

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CRA-S-2215-SB-2005
Date of decision :07.01.2015

Sunil Kumar

... Appellant

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr.K.S.Dhaliwal, Advocate
for the appellant.

Mr.Prabhjeet Singh Sullar, Addl. A. G. Haryana.

REKHA MITTAL, J.

The present appeal has been directed against the judgment of conviction and order of sentence dated 14.11.2005 and 16.11.2005 respectively whereby the appellant has been convicted and sentenced for commission of offence punishable under Sections 363, 366, 376 of the Indian Penal Code (in short 'IPC'), extracted hereinbelow:-

Name of Convict	Under Section	Sentence (R.I.)	Fine(in Rs.)	In Default (R.I.)
Sunil	363	4 years	1000/-	6 months
	366	4 years	1000/-	6 months
	376	7 years	2000/-	6 months

Ishwar Singh, the complainant submitted an application Ex.PC on the allegations that Jagdish married to Smt.Phoolpati passed away about 8 years back. The prosecutrix aged about 16 years was born out of wedlock

of Jagdish and Smt.Phoolpati. After death of Jagdish, Smt.Phoolpati performed Kareva marriage with Sunder son of the complainant. On 31.03.2004, the complainant, his wife and other family members had gone to fields for harvesting wheat crop. In the evening, when they returned to the house, they found the prosecutrix missing. She could not be traced despite frantic search. Sunil son of Kaptan, a neighbourer was also missing from his house. The complainant suspected that Sunil had enticed the prosecutrix and Satish son of Darya Singh helped in kidnapping the girl.

On the basis of complaint, formal FIR Ex.PC/2 was registered at the Police Station. Site plan of the place of occurrence Ex.PH was prepared. On 13.04.2014 Balwan Singh and Surender booked for abetting the crime were interrogated. They suffered disclosure statements Ex.PE & PF. On 06.03.2005, the Investigating Officer received information that the accused in the company of the prosecutrix was present at Railway Station Gohana. He along with two lady constables proceeded towards Railway Station Gohana and Bhim Singh, met him at Baroda Chowk, Gohana. The victim was identified by Bhim Singh and as such the accused and the victim were apprehended at Railway Station. At that time, the victim was carrying a child of about 2 months. Rough site plan of the place of arrest of the accused was prepared. The accused and the prosecutrix were got medico legally examined. Statement of the prosecutrix was recorded and she was sent to Nari Niketan under the orders of Judicial Magistrate. On investigation being completed, report under Section 173 Cr.P.C. was submitted for commencement of trial.

After compliance with the mandatory provisions of Section 207

Cr.P.C., the case was committed to the Court of Sessions as offence under Sections 366 and 376 IPC is exclusively triable by the said Court.

The accused was charged for committing offence punishable under Sections 363, 366, 376 & 368 IPC to which he pleaded not guilty and claimed trial.

To prove its case, the prosecution examined Dr.Alankrita PW1, Ishwar @ Ishar complainant PW2, Constable Somvir Singh PW3, the prosecutrix (name kept secret) PW4, ASI Raj Singh PW5, Lady Constable Satwanti PW6, HC Ramesh PW7, Smt.Phoolpati PW8, Bhim Singh PW9, SI Satpal Singh PW10, HC Radhey Shyam PW11, Sission Kumar PW12, HC Rajbir PW13, Constable Rajesh Kumar PW14, Kaptan Singh PW15, ASI Azad Singh PW16, Chhattar Singh SA PW17 and Sunder Singh PW18. The report of the Forensic Science Laboratory was tendered into evidence as Ex.PB.

On evidence of the prosecution being closed, the accused was examined under Section 313 Cr.P.C. wherein he denied all the incriminating circumstances appearing against him and pleaded his false implication. He, however, did not lead any evidence in defence.

On appreciation of evidence adduced by the prosecution and rival submissions made by respective counsel for the parties, the learned trial Court held the accused-appellant guilty of committing offence punishable under Sections 363, 366 and 376 IPC and sentenced him accordingly, noticed hereinbefore.

Feeling aggrieved by the verdict of the learned trial Court, the present appeal was preferred by the convict in 2005 and has now matured

for hearing.

Counsel for the appellant has strenuously argued that the learned trial Court fatally faulted in holding the accused guilty of committing offence punishable under Section 376 IPC. The prosecutrix appeared in the witness box and did not support the prosecution case. As per the statement of the prosecutrix, she was born on 04.03.1987, thus, she was more than 16 years of age on the day, she admittedly left with the accused Sunil. The prosecutrix has denied in unequivocal terms that she was subject to rape by the accused. She has admitted that the accused was known to her for the past about three years before they went to Gujrat. She had friendship with the accused and had decided to perform marriage. Another submission made by counsel is that it is an admitted position of the case that when the prosecutrix along with the accused were apprehended in the year 2005, the prosecutrix had a baby in her lap. It is argued that as the prosecutrix has not supported cause of the prosecution, offence under Section 376 IPC is not proved. Even if it is assumed that the alleged victim performed marriage and developed physical relations, no offence under Section 376 IPC can be said to be established as the prosecutrix was more than 16 years of age. In addition, it is submitted that even if the prosecutrix was slightly less than 16 years of age in view of date of birth recorded in the office of Registrar, Births and Deaths, no offence under Section 376 IPC can be said to be proved.

Counsel has further submitted that the prosecutrix, admittedly, has performed marriage with the accused and out of their wedlock, two children have been born and parties are leading a happy married life. It is

argued that though no offence under Section 366 IPC can be said to be made out but he does not assail conviction of the accused for offence under Sections 366 and 363 IPC. It is argued that keeping in view that the accused has faced trauma of criminal proceedings for the past about 10 years, suffered custody for a period of one year and more than six months and there being no other criminal case registered much less pending against him along with the fact that the prosecutrix and the accused are husband and wife leading a happy married life, the sentence awarded for offence under Sections 363 and 366 IPC may be reduced to the period already undergone.

Counsel for the State, on the other hand, has supported the judgment passed by the trial Court with the submissions that the accused cannot escape his liability as he sexually assaulted a young girl less than 16 years of age who was kidnapped out of lawful keeping of her guardian with an intent to force her to marry and seduce her to illicit intercourse.

I have heard counsel for the parties and perused the records.

The prosecutrix is the star witness to prove culpability of the accused for offence of rape. The prosecutrix has altogether failed to inculcate the accused either for taking her away against her wishes much less subjecting her to rape. She was declared hostile at the request of public prosecutor and was cross examined at length by him. She has categorically deposed that she was born on 04.03.1987 and denied that she was born on 31.07.1988. The Public Prosecutor failed to extract any tangible and material facts during her cross-examination to support the charge. In this view of the matter, I am of the considered opinion that the learned trial Court failed to take a correct view and convicted the accused for offence

under Section 376 IPC merely on the basis of surmises, conjectures and assumptions. The conviction and sentence of the appellant for offence under Section 376 IPC cannot be allowed to sustain and accordingly set aside.

This brings the Court to the question of sentencing in regard to offence under Section 366 and 363 IPC. The prosecutrix has deposed that she voluntarily accompanied the accused as she and the accused developed friendly relationship three years prior to their leaving for Gujrat in March 2004. Counsel for the State has not disputed that the prosecutrix has performed marriage with the accused and out of their wedlock, two children have been born and the parties along with their children are leading a happy life. Keeping in view the above, I do not find any reason to send the convict to jail at the cost of creating disharmony in the family. Interests of justice would be better served if the substantive sentence awarded to the convict is reduced to the period already undergone.

For the reasons aforesaid, the appeal is allowed in the aforesaid terms. The conviction and sentence of the appellant for offence punishable under Section 376 IPC is set aside. The substantive sentence awarded for offence under Sections 366 and 363 IPC is reduced to the period already undergone. However, the sentence of fine with default stipulation shall remain intact.

Disposed of accordingly.

(REKHA MITTAL)
JUDGE

January 07, 2015.
Davinder Kumar