

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-1215-SB of 2011
Date of decision: 29.07.2015

Rasheed Appellant

Versus

U.T. Chandigarh and another Respondents

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH

1. *Whether Reporters of the local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

Present: Mr. H.S. Jaswal, Advocate
for the appellant.

Mr. Anil K. Lamdharia, Addl. P.P., U.T. Chandigarh.

R.P. NAGRATH, J.

The appellant faced trial of the charges under Sections 366-A and 376 of Indian Penal Code (IPC) for kidnapping and raping a six years old girl child. Learned trial Court held the appellant guilty of charge under Section 376 IPC and acquitted him of the second charge with the observations that there was no authentic evidence in proof of offence under Section 366-A IPC. The trial Court awarded sentence to appellant to undergo rigorous imprisonment for seven years and to pay fine of ₹ 50,000/-, in default to further undergo rigorous imprisonment for one year under Section 376 IPC.

2. It has emerged during the trial that the victim was living with her maternal grandmother at Dadumajra Colony, Chandigarh. The incident happened on 14.05.2010. On that day mother of the victim came to her mother's house in the morning. The complainant

herself is resident of Dhanas, Chandigarh. It was stated that while the prosecutrix was playing in the park in the afternoon, the complainant saw one boy giving some eatables to the girl and went away after sometime. At about 6 o'clock again the complainant was sitting in the park and her daughter was playing there. The complainant saw the same boy wandering there. After sometime the prosecutrix went missing. The complainant suspected that boy to have kidnapped the girl.

3. On receiving telephonic message the police party headed by ASI Kuldeep Singh, reached the spot. Application Ex. PC was handed over to the investigating officer at 09.50 p.m. The same was sent to the police station by making an endorsement and FIR Ex. PJ was registered.

4. The police party started searching for the girl by associating the complainant. While they were passing through Dhanas bridge towards the area of dumping ground that they heard the cries of a child. The police party went towards that spot. The victim was recovered and the appellant who was present there was apprehended.

5. The appellant was taken to the hospital and medically examined on the same night i.e. 14.05.2010 at 11.50 p.m. The prosecutrix was examined by PW-1 Dr. Meera of Government Hospital, Sector 16, Chandigarh. The girl was also examined on 15.05.2010 by the concerned doctors for determining her age. The skirt, which the child was wearing, the vaginal swabs and the underwear of appellant were also handed over to the investigating officer, in a sealed parcel. These exhibits were sent for examination

by the Central Forensic Science Laboratory (CFSL). Vide report Ex. PQ, human semen was detected on exhibits i.e. the skirt of the girl and underwear of the appellant but semen could not be detected on the vaginal swabs of the victim.

6. The case was committed to the Sessions Court for trial. The prosecution examined 11 witnesses in support of its case.

7. During his examination under Section 313 Cr.P.C., appellant denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded false implication. The plea set up by the appellant now is that he came to Chandigarh in search of a job but was falsely implicated in this case. No evidence was led by the appellant in defence.

8. Learned trial Court convicted and awarded the sentence to the appellant as aforesaid.

9. I have heard learned counsel for the appellant, the State counsel and have gone through the record quite extensively.

10. Most important would be the testimony of the victim, a six years old child, examined as PW-3. The learned trial Judge certified that the victim was able to understand questions and give proper response, after examining her generally. Learned trial Court recorded its satisfaction that the victim was a competent witness to make statement.

11. The statement of PW-3 is so natural leaving no scope of suspicion. Her entire statement in chief is reproduced below:-

“The accused standing in the Court Rashid never met me nor I identify him. Rashid had given me a toffee. The witness has pointed towards accused Rashid who had

given a toffee to her. Rashid who had given the toffee had taken me to the bushes. Accused Rashid had done bad acts with me.”

12. There is virtually no challenge to the statement of prosecutrix. In cross-examination, she stated that the appellant present in Court is the same person who had taken her to bushes for doing the bad act. The girl further stated in cross-examination that there were two other persons with the appellant. Taking advantage of this statement it was suggested to PW-3 that wrong act was committed by the other two persons and not by the appellant. A child witness is very likely to give response to the questions put to her in cross-examination in this way as most of the times the questions are in suggestive form. Anyhow, no advantage can be taken by the appellant of the aforesaid statement as PW-3 has categorically denied the suggestion that the other two persons accompanying the appellant committed rape on her.

13. The testimony of mother of the prosecutrix as PW-4 and that of PW-9 investigating officer about the manner in which the girl was recovered and appellant arrested on the same night itself, would bring complete corroboration to the statement of the victim. PW-9 the investigating officer rather stated that the appellant was all alone present with the girl when he was arrested.

14. PW-4 stated that after the police came, they started searching for the girl. When they reached near the dumping ground she heard cries of her daughter. She also saw the appellant present near the bushes. The appellant tried to run away but was arrested by the police.

15. Despite extensive cross-examination of PW-4 she has withstood the test of scrutiny. There is no ulterior motive for PW-4 or the victim to falsely implicate the appellant for such a heinous crime. It was for the first time during examination of PW-9 it was suggested that the complainant was nursing some personal grudge/grouse against the appellant and falsely implicated him. What was the basis of grudge was not highlighted. This defence was also not reiterated by the appellant during his examination under Section 313 Cr.P.C. Even no such question was put to the victim also.

16. It is quite well settled that if a child witness is found competent to depose to the facts and reliable one, such evidence could be the basis of conviction.

17. In **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and Intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shake and moulded, but it is also an

accepted norm that, if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

18. PW-1 Dr. Meera, Medical Officer, posted in the Government Hospital, Chandigarh, conducted medicolegal examination of the victim a six years old child on 14.05.2010. *(Note:- In the statement of doctor the date is mentioned as 16.05.2010 but it seems to be a typographical error as copy of MLR Ex. PB proved in the statement of doctor shows that the girl was examined on 14.05.2010 at about 11.55 p.m. and according to the investigating officer and mother of the girl, the girl was taken to the hospital on the same night).* The doctor found hymen torn and there was slight bleeding from the torn hymen. The doctor also took swabs from the hymen orifice for being sent for chemical examination. The black frock, which the girl was wearing at the time of incident, was prepared into parcel sealed with seal of doctor. The parcel containing frock was produced during examination of the doctor and the same is Ex. P1.

19. The above medical evidence fully corroborates the story that the girl was subjected to the sexual intercourse. Even the appellant was produced before PW-8 Dr. Rajwinder Singh on 14.05.2010 itself at about 11.50 p.m. There were five injuries on his person which were contusions mostly on the facial area. No question was, however, put to the investigating officer and mother of the girl as to how there were such injuries on the person of appellant and this was also not an important factor for determining

charge against the appellant. PW-8 observed that the appellant had consumed alcohol but he was not under the influence of alcohol. The doctor found that the appellant was medically fit and there was nothing to suggest that he was incapable of performing sexual intercourse.

20. The report of CFSL Ex. PQ is proved by PW-10 Dr. Sanjiv, Assistant Director, CFSL, Chandigarh. The frock of the girl and underwear of the appellant were also produced during examination of PW-10.

21. To connect this report with the apparels of the victim and the accused, the prosecution also examined PW-6 HC Sukh Chain Singh, who was posted as Moharrier Head Constable and PW-11 C. Santokh Singh. It is recorded in the report Ex. PQ that these parcels duly sealed with seal of the doctor were deposited in CFSL through C. Santokh Singh.

22. The prosecution also examined two other doctors who examined the victim for determining her age. PW-5 Dr. Nita Mahajan, Medical Officer, Dental, Government Multi Specialty Hospital, Chandigarh examined the victim girl on 15.05.2010 for determining her dental age. The doctor found age of the prosecutrix to be varying between 6 to 7 years. PW-7 Dr. Karam Singh, Radiologist, Government Hospital, Chandigarh stated that bone age of the prosecutrix was between 6 to 8 ½ years. The doctors have proved their respective reports.

23. There was in fact no challenge to the above evidence led to determine age of the victim and the statements of the girl and her mother in this regard were also not challenged. PW-3 during

her general examination by the trial Court stated that she was studying in the 1st standard.

24. In fact learned counsel for the appellant was unable to refer to any material on record to find any fault with the conviction recorded by the trial Court. The only submission made by learned counsel for the appellant was that fine imposed by the trial Court to the tune of ₹ 50,000/- is quite exorbitant and the contention raised was that the fine may be reduced.

25. In view of the above and minute analysis of the evidence and the principles applicable to the case, I uphold the finding of the guilt of appellant as reached by learned trial Court. The charge framed against the appellant clearly stated that the age of the victim was six years, so the conviction was supposed to have been recorded specifically under Section 376 (2) (f) IPC. I, thus, alter the conviction by correctly describing the section as Section 376 (2) (f) instead of Section 376 IPC while dismissing appeal on merits. Section 376 (2) (f) IPC as it existed before the Criminal Law (Amendment) Act, 2013 provided punishment for committing rape on a girl below 12 years of age to be rigorous imprisonment for a term which shall not be less than 10 years but which may be for life and also liability to pay fine.

26. I have also heard learned counsel for appellant and the State counsel on the question of sentence. The trial Court awarded the sentence to the appellant to undergo rigorous imprisonment for 7 years under Section 376 IPC. It seems that the learned trial Court was not alive to the proviso to Section 376 (2) (f) IPC which says that the Court may for adequate and special reasons to be

mentioned in the judgment may impose a sentence of imprisonment of either description for a term of less than ten years. The learned trial Court has not recorded any reason much less special to award lesser than the minimum sentence. The relevant part of the order of sentence is reproduced as under:-

“.....The convict has been heard on the quantum of sentence. He pleaded that he is a poor person and his parents are old and he is the only earning member in the family. That he is the first offender and he further requested to take a lenient view.

The learned Public Prosecutor for the State has contended that the offence of rape is an offence against the society and no leniency can be shown to the convict in such case.

After hearing the learned counsel for the convict, convict in person and the learned Public Prosecutor for the State, the convict Rasheed is sentenced to undergo rigorous imprisonment for seven years and to pay fine of ₹ 50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year under Section 376 of the Indian Penal Code.”

27. The Legislature has provided minimum sentence in the case of offence of rape with a girl of less than 12 years as in the case of gang rape. If the trial Court has not adverted to the mandatory provisions of law this Court should in the circumstances of the case invoke its *suo motu* revisional jurisdiction by invoking Sections 482 and 401 Cr.P.C. to set aside the order awarding

sentence. It is quite astonishing that even the State has not cared to come up before this Court for seeking enhancement of the sentence.

28. In **Nadir Khan vs. The State (Delhi Administration)**, (1975) 2 SCC 406, Hon'ble Supreme Court held as under:-

“4. It is well known and has been ever recognised that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. The High Court, as an effective instrument for administration of criminal-justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounded duty to suo motu act where there is flagrant abuse of the law. The character of the offence and the nature of disposal of a particular case by the subordinate court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code. The High Court in a given case of public importance e.g. is now too familiar cases of food adulteration reacts to public concern over the problem and may act suo motu on perusal of newspaper reports disclosing imposition of grossly inadequate sentence upon such offenders. This position was true and extant in the old Code of 1898 and this salutary power has not been denied

by Parliament under the new Code by rearrangement of the sections. It is true the new Code has expressly given a right to the State under s.377 Cr. P.C. to appeal against inadequacy of sentence which was not there under the old Code. That however does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court. This Court will be slow to interfere with exercise of such discretion under Art. 136 of the Constitution.

5. *Section 401 expressly preserves the power of the High Court, by itself to call for the records without the intervention of another agency and has kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court. The provisions under s. 401 read with s. 386 (c) (iii) Cr. P.C. are clearly supplemental to those under s. 377 whereby appeals are provided for against inadequacy of sentence at the instance of the State Government or Central Government, as the case may be. There is therefore, absolutely no merit in the contention of the learned counsel that the High Court acted without jurisdiction in exercising the power of revision, suo motu, for enhancement of the*

sentence in this case. The application stands rejected.”

29. I am, however, of the view that the accused should be heard before any order of enhancement of sentence is to be passed. Since the order of learned Sessions Judge does not discuss about the provision of minimum sentence provided for the offence and has not given any special or adequate reasons while recording sentence to the appellant, the impugned order of sentence passed against the appellant is set aside in *suo motu* in exercise of revisional jurisdiction of this Court and the matter is remitted to the Sessions Judge, Chandigarh for a fresh decision on the question of sentence in accordance with law.

30. As per custody certificate dated 30.11.2014, the appellant has undergone actual sentence of about 3 years and 9 months of imprisonment and approximately 6 ½ years by including the remissions earned by him. The learned Sessions Judge is directed to issue production warrants of the appellant within one week from the date of receipt of certified copy of this order and after hearing the appellant take a decision on the question of sentence expeditiously and positively within a period of 15 days thereafter.

Copy of this order be sent to the learned Sessions Judge immediately and preferably through a special messenger.

July 29, 2015
jk

(R.P. NAGRATH)
JUDGE