainant and his companion Subhash Kumar caught the appellant while he was indulged in committing the alleged offence and took him to the police station.

On conclusion of the trial, the appellant was convicted and sentenced as stated above.

Learned Amicus Curiae, appointed by this Court to conduct the appeal on behalf of the appellant,

submitted that the prosecution has failed to conclusively prove the case against the appellant. Learned Amicus Curiae contended that the victim did not identify the appellant nor the victim in her testimony named the appellant. Learned Amicus Curiae further contended that the scribe of FIR, namely, Sri Subhash Kumar, who along with the complainant, allegedly caught the appellant red-handed, has not been examined before the trial court and the facts elicited during the cross-examination of the complainant (PW1), an alleged eyewitness, are totally contrary to the prosecution story. Learned Amicus Curiae further contended that the PW4, who is the mother of the victim, also did not support the prosecution story and declared hostile leading her cross-examination by the Public Prosecutor.

Learned AGA, appearing for the State, submitted that the prosecution produced sufficient and credible evidence and the trial court has rightly convicted and sentenced the appellant. Learned AGA further submitted that the appellant-accused, who was examined as DW1, himself made contradictory statement.

In the present case, prosecution examined as many as six witnesses. PW1 is the complainant. In his examination-in-chief, he has reiterated the averments made in the FIR. However, in his cross-examination, he has stated diagonally opposite to the averments made by him in the FIR. In his cross-examination, PW1 has accepted that he did not catch the accused-appellant red-handed nor did he see the alleged incident. PW1 has admitted in his cross-examination that one Pramod told him that the accused-appellant was committing the alleged offence. PW1 has further admitted in his cross-examination that he found the victim in the lap of her mother (PW4) and after seeing the victim it did not appear

to him that any unfortunate incident happened with the victim.

Victim has been examined as PW3. During her testimony, the accused-appellant was shown to the victim and she was asked a specific question by the Court as to whether she identified the accused-appellant, to which the victim replied 'No'. Victim was further asked whether the accused-appellant ever done anything to her or beaten her, to which the victim denied that the accused-appellant ever done anything to her. In her 164 CrPC statement also, the victim did not name the accused-appellant. Here, it may be noted that the as per the case of the prosecution, the accused-appellant lived in the neighbourhood of the victim and she knew him.

PW4, who is the mother of the victim, also did not support the prosecution story and turned hostile. Here, it may also be noted that neither Subhash Kumar (alleged eyewitness) nor Pramod, who allegedly told about the incident to PW1, could be examined by the prosecution. Further, there are contradictory statements even on the point of calling the police.

Medical examination report of the victim, conducted by PW2 Dr. Deepti, discloses that urethral meatus & vestibute, labia major and labia minor of the victim were found normal and no tear or swelling in the private parts was found. Hymen perineum of the victim was also found intact. However, in her testimony, PW2 Dr. Deepti has stated that a little redness was present in the outer surface of hymen of the victim and the presence of dried blood stains was also detected on her private parts and these conditions led to opine her that the attempt of sexual intercourse with the victim was made. However,

PW2 admitted that there was no mark of injury on the body of the victim.

As regards the opinion of doctor that attempt of sexual assault was made, that alone is not enough to connect the accused-appellant with the alleged crime in view of the material on record and in the absence of any credible evidence.

Having carefully heard the submissions advanced on behalf of the rival parties and considering the evidence on record, this Court is of the considered opinion that the prosecution has miserably failed to prove its case. In criminal cases, conviction cannot be based upon morality and there must be admissible and credible evidence to base conviction and moreover it is well settled canon of criminal jurisprudence that 'fouler the crime higher the proof' and mandate of law is that the prosecution has to prove the charges beyond all reasonable doubt. A few bits here and a few bits there on which prosecution relies cannot be held to be adequate or connecting the accused with the crime in question.

Consequently, this appeal is allowed. Conviction and sentence imposed on the appellant are quashed. Impugned judgment and order is set aside. Appellant is in jail. Unless wanted in any other case, the appellant shall be released forthwith.

Let a copy of this judgment and order, along with the LCR, be sent to ensure its compliance. Trial court to also ensure compliance of Section 437-A of the CrPC.

**(Narayan Singh Dhanik, J.)**

