

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

Crl. Appeal No.S-2776-SB of 2011

Date of Decision: 23.09.2015

Satish Gir

....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. Ashok Giri, 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 by accused-Satish Gir 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 376 IPC and was sentenced to undergo rigorous imprisonment for a period of ten years with fine of ₹ 5,000/- with default clause. He has also been convicted 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 and for offence under Section 506 IPC, he has been convicted and sentenced to undergo rigorous imprisonment for a period of one year. 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.

As per the version of the complainant, 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 accused 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 have come 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 on her and had even 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 appellant-Satish Gir to challenge the judgment of conviction and order of sentence.

Learned counsel for the appellant contends that as per opinion of the doctor, who had examined the prosecutrix on the request of the police, the age of the prosecutrix was approximately between 14 to 16 years. The defence also examined Dr. Arun Gupta, Senior Medical Officer as DW-1. He has stated that the prosecutrix could be of 17 years of age. Learned counsel also submits that the age of the prosecutrix was proved on the basis of school certificate but there was no proof as to on what basis, the entry was made in the school record. Learned counsel also submits that as per statement of mother of the prosecutrix, she gave birth to a daughter, namely, Santosh at the age of 26 years. At the time of recording of statement, she has stated her age as 46 years. The date of occurrence was 28.09.2008, so the age of the prosecutrix could not be less than 17 years at that time. Learned counsel also submits that the prosecutrix remained in the company of accused at different places from 28.09.2008 to 01.10.2008, which shows that she was a consenting party. Learned counsel also submits that the judgment of the trial Court is not based on proper appreciation of evidence. Not only the contradictions and

discrepancies are there in the statements of the prosecution witnesses but as per statement of Dr. Anita Bansal, who appeared as PW-9, there was no external mark of injury on the person of the prosecutrix. In cross examination, she has stated that possibility of the prosecutrix being habitual to sexual intercourse was there as her vagina admitted two fingers easily and the hymen was also ruptured. Learned counsel also submits that the accused was in early 20's at that time and not only the accused has settled in his matrimonial life but the prosecutrix has also married and is having three children out of that wedlock.

Lastly, learned counsel for the appellant submits that the appellant is in custody for the last more than seven years and is facing the agony of trial since lodging of FIR i.e 28.09.2008. He also submits that he would not like to contest the conviction, in case, the sentence of the appellant is reduced to the period already undergone as he is not having any criminal background as no criminal case is pending against him.

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***, judgments of this Court in cases ***Shiv Kumar vs State of Haryana 2010(4) RCR (Criminal) 921***, ***Balkar Singh vs State of Haryana 2007(4) RCR (Criminal) 597***, ***Nirmal Singh and another vs State of Haryana 2007(4) RCR (Criminal) 271***, ***Sanjiv Kumar vs State of Punjab 2005(2) RCR (Criminal) 146***, ***Sunil Kumar alias Bholu vs State of Haryana 2008(3) RCR (Criminal) 531*** as well as judgment of Delhi High Court in case ***Babloo vs State 2012(1) RCR (Criminal) 455*** in support of his contentions.

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 statements of the prosecution witnesses and other documents available on the file.

Although, learned counsel for the appellant has raised certain 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-appellant 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 accused-appellant 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 taken into consideration and for offence punishable under Section 376 IPC, the minimum sentence is seven years. The appellant has already undergone actual sentence of more than seven years and he is still in custody. There is no other criminal case pending against him.

On perusal of evidence available on record, it has been proved that the prosecutrix had travelled with the appellant 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 accused 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.

By considering the age of the accused-appellant as well as the fact that the prosecutrix had married and is having three children and also the fact that the appellant is facing trial for the last more than seven years, its continuance would not be in the interest of children and other family members of the accused.

Accordingly, by considering these factors in mind, the conviction is upheld and sentence of the appellant, namely, Satish Gir, is reduced from ten years to seven years.

Sentence of fine shall also remain the same. In case, the appellant has completed seven years of sentence, he should immediately be released and in case, he has not completed seven years of sentence, then he should be released on completion of seven years of sentence, if not required in any other case.

The appeal is disposed of with the said modification of sentence.

23.09.2015
gurpreet

(DAYA CHAUDHARY)
JUDGE