

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Criminal Appeal S-834-SB of 2004
Date of Decision: September 28, 2015**

Hari Chand

.....Appellant

Versus

The State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE T.P.S.MANN

Present : Mr. Simrandeep Singh Sandhu, Advocate
for the appellant.

Mr. Dhruv Dayal, Deputy A.G., Haryana.

T.P.S.MANN, J. (Oral)

Appellant-Hari Chand has filed the present appeal for challenging the judgment and order dated 14.2.2004 passed by learned Additional Sessions Judge, (Adhoc) Faridabad, whereby, he stands convicted under Section 376(2)(g) IPC and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- and in default of payment of fine, to further undergo rigorous imprisonment for two months. He further stands convicted under Section 363 IPC and sentenced to undergo imprisonment for three years and to pay a fine of Rs.500/- and in default of payment of fine, to further undergo imprisonment for one month. He also stands convicted under Section 366-A IPC

and sentenced to undergo imprisonment for four years and to pay a fine of Rs.500/- and in default of payment of fine, to further undergo imprisonment for one month. All the substantive sentences were ordered to be run concurrently. The period for which the appellant had remained in custody during the course of investigation/trial was ordered to be set off against the substantive sentence of imprisonment imposed upon him. Hence, the present appeal.

The case of the prosecution, in nutshell, is that the prosecutrix, who was studying at Sonapat, had come to stay with her mother at Faridabad during vacations from the school. On 20.10.2000, mother of the prosecutrix was busy attending to her duties, while her brother was away to the market. At about 12.00 noon, when the prosecutrix was all alone in the house, accused-Nain Sukh (now Proclaimed Offender), along with the appellant, who was his friend, came to the house of the prosecutrix and on finding her alone, Nain Sukh called her in a room of her house. Accused-Hari Chand bolted the door of the room from outside. Accused Nain Sukh raped her against her wishes. She tried her best to get herself released from the clutches of Nain Sukh, but it was all in vain. After committing the offence, Nain Sukh and appellant-Hari Chand threatened her that in case she reported the matter to anyone, her family would be

eliminated. At the same time, Nain Sukh promised to marry her. Out of fear, the prosecutrix did not disclose anything about the incident to anyone in the family.

Further case of the prosecution is that on 29.10.2000, at about at about 4:00 a.m., when the prosecutrix had gone to bathroom, Nain Sukh picked her up forcibly. At that time, appellant-Hari Chand was present with him. Both of them took the prosecutrix on their motor cycle to the jungles in U.P. Nain Sukh, with the assistance of the appellant raped her several times. Nain Sukh then brought her to the Court premises in Chhata (U.P.) for Court marriage. However, the prosecutrix managed to escape and reached Railway Station Chhata. At the railway station, she was caught hold of by the appellant and again taken by him and Nain Sukh to the jungles of U.P. On 6.11.2000, when the two accused were taking her on the motor cycle to Rewari, they were apprehended by the police at the Railway Station of Karman Phatak at about 3.00/4.00 p.m. She narrated the entire incident to the police and also her mother. She was, thereafter, got medically examined in Civil Hospital, Hodal. Her statement under Section 164 Cr.P.C. was also got recorded by the Magistrate.

It may be worthwhile to mention here that while the prosecutrix was in the custody of the two accused, the mother of the prosecutrix submitted application to the police, and on its

basis, FIR No. 413 dated 4.11.2000 under Sections 363/366/120-B IPC was registered at Police Station, Hodal. It was alleged therein that two accused, who had earlier been living in the house of the mother of the prosecutrix had enticed the prosecutrix with the promise to marry her. Subsequently, after the statement of the prosecutrix was recorded, offence under Section 376 IPC was also added to the FIR.

After the completion of the investigation, final report under Section 173 Cr.P.C. was submitted by the police against the appellant Hari Chand and Nain Sukh. Both the accused pleaded not guilty and claimed trial. Subsequently, on 26.8.2002, Nain Sukh was declared as Proclaimed Offender.

In support of its case, the prosecutrix examined PW1 Inspector Lekh Raj Dagar, who had prepared final report under Section 173 Cr.P.C., PW2 Dr. Manjula Mishra, who had medically examined the prosecutrix, PW5 prosecutrix herself, PW6 Neelam, mother of the prosecutrix, PW7 Shri P.R.Sharma, Judicial Magistrate 1st Class, Palwal, who had examined the prosecutrix under Section 164 Cr.P.C., PW9 Ashok Kumar, Draftsman who proved scaled site plan Ex.PW9/A prepared on the pointing of the prosecutrix, PW10 Dr. S.P.Jayant, who had deposed that he conducted X-ray examination of the prosecutrix for her age verification and opined that the age of the prosecutrix was 16/17

years with variation of two years on either side and PW3 ASI Virender Singh, PW4 Constable Ram Singh, PW8 HC Ishwar and PW11 Constable Ajit Singh, who deposed about the various steps taken by them during the investigation of the case.

The trial Court believed the prosecution version and convicted and sentenced the appellant, as mentioned above. However, keeping in view the fact that the appellant had not committed rape upon her nor even tried to do so, the trial Court found it to be a fit case to impose sentence for a term lesser than the minimum prescribed for the offence under Section 376(2)(g) of IPC and, accordingly, sentenced him to undergo imprisonment for five years on that count, besides sentences of three years and four years for the offences under Sections 363 and 366-A IPC, respectively. All the substantive sentences were ordered to run concurrently.

Having heard learned counsel for the parties and on going through the record of the case with their able assistance, this Court finds that the prosecutrix while deposing before the trial Court as PW5 had stated in clear terms that she was subjected to rape by Nain Sukh on 20.10.2000 and at that time the appellant bolted the door of the room from outside. Further, on 29.10.2000 at about 4:00 a.m., she was forcibly taken by Nain Sukh and appellant-Hari Chand to the jungles of U.P. where she was

subjected to repeated sexual intercourse by Nain Sukh and the appellant had only facilitated the commission of crime. After being recovered from the custody of the accused, the prosecutrix was medico legally examined in Civil Hospital, Hodal. She also got recorded her statement under Section 164 Cr.P.C. wherein she stated that both the accused had been living as tenants in her house for a period of five months prior to the occurrence. She also stated that it was Nain Sukh, who had been repeatedly subjecting her to forcible sexual intercourse. However, at no stage, did she state that appellant-Hari Chand had subjected her to forcible sexual intercourse. The role attributed to him was of facilitating Nain Sukh in the commission of the crime. The testimony of the prosecutrix has been duly corroborated by her mother Neelam, who stepped into the witness box as PW6.

It is true that when the prosecutrix stepped into the witness box as PW5, she produced Middle Examination Certificate Mark-A, which showed her date of birth as 5.12.1984. As such, on 20.10.2000, when the prosecutrix was first subjected to rape by Nain Sukh, she was fifteen years, ten months and fifteen days' old. The said certificate was not duly proved by the prosecution. That apart, PW10 Dr. S.P. Jayant, who had radiologically examined the prosecutrix on 9.11.2000, opined that the radiological age of the prosecutrix was between sixteen and

seventeen years with a margin of two years on either side. Taking into consideration the totality of the circumstances, this Court is of the considered view that the prosecutrix was more than sixteen years of age on the date of commission of the crime.

In view of the above, no case is made out for any interference in the conviction of appellant-Hari Chand for the offences under Sections 376(2)(g), 363 and 366-A IPC.

As regards the quantum of sentence, this Court is of the considered view that there is no allegation of commission of rape against the appellant. The role attributed to him was of facilitating Nain Sukh in committing rape upon the prosecutrix. As regards the allegation that it was the appellant, who had bolted the door from outside, this Court finds that the said fact was not corroborated by the prosecutrix when she appeared before the trial Court as PW5. Rather, she stated that the door was bolted from inside. Further, as is apparent from the record, the appellant was arrested on 6.11.2000 and, thereafter, released on bail on 11.12.2000 during the trial of the case. Upon his conviction and sentence by the trial Court, the appellant was taken into custody on 14.2.2004. Subsequently, the application filed by him for suspension of sentence was allowed by a co-ordinate bench of this Court on 4.3.2005 and the appellant came to be released on bail. He is facing the agony of criminal prosecution for the last

about fifteen years.

Taking into consideration the totality of the circumstances, this Court is of the considered view that no useful purpose would be served by sending the appellant behind the bars, once again, to undergo the remaining sentence of imprisonment imposed upon him. Ends of justice would be suitably met, if the remaining sentence of imprisonment of the appellant is set aside.

Resultantly, the conviction of the appellant under Sections 376(2)(g), 363 and 366-A IPC is upheld. The substantive sentences of imprisonment on all the counts are reduced to the one already undergone by the appellant. However, the sentences of fine alongwith their default clauses are maintained.

The appeal is, accordingly, disposed of.

September 28, 2015
amit rana

(T.P.S. MANN)
JUDGE