

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

Crl. Appeal No.S-2600-SB of 2011

Date of Decision: 23.09.2015

Surender @ Jonti

....Appellant

Versus

State of Haryana

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspapers may be allowed to see the 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. Rajesh Khandelwal, Advocate
for the appellant.

Mr. B.S. Virk, D.A.G., Haryana
for the respondent-State.

DAYA CHAUDHARY, J.

The present appeal has been filed to challenge the judgment of conviction and order of sentence dated 20/21.09.2011 passed by the Additional Sessions Judge, Hisar, whereby, the appellant has been convicted for offence punishable under Section 363 IPC and was sentenced to undergo rigorous imprisonment for a period of five years with fine of ₹ 1,000/- with default clause. He has also been sentenced to undergo rigorous imprisonment for a period of one year under Section 506 IPC. However, all the substantive sentences were ordered to run concurrently.

As per the prosecution story, when ASI Mahipal, along with

other police officials, was on patrol duty on 28.09.2008, the complainant-Jai Devi came along with her brother-in-law (jeth), namely, Ram Kumar and got her statement recorded. She had stated that she was aged about 40/42 years and her husband was in service. She was having one son and four daughters. One of the daughters was aged about 15 years and was studying in Class VIII. On 28.09.2008, at about 1.00 p.m., she and the prosecutrix went to the fields for fetching fodder for the cattle. While she was washing clothes on the drain pipe (*nali*), two boys came on a motorcycle out of whom, one was Satish @ Gunda and another could not be identified. Both the boys enticed away the daughter of the complainant on their motorcycle. Complainant made all efforts to stop the accused but she failed to do so. It has also been mentioned in the complaint that the prosecutrix was having a mobile phone activated with No.97292-30869. The complainant narrated this incident to her brother-in-law, namely, Ram Kumar and thereafter, both of them went to report the matter to the police.

On the basis of said complaint, the FIR was registered under Sections 363 and 366 read with Section 34 IPC. The investigation of the case was conducted and during investigation, both the accused were got identified subsequent whereupon, accused Satish was arrested on 01.10.2008. The prosecutrix was got *medico-legally* examined and her statement under Section 164 Cr.P.C was recorded before the Judicial Magistrate Ist Class, Hisar, wherein, she had stated that she was taken away by the accused persons and was kept at different places. Accused-Satish had committed rape upon her and threatened her to remain silent. On the basis of the aforesaid statement of the prosecutrix, Section 376 of the IPC was also added. Both the accused were charge-sheeted for offences punishable under Sections 363/366/506 read with Section 34 IPC

and Section 376(2)(g) Explanation 1 of the IPC as accused Satish had committed rape on the prosecutrix and accused Surender had assisted him in commission of the offence. Both the accused faced trial. Accused Satish was convicted and sentenced for offences punishable under Sections 363, 376 and 506 IPC, whereas, accused Surender @ Jonti was convicted and sentenced for offences punishable under Sections 363 and 506 IPC vide judgment dated 21.09.2011. Both the accused have challenged the judgment of conviction and order of sentence by way of filing separate appeals before this Court.

The present appeal has been filed by accused-Surender @ Jonti to challenge the judgment of conviction and order of sentence.

Learned counsel for the appellant submits that the judgment of the trial Court is not based on proper appreciation of evidence as sufficient evidence was not there for convicting the present appellant. He further submits that not only the contradictions and discrepancies are there in the statements of the prosecution witnesses but the guilt has also not been proved beyond the reasonable doubt. Learned counsel also submits that there was no entry with regard to birth of the prosecutrix in the register of the Health Department and the entry in the School Register has been relied upon. Even no evidence has come on record to show as to who had admitted the prosecutrix in the school and how her date of birth in school record was got recorded.

Learned counsel for the appellant submits that the appellant is facing trial since lodging of the FIR i.e 28.09.2008 and has undergone sentence for more than ten months. Learned counsel also submits that the appellant is not involved in any other criminal case and hence, he should have been released on probation by the trial Court, keeping in view his young age but in spite of making specific requests, the same was not

considered. Learned counsel further submits that the appellant is less than 22 years of age and is un-married. There was no role of the appellant in any manner in kidnapping of the prosecutrix and co-accused has been convicted for offence punishable under Section 376 IPC as the prosecutrix had remained in the company of the appellant. He also submits that not only the appellant but even the prosecutrix has settled in her matrimonial life. She has got married and is having three children. Learned counsel for the appellant prays that a lenient view be taken by reducing the sentence to the period already undergone.

Learned counsel for the appellant has also relied upon the judgment of Hon'ble the Apex Court in case ***Ram Kumar vs State of Haryana 2007(2) RCR(Criminal) 305*** as well as judgments of this Court in cases ***Hari Chand vs State of Haryana 2004(2) RCR (Criminal) 379*** and ***Davinder Singh vs State of Punjab 2005(1) RCR(Criminal) 791***, in support of his contentions.

In ***Hari Chand's*** case (supra), the offence was under Sections 363, 342 and 120-B of the Indian Penal Code and the accused was released on probation.

Similarly, in ***Davinder Singh's*** case (supra), the offence was under Sections 363 and 366 IPC and the prosecutrix was also less than 16 years of age but under the identical circumstances, the accused was acquitted of the charges.

Learned counsel for the respondent-State submits that the judgment of the trial Court is well reasoned and is based on proper appreciation of evidence and as such, no interference is required.

Heard the arguments of learned counsel for the parties and have also perused the judgment of the trial Court and record of the case. I have also minutely perused the statement of the prosecution witnesses

and other documents available on the file.

Although, learned counsel for the appellant has raised arguments on merits but ultimately, he has prayed for reducing the sentence of the appellant to the period already undergone on the ground that he is facing the agony of trial since the registration of FIR. The appellant is not having any criminal background as no other case is pending against him.

On perusal of evidence available on record, it has been proved that the prosecutrix had travelled with accused-Satish at different places. The date of birth of the prosecutrix has been proved on the basis of School Certificate, whereas, it is not clear as to how the date of birth was got entered in the school record. By considering the age of the prosecutrix on the basis of school record, the judgment of conviction has been passed. It is also not disputed that the prosecutrix had remained in the company of co-accused Satish for days' together and nothing has come on record as to why the prosecutrix remained silent. Although keeping in view the age of the prosecutrix, her consent was not relevant and the judgment of conviction has been passed.

Accordingly, no interference is required qua conviction part but as far as the quantum of sentence is to be considered, the same is to be decided after giving due consideration to the facts and circumstances of each case. For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of relevant circumstances in a dispassionate manner by the court. While exercising discretion of reducing the sentence, the statutory minimum sentence is to be seen and for that, adequate and special reasons are to be recorded. In case of offence under Section 363 IPC,

minimum sentence has not been provided.

The accused and the prosecutrix were un-married and all the allegations are against the main accused, namely-Satish Gir. The prosecutrix has got married and is settled in her matrimonial life and is also having three children out of the wedlock. The appellant is also having no criminal background and as such, by taking a lenient view and by considering the fact that no minimum sentence is provided for offence committed under Section 363 IPC; also the fact that the appellant is facing the agony of trial since lodging of the FIR i.e 28.09.2008 and has undergone actual custody for a period of ten months against the total sentence of five years; he was released on bail during pendency of the trial and he never misused that concession. Now to send the appellant again in jail would not only affect his future but that of his other family members as well and as such, by taking a lenient view, the judgment of conviction dated 20.09.2011 passed by the Additional Sessions Judge, Hisar is upheld but his sentence is reduced to the period already undergone. The amount of fine is increased from ₹ 1,000/- to ₹ 10,000/-, to be paid to the complainant, by way of draft to be deposited with the trial Court within a period of one month from the date of receipt of certified copy of this order.

However, in case, the enhanced amount of fine is not deposited with the trial Court within the period as mentioned above, the appellant shall have to undergo the remaining part of his sentence.

Disposed of with the said modification of sentence and fine.

23.09.2015
gurpreet

(DAYA CHAUDHARY)
JUDGE