

Zabir vs State Of Uttarakhand on 20 May, 2026

Author: Ravindra Maithani

Bench: Ravindra Maithani

2026:UHC:3947-DB

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
Criminal Appeal No.96 of 2022

Zabir Appellant

Vs.

State of Uttarakhand Respondent

Presence:

1. Mr. Akshay Pradhan, learned Amicus Curiae for the appellant.
2. Mr. Pankaj Joshi, learned A.G.A. for the State.

Coram: Hon'ble Ravindra Maithani, J.

Hon'ble Siddhartha Sah, J.

Hon'ble Ravindra Maithani, J. (Oral) Instant appeal is preferred against the judgment and order dated 11.01.2022, passed in Special Sessions Trial No.45 of 2019, State of Uttarakhand vs. Zabir, by the court of F.T.S.C./Additional District & Session Judge, Dehradun. By it, the appellant has been convicted under Section 342 of IPC and Section 5/6 of the Protection of Children from Sexual Offences Act, 2012 ("the Act") and sentenced to undergo six months rigorous imprisonment under Section 342 of IPC and further sentenced to undergo twenty years rigorous imprisonment under Section 5/6 of the Act, 2012 with a fine of `30,000/-. In default of payment of fine, to undergo, simple imprisonment for a further period of six months.

2. Facts necessary to appreciate the controversy, briefly stated, are as follows. According to the prosecution case on 11.01.2019 the appellant took the victim a young girl of eight years inside a room, molested her and injured her vagina by his teeth. He 2026:UHC:3947-DB also disrobed the victim and sat on her, the victim cried, that is how she could be saved. PW2, the father of the victim lodged FIR of the incident on 11.01.2019 at 5:44 p.m. Based on which case crime No.19 of 2019 under Sections 342, 376, 511 of IPC and Section 10 of the Act was registered. In fact, after the incident, the appellant was apprehended by the local people and he was brought to Police Station. The extract of the general diary entry by which the offence was lodged at Police Station is Exhibit A-11. It also revealed that the appellant was brought in the police station and he was arrested. The

victim was examined under Section 164 of the Code of Criminal Procedure (in short "the Code") on 16.01.2019. She was medically examined on the date of incident itself at 9:00 p.m., her parents narrated the story to the doctor and the doctor had noted that there was tenderness on the left forearm and the redness present on the perennial region. Medical examination report is Exhibit A-3. Certain articles including the clothes of the victim and some articles of the appellant were also collected by the Investigating Officer and they were sent for forensic examination. According to the forensic examination report, human semen was detected on the pant of the appellant. After investigation, charge sheet was submitted under Sections 342 and 376 of IPC and Section 6 of the Act. It is basis of the case. On 30.04.2019 charge under Sections 342 and 376 of IPC and Sections 5/6 of the Act were framed. To which, the appellant denied and claimed trial.

3. In order to prove its case, the prosecution examined seven witnesses, namely, PW1, victim, PW2, father of the victim, PW3, mother of the victim, PW4, Dr. Lata, who conducted the medical 2026:UHC:3947-DB examination of the victim, PW5, Lady Constable Bindu Saini, PW6, S.I. Rashmi Rana and, PW7, S.I. Monika Manral.

4. After prosecution evidence, the appellant was examined under Section 313 of the Code. According to him, he has been falsely implicated. According to the appellant, the informant had taken Rs.15,000/- as loan from him and he was not returning it. On the date of incident also, Rs. 4,500/- was removed from his room, due to which there was a fight.

5. After hearing the parties, by the impugned judgment and order, the appellant has been convicted and sentenced, as stated hereinbefore. Aggrieved, the appellant has preferred the instant appeal.

6. Heard learned counsel for the parties and perused the record.

7. Learned counsel for the appellant submits that prosecution has failed to prove its case beyond reasonable doubt; the place of incident has not been established. According to the FIR, the place of incident was a room and to the statement of the victim recorded under Section 164 of the Code, it was a house whereas according to PW1, it was the friend's house of the appellant and before the Doctor, the parents of the victim have stated that the act was done in the open place. It is argued that it doubts of the prosecution case. He would also raise the following points in his submission:-

(i) The testimony of the victim and her parents is not reliable.

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(ii) According to the FIR, when the victim cried, the people gathered and caught hold of the appellant, whereas the victim, in her statement under Section 164 of the Code, has stated that after the incident, she returned home on her own, but in court she says that it is the appellant, who dropped her at her home. Reference has been made to the statement of PW3, the mother of the victim to argue that according to her, the children had taken the victim to her at a place, which was about a distance of one hour from the place of incident.

(iii) The medical examination report does not support the prosecution case. According to the PW1 the victim, after teeth bite by the appellant in her vagina, she felt pain and blood oozed out, but as such medical examination report does not support.

(iv) The Forensic Science Laboratory report also does not support the prosecution case, because no semen was detected on the vagina of the victim. He would refer to the statement of PW3, the mother of the victim to argue that according to her, she had noticed the gandapani on the private parts of the victim. It is argued that this gandapani has not been detected in the forensic report. He would also refer to the statement of the PW7, Investigating Officer Monika Manral, where she states that there were some boys around, whose statements were recorded by her, but 2026:UHC:3947-DB it is argued that they have not been examined. They could have been helpful to the Court in arriving at the truth as to whether the victim was ever taken by the appellant or not.

8. On the other hand, learned State Counsel submits that prosecution has established its case beyond reasonable doubt. It is submitted that the ocular statement is supported by the medical and Forensic Science Laboratory report. Learned State Counsel raised the following points in his submissions:

(i) Prosecution has established its case beyond reasonable doubt. It is a case of presumption of guilt in view of Section 29 of the Act. The appellant has to prove his innocence.

(ii) There is no contradiction in the place of occurrence.

The appellant was staying with his friend's house and that is what is stated by the victim in her statement.

(iii) The Forensic Science Laboratory report confirms the prosecution case. The victim has nowhere stated that semen was discharged on her private parts. Referring to the statement of PW3, the mother of the victim, the learned State Counsel would submit that she has not stated that any semen was ever discharged on the private parts of the victim.

9. Before the arguments are appreciated, it may be seen as to what the witnesses have stated.

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10. PW1 is the victim, she was initially examined by the court so as to assess the level of understanding and thereafter her statement was recorded. She stated that on the date of incident, the appellant who was present in the court on the date of examination, took her in his friend's house; he disrobed himself and the victim also. There were some white material oozing out. She has stated that the appellant did bite her vagina by his teeth. She felt pain and blood also oozed out. She wiped the blood. It is the appellant according to the victim, who dropped her at her home. She revealed the incident to her mother. Thereafter, the appellant was questioned. He was beaten up also and taken to the police station. This witness has also stated that her examination was done

before the Magistrate. She has also proved her statements recorded before the Magistrate and the articles, which were worn by her at the time of the incident.

11. PW2 is the father and PW3 is the mother of the victim. They have stated that after the incident, the victim revealed the incident to her mother. Thereafter, the appellant was questioned. He was beaten up also and taken to the police station. According to PW2, the father of the victim, a report was lodged by him.

12. PW4, Dr. Lata did medically examined the victim on the date of incident. She has proved the medical examination report, Exhibit A-3, which records that redness was found in the perineal regions and there were no other injuries. The victim was also complaining of pain on her left hand. She has also proved the supplementary medical examination report, Exhibit A-4.

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13. PW5, Constable Bindu Saini had taken the articles of the victim after medical examination. She has stated about it.

14. PW6, S.I. Rashmi Rani had initially conducted investigation and arrested the appellant. She has prepared the arrest memo, Exhibit A-5.

15. PW7, S.I. Monika Manral, who is the Investigating Officer, has conducted an investigation and prepared the site plan, Exhibit A-6. She got the statements of the victim recorded under Section 164 of the Code, took the samples and finally she submitted charge sheet. She has proved other documents as well.

16. It is a case of sexual assault upon a young child. The appellant has been charged under Section 376 of IPC and Section 5/6 of the Act. Section 5 of the Act provides punishment for aggravated penetrative sexual assault. What is penetrative sexual assault is defined under Section 3 of the Act, which reads as hereunder:-

"3. Penetrative sexual assault.--A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or 2026:UHC:3947-DB

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

A bare reading of above shows that inserting a finger in the anus and applying mouth to the vagina also amounts to penetrative sexual assault, in view of Section 3(b) and Section 3(d) of the Act, as quoted herein above.

17. Section 376 IPC provides punishment for the offence of rape as defined under Section 375 IPC, which reads as follows:-

375. Rape. - A man is said to commit "rape" if he -

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome 2026:UHC:3947-DB substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Like the provisions of Section 3 of the Act, in view of Section 375(b) and (d), inserting any articles in the anus or applying mouth to vagina amounts to rape.

18. First and foremost, it is argued that the place of incident is not established. FIR records that the appellant took the victim in his room. In her statements recorded under Section 164 of the Code, the victim has stated that the appellant took the victim inside the house. There is no contradiction or inconsistency in these two statements. Before the court, the victim tells that the appellant took her in his friend's house.

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19. Learned State counsel has stated that in fact, the room belongs to one Munna with whom the appellant was staying at the relevant time. In fact, in answer to Question 13 of his examination under Section 313 of the Code, the appellant has stated that he had a room partner. Not only this, the site plan is on record, which has been proved by PW-7 as Exhibit A-6. It shows that the act was done inside the room. There is no inconsistency with regard to the place of incident. The victim is consistent that when she was playing with other children, she was taken inside a room by the appellant and the act was done by the appellant on her.

20. On behalf of the State, it is argued that it is a case of presumption of guilt and the basic facts constituting the offence has been proved by the prosecution. Section 29 of the Act makes provisions with regard to the presumption of guilt, which reads as under:-

"29. Presumption as to certain offences. Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

But in the case of presumption of guilt also, it is the prosecution which has to prove its case beyond reasonable doubt. In the case of "Noor Aga vs. State of Punjab and Another", (2008) 16 SCC 417, the Hon'ble Supreme Court has discussed this aspect and held as follows:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also 2026:UHC:3947-DB place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

21. Reference has also been made to the sequel of evidence as to what had happened post incident. It is true that according to FIR, when the appellant had disrobed himself and the victim and sat over the victim. The victim cried and the local people gathered. Whereas, in her statements under Section 164 of the Code, the victim tells that after the incident, she came back to her home and revealed the incident to her mother. In court, the victim tells that after the incident the appellant had dropped her. It is also true that according to PW-3, the mother of the victim, the children had taken the victim to her at a place, which was about a distance of one hour from the place of incident.

22. This is also not material. It is admitted that the victim has stated that she revealed the incident to her mother, she returned from there. The Court has to appreciate the evidence keeping in view the status of the victim and the witnesses. The victim is 5 years old girl. With meticulous precision, it is not expected that she would be accurate about each and every minute details of the incident. She 2026:UHC:3947-DB tells as to what had happened to her. She came back to her home and revealed the incident to her mother and father. Therefore, whatever arguments have been made on this behalf has less merit for acceptance.

23. It is true that according to PW-1, the victim, the appellant did bite her vagina due to which she felt pain and blood also oozed out. It is also true that the medical examination report does not detect any blood oozing out from the vagina, but fact remains that the medical examination report records that there was redness around the vagina.

24. PW-4 is the doctor, who has been asked about the cause of such redness. In the last page, second paragraph of the examination, she has ruled out any infection due to which the redness could occur. Therefore, whatever version the victim has stated about the consequence of the act of the appellant, i.e., bite on her vagina that is not doubtful. There have been some variations with regard to blood but it is immaterial and insignificant under the facts and circumstances of the case.

25. Initially, in the examination under Section 164 of the Code, the victim did not tell that the appellant inserted his finger into her anus, which she states in the court. But it also does not doubt her credibility. She states that the appellant did apply his mouth to her vagina.

26. With regard to the Forensic Science Laboratory report, the victim has not stated that any discharge was made on her person. She has said that some white discharge was there when the 2026:UHC:3947-DB appellant disrobed himself and herself. There was nothing which could have been detected in such circumstance in the forensic report. It is not a case of complete penetration.

27. It is also true that PW-7, Monika Manral, the I.O. has stated that she took statements of some Priya Bansal and some other persons. They have not been examined. Mere non-examination of any other person as a witness does not doubt the prosecution case. It is settled law that it is the quality of evidence that matters and not the numbers of the witnesses.

28. In view of the foregoing discussion, this Court is of the view that the prosecution has been able to prove its case beyond reasonable doubt against the appellant. The court below has rightly convicted and sentenced the appellant by the impugned judgment and order, which calls for no interference. Accordingly, the appeal deserves to be dismissed.

29. The appeal is dismissed.

(Siddhartha Sah, J.) (Ravindra Maithani, J.) 20.05.2026 20.05.2026 BS/Akash AKASH DN: c=IN, o=HIGH COURT OF UTTARAKHAND, 2.5.4.20=dae2472c001d56469ea76fcocaa68f48ef73518c148d140566ab1e26f9cbe61d, postalCode=263001, st=Uttarakhand, serialNumber=27096a1625377537a487dee49224c891823fc6a0334628b21e516047ed4f22f7, cn=AKASH Date: 2026.05.27 17:59:38 +05'30'