

Mandawali on the information by Wireless Operator E-59 received from Rukhsar through telephone No. 27650126, ID Hospital, Kingsway Camp regarding rape committed on her daughter by her (Rukhsar's) husband at her house i.e. House No.123, Gali No.3, Railway Colony, Mandawali. The said DD was entrusted to ASI Vijender Singh who alongwith Ct. Suresh reached the spot. He met the child victim 'S' (name of the child victim withheld to conceal her identity), her mother Rukhsar and Uncle. ASI Vijender recorded the statement Ex.PW10/B of child victim 'S'.

3. The Statement Ex.PW10/B made by the child victim 'S' is to the effect that on the night intervening 31.08.2005/01.09.2005 while she alongwith her younger sister Shalu was sleeping on the roof of their house with their Uncle Chhutku, her two other younger sisters Shabu and Kajal were sleeping in the room downstairs and her mother had gone to the hospital with her another younger sister Sapna. In the midnight, her father came up to the roof and told her that her mother has returned from hospital and she was calling her downstairs. She came downstairs with her father and as soon as they entered the room, her father bolted the room from inside and threatened her not to raise any alarm otherwise he would give her beating. Then her father made her to lie on the floor near the bed and raped her. Thereafter her father went out and she also came out of the room and started crying. On hearing her cries, her Uncle Jagbir, who was living in the adjoining room, came out and she narrated the incident to him. Her Uncle Jagbir informed her mother on telephone and also made her to talk to her mother on phone. She narrated the incident to her mother.

4. On the basis of this statement, FIR under Section 376 IPC was

registered against the appellant. During investigation, appellant was arrested and child victim as well as the appellant were medically examined at LBS Hospital. After completion of investigation, chargesheet was filed against the appellant for committing the offence punishable under Section 376 IPC.

5. During the course of trial, prosecution examined 14 witnesses in all to prove its case. Statement of the appellant was also recorded under Section 313 CrPC wherein he denied the case of prosecution and submitted that he has been falsely implicated in this case due to his enmity with his neighbour Jagbir who wanted to take revenge from him for the reason that the son of Jagbir had fallen from the lap of his (appellant's) daughter and had sustained injuries.

6. After considering the testimony of prosecution witnesses as well as the medical and scientific evidence, the learned ASJ has convicted the appellant for committing rape on his minor daughter, who was aged about thirteen years and sentenced him in the manner aforesaid.

7. During the course of arguments, Mr. Tanmay Mehta, learned counsel for the appellant has submitted that this is a case where the appellant has been convicted for committing the rape on his own daughter and sentenced to undergo RI for ten years despite the fact that neither the child victim i.e. PW-4 - 'S' nor her mother i.e. PW-5 Rukhsar has supported the case of prosecution.

8. Learned counsel for the appellant has further submitted that the appellant has six daughters and his family is starving in his absence. His daughters have now become of marriageable age and his family requires his support which can be made out from the fact his wife and daughter

stated before the Court, at the time of their deposition, that he has been falsely implicated in this case due to enmity with Jagbir Singh.

9. It has been further submitted that the age of the child victim, at the time of occurrence, was 13 years despite that he has been sentenced to undergo minimum imprisonment of 10 years.

10. Learned counsel for the appellant, on the instructions received from the appellant, has submitted that he is not challenging his conviction and his substantive sentence may be reduced to the period already undergone by him in this case and lenient view may also be taken in respect of fine imposed by learned Trial Court considering the poor financial condition of his family.

11. On behalf of State, Ms.Rajdipa Behura, learned APP has submitted that in this case, the appellant has committed rape on his own daughter, who was aged about 12/13 years at the time of occurrence. Learned APP has further submitted that though PW-4 - the child victim and PW-5 Rukhsar, mother of the victim and wife of the appellant have not supported the case of prosecution but PW-8 Jagbir – the neighbourer who is the first person to whom the child victim met immediately after the incident and narrated the entire incident to him, has deposed in a natural manner and has supported the case of prosecution. Further the medical evidence adduced by the prosecution is sufficient to nail the appellant with the crime for which he has been convicted. Thus, in the circumstances, it has been prayed that the conviction and the sentence of the appellant may be maintained.

12. I have considered the submissions made on behalf of the appellant as well as State.

13. In the case ***Khem Chand & Ors. vs. State of Delhi 2008 VII AD (Delhi) 199***, a Division Bench of this Court has dealt with 12 appeals filed by different appellants wherein the victims of rape were under 12 years of age. The factors to be considered while awarding sentence were discussed in detail. It was observed as under :

‘There is judicial recognition now to take into account the post conviction conduct of the accused in jail, while considering the case for reprieve in the sentence awarded. Reference may be made to “Tapas Kumar Dutta Vs. State of Bihar” reported at 1997 (10) SCC 382 and “T.Gurumurthy Vs. State” reported at 2005 (10) SCC 208. Conduct in jail whether the convict has gone in for higher education or not, participates and performs duties assigned, adapts to practice of Vipasna or Meditation, are among other factors suggestive of penitence and reformation. The above coupled with good conduct in jail, which does not disclose any propensity towards crime or violence are factors which may be considered for possible reprieve in sentence, even if conviction is upheld in appeal.’

14. In the written submissions filed on behalf of the appellant, it has been submitted that he has already remained in judicial custody for more than seven years and has also earned remission of one year, eleven months and two days and during that period, his behaviour has been satisfactory and there has been no untoward incident. It has been further submitted that the appellant has been on the path of reformation and now there is no danger to the society if the appellant is released from incarceration. He has relied upon ***T.K.Gopal vs. State of Karnataka (2000) 6 SCC 168*** in support of his contention. Learned counsel for the appellant has further submitted that the appellant has six children and a wife to support. His children have become of marriageable age and the

presence of appellant is imperative. He has prayed that sentence of the appellant may be reduced to the period already undergone.

15. In the instant case, learned Trial Court has relied upon the school certificate Ex.PW6/B showing the date of birth of the child victim as 30.05.1994 but from the statement of PW-6 Mr.R.S.Sharma, Manager, Arya Samaj Preet Vihar Vaidik Shiksha Kendra, C-Block, Preet Vihar, Delhi, it is clear that this date of birth has been recorded only on estimation and not on the basis of any entry in the birth register or other documentary evidence regarding the age of the child victim. As per the photocopy of admission form proved on record as Ex.PW6/B, the date of birth of child victim is mentioned as 30.05.1994 and class in which the admission was sought is mentioned as 'Nursery' and the date on which application form was filled is given as 03.08.2004. So, the child victim was admitted in Nursery Class at the age of 10 years without any documentary evidence regarding her age.

16. As per the nominal roll received, out of the total sentence of 10 years awarded to the appellant, the unexpired portion of sentence, as on 03.09.2012, is one year, three months and twenty two days.

17. Taking into consideration that as per the child victim i.e. PW-4 as well as her mother i.e. PW-5 Rukhsar, the age of the child victim was 13 years at the time of occurrence and also the submissions made by the appellant about his family circumstances, while upholding the conviction of the appellant, the substantive sentence awarded to him is reduced to nine years. The sentence of fine amount of Rs.5,000/- as imposed by the learned Trial Court is maintained, however, considering the submissions made by learned counsel for the appellant that his family is not even able

to make both ends meet, the period of sentence awarded for default of payment of fine is reduced to simple imprisonment for 15 days.

18. The appeal stands disposed of with above observations.

19. A copy of the order be sent to learned Trial Court as well as to the Jail Superintendent for necessary compliance.

PRATIBHA RANI, J

December 03, 2012

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