

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl. Appeal No. S-510-SB of 2004

DATE OF DECISION: 02.12.2015

Babloo

.....Petitioner

Versus

State of Haryana

.....Respondent

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

1. **Whether reporters of local newspaper may be allowed to see judgment? (Yes/No)**
2. **To be referred to reporters or not? (Yes/No)**
3. **Whether the judgment should be reported in the Digest? (Yes/No)**

Present:- Mr. Sushil Bhardwaj, Advocate
for the appellant.

Mr. B.S. Virk, DAG, Haryana.

DAYA CHAUDHARY, J.

The present appeal has been filed by accused-appellant, namely, Babloo to challenge the judgment of conviction and order of sentence dated 7/8.1.2004 passed by Sessions Judge, Kurukshetra, vide which, he has been convicted for offences punishable under Sections 366 and 376 (2) (g) IPC and sentenced to undergo RI for five years and to pay a fine of ₹ 1000/- with default clause and RI for ten years and to pay a fine of ₹ 2000/- with default clause, respectively. Both the sentences were ordered to run concurrently.

As per prosecution version, the daughter of the complainant, who was 13/14 years of age did not reach home after doing work. In spite of making of efforts by the complainant-mother, she could not be traced. A

complaint was made to the police against two persons, namely, Babloo and Sanjay. On 28.3.2002, the police party accompanied by the complainant and her maternal uncle went to the village of Babloo from where her daughter was recovered. Victim disclosed to the police that she was taken by accused-Sanjay to her house on the pretext that she was called by her father for some urgent work. She further stated that accused-Babloo also met them on the way. On reaching home, she found that no body was present in her home and accused-Babloo forcibly committed rape upon her. Both the accused allured and enticed her to accompany them at different places from bus stand, Pipli to Delhi and then to Kanpur. They stayed in Kanpur for 4-5 days and they used to sleep at Railway Station at night. On 27.3.2002, accused-Sanjay left Kanpur for Kurukshetra but victim remained with accused-Babloo, who took her to his home District i.e. Unnao on 28.3.2002. After recording the statement of the victim, she was got medico legally examined and FIR was registered against Babloo as well as Sanjay.

On completion of the investigation, challan was presented against both the accused and the case was committed to the Court of Sessions. Charges under Sections 363,366 and 376 (g) (wrongly mentioned) of IPC were framed against both the accused by Fast Track Court, Kurukshetra. However, later on, on the direction of Administrative Judge, ossification test was conducted and accused-Sanjay being juvenile was sent to Juvenile Court for separate trial and trial was proceeded against accused-Babloo before Sessions Court. Fresh charge for offence punishable under Sections 363,366 and 376 (g) IPC was framed against the accused, to which, he pleaded not guilty and claimed trial.

The prosecution in order to prove its case examined as many as 14 witnesses.

On conclusion of prosecution evidence, statement of the

accused under Section 313 Cr.P.C. was recorded, wherein, he denied all the incriminating circumstances against him and claimed innocence. The accused did not lead any evidence in his defence.

On appraisal of evidence available on record and after hearing the arguments of the parties, the trial Court convicted and sentenced the accused-appellant as mentioned above.

The present appeal has been filed to challenge the judgment of conviction and order of sentence passed by the trial Court.

Learned counsel for the appellant contends that it was a case of consent and ossification test was also conducted upon the prosecutrix, wherein, the age of the victim was stated to be 14/16 years. There is always a margin of two years on either side in the ossification test and it can be inferred that the age of the victim was not less than 18 years. As per opinion of the Doctor, the victim was habitual of sexual intercourse. The prosecution had remained in the company of the accused and visited various places but no hue and cry was ever raised. The victim stayed at railway station with the accused-appellant but she never tried to run away from that place. It is a case of consent, therefore, it could not be a case of rape. Learned counsel also submits that there are serious contradictions and discrepancies in the statements of the witnesses. The appellant has wrongly been convicted for offence punishable under Section 376 2 (g) IPC, whereas, there was no allegation of commission of rape against co-accused Sanjay. The prosecutrix has settled in her matrimonial life and is having children as well. The appellant is facing agony of trial since lodging of the FIR i.e. 23.3.2002. He has also undergone actual custody of five years and nine months. He was 21 years of age at the time of commission of offence and is still unmarried and has not settled in his matrimonial life.

Learned counsel has also relied upon the judgments of Hon'ble the Apex

Court in the case of **Shyam and another Vs. State of Maharashtra** 1995 SCC (Cri) 851, **State of Chhattisgarh Vs. Lekhram** 2006 (2) RCR (Criminal) 475, of this Court in **Rakesh Vs. State of Haryana** 2006 (4) RCR (Criminal) 505, **Avdesh Vs. The State of Haryana** 2010 (4) RCR (Criminal) 154, **Rajpal Vs. State of Haryana** 2005 (1) RCR (Criminal) 635, **Dinesh Vs. State of Haryana** 2007 (3) RCR (Criminal) 241, **Sandip Kumar Vs. State of Punjab** 2007 (2) RCR (Criminal) 758, **Satbir Vs. State of Haryana** 2007 (4) RCR (Criminal) 169, **Dilawar Singh Vs. State of Haryana** 2011 (1) Law Herald 928, **Rajesh Vs. State of Haryana** 2011 (3) RCR (Criminal) 59 and of Delhi High Court in **Mahabir Prasad Vs. State** 1999 (1) CCR 1, in support of his contentions. In the end learned counsel prays that some lenient view may be taken by reducing the sentence to the period already undergone by him.

Learned counsel for the respondent-State has not disputed the custody period as well as the age of the prosecutrix but opposes the submissions made by learned counsel for the appellant on the ground of seriousness of the offence. He further contends that the judgment passed by the trial Court is well reasoned and the same is based on proper appreciation of evidence. It has also not been disputed by learned State counsel that it is not a case of 376 (2) (g) IPC as allegations of rape are there against the present appellant only.

Heard the arguments advanced by learned counsel for the appellant as well as learned State counsel and have also gone through the record of the trial Court including the statements of the prosecution witnesses and also of defence witnesses.

A perusal of statements of the prosecution witnesses would show that there are serious contradictions not only with regard to age of the prosecutrix but with regard to place of occurrence as well. It has

specifically been stated by the prosecutrix in her statement that she has visited various places with accused-appellant and was ultimately apprehended by the police with the accused. Public places were visited by them but nothing has come on record to show that the victim has ever raised any hue and cry. Rape was committed in the house of the victim itself and thereafter she went with accused to different places from Kurukshetra to Delhi, Kanpur and then to Unnao (HP) but no efforts were made by her to run away. It has also been brought to the notice of the Court that the prosecutrix has settled in her matrimonial life and is having children as well. A perusal of the statement of the Doctor, who medico legally examined the prosecutrix, would show that there was no injury on the private part of the prosecutrix. The opinion given by the doctor is reproduced as under:-

External examination.

There was no mark of injury on any part of the body.

Breast

Breasts were well developed, areola of pink colour and nipples were prominent.

Menstrual history

She was un-married. Age of menarchi 8 month back L.M.P. Was 28.3.2002. Menstrual 5/28 days regular.

Internal examination

Secondary sex-character were well developed. Pubic hairs were present and matted and they were taken for chemical examination. There was no mark of injury over vulva and inner aspect of thigh.

P/V Labi were healthy. Hymen was torn, at 12.00 o' clock and 8 o' clock. Heal tears were present. Vagina admits one finger.

Finger was stained with menstrual bleeding. Two slids and two swabs were prepared from posterior vaginal fornix. Two slids of vaginal smear and two swabs from posterior fornix were packed in a card board bok. Underwear of brown colour with strips and paticot of green colour were taken and sealed properly and handed over to the police. An envelope containing copy of MLR and forwarding letter with sample seals was also sealed and handed over to the police.

Opinion

Opinion from examining the FSL report; he sexual act could not be ruled out. The carbon of MLR is Ex. PC and original is with me and bears my signature.

For age:- Rekha was referred to radiological examination. At this stage, a sealed envelope bearing the seal of FSL was opened and it was containing paticot Ex. P1, two vials containing swabs and pubic hairs are the Ex. P2 and Ex. P3, which are the same which I handed over to the Police. I examined Rekha on police application Ex. PB and endorsement is Ex.PD/1 and Ex. PD/2.

A perusal of radiological report would show that with regard to the age of the prosecutrix two views are possible. The age of the prosecutrix has been assessed to be 14/16 years and the view which is more favourable to the accused has to be accepted by the Court. The judgment of this Court rendered in **Om Parkash @ Mita @ Prem Vs. State of Haryana** 1997 (1) RCR (Criminal) 741, the victim was found to be between the age of 16-17 years and a margin of three years was given on either side as the report can be made by margin of couple of years on both sides. Similarly in the case of **Rajinder Chandra Vs. State of**

Chhattisgarh 2002 (1) RCR (Criminal) 587 SC, the age of the victim as per ossification test was opined to be 15-16 years and as such on the basis of that report it was observed that there could be a variation of 2-3 years on either side. In **Rakesh's case (supra)**, this Court acquitted the accused of the charges by relying upon the age of the prosecutrix assessed in the ossification test. Similarly, in **Avdesh's case (supra)**, the prosecutrix travelled with the accused in a bus at different places and it was observed that she was having many occasions to raise hue and cry but no such efforts were ever made and she remained mum. In that case also there was no mark of external injury on the person of the prosecutrix. It was observed that in absence of the injuries on the prosecutrix or the accused, it is clear that she was the consenting party. Similarly, in **Mahabir Prasad's case (supra)**, the age of the prosecutrix was found to be between 14-16 years as per radiological test. The accused in that case was punished for offence of kidnapping only and not for rape by considering that the offence was committed about 23 years ago and sentence of the accused was reduced to the period already undergone. Similarly in the judgment of this Court rendered in **Rajpal's case (supra)**, the accused was convicted under Section 376 IPC and faced trial for nine years but being bread winner of his family, his sentence was reduced from seven years to the period already undergone by him i.e. four years. Similarly in another judgment of Hon'ble the Apex Court in **Lekhram's case (supra)**, the sentence was reduced from three years to one year and six months.

In the present case also, the prosecutrix has settled in her matrimonial life, whereas, the accused-appellant has faced trial since lodging of the FIR i.e. 23.3.2002 and is still unmarried. He is stated to be poor person being the only bread winner of the family. He has undergone

actual sentence of five years and nine months till the suspension of his sentence by this Court i.e. on 7.1.2008.

In view of the facts as mentioned above and after considering the submissions made by learned counsel for the appellant, the conviction of the appellant is upheld. However, the sentence of the appellant is reduced to the period already undergone by him.

The fine has already been deposited. The appellant is on bail as his sentence has already been suspended by this Court.

Accordingly the present appeal is disposed of with the aforesaid modification in sentence.

December 02, 2015
pooja

(DAYA CHAUDHARY)
JUDGE