

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Criminal Appeal No.S-3232-SB of 2012 (O & M)

Date of Decision: August 12, 2015

Naveen Rawat

..... APPELLANT

VERSUS

State of Haryana

..... RESPONDENT(S)

. . .

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

. . .

PRESENT: - Mr. Aman Vashisht, Advocate, for the appellant.

Mr. Y.K. Gupta, Assistant Advocate General, Punjab.

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Jaspal Singh, J

1. The instant appeal has been preferred by Naveen Rawat against judgment of conviction dated September 18, 2012 and order of sentence dated September 20, 2012 passed by learned Sessions Judge, Yamuna Nagar at Jagadhri, in case FIR No.158 dated March 30, 2011 under Sections 363, 366, 376 IPC, registered at Police Station, Pohri Garhwal (Uttaranchal), whereby the appellant – accused has been convicted and sentenced as under:

Sr.No.	Section	Sentence	Fine	In Default
1	363 IPC	RI for 3 years	₹ 1,000/-	RI for one month
2	366 IPC	RI for 3 years	₹ 2,000/-	RI for two months
3	376 IPC	RI for 7 years	₹ 5,000/-	RI for six months

2. Briefly stated, the facts of the case are that complainant – Vijay Bhan alongwith his family comprising of his wife and five children was living in a rented house. Accused – appellant Naveen Rawat was also a tenant in another room in the same house. On March 29, 2011, complainant went to his office leaving behind his children including eldest daughter aged about 13 years and a student of 6th class in the house. She was found missing from the house. Complainant came to know that accused was also not present. He reported the matter to the police, whereupon, FIR under Sections 363, 366 IPC was registered against the accused. On search, the police traced out the prosecutrix and accused on March 30, 2011 while they were sitting near inquiry office of Railway Station, Yamuna Nagar. The prosecutrix, in her statement, stated that accused after enticing her away from home had taken her to a park and some other places, and during night had forcibly committed sexual intercourse with her in a public toilet situated in Super Market Complex, Yamuna Nagar. Thereafter, offence under Section 376 IPC was added in the FIR. The prosecutrix and accused were subjected to medico-legal examination. The lady doctor took vaginal swabs of prosecutrix and handed over the same alongwith clothes worn by prosecutrix to police in sealed parcels. The male doctor, who examined the accused, had also given a sealed parcel of clothes worn by the accused at the time of his medical examination, to the police. The parcels were sent to Forensic

Science Laboratory, Madhuban. Human semen were detected on the underwear of the prosecutrix.

3. On completion of necessary investigation and other formalities, report under Section 173(2) Cr.P.C. was presented in the court of jurisdictional magistrate. Copies of the challan alongwith documents were supplied to the accused as required under Section 207 Cr.P.C. Since the offence punishable under Sections 366 and 376 IPC was exclusively triable by the court of Sessions, the case was committed. Accused was chargesheeted under Sections 363, 366-A and 376 IPC, to which, he pleaded not guilty and claimed trial.

4. In order to substantiate the charge, prosecution examined as many as 12 witnesses. Incriminating circumstances appearing in the prosecution evidence were put to accused in his statement under Section 313 Cr.P.C., which were denied by him. Accused pleaded that his own family and family of prosecutrix were living on rent in one house and father of prosecutrix has falsely involved him on account of revenge. Accused did not lead any evidence in defence.

5. After hearing learned counsel for the parties and perusing the record available on file, the accused was held guilty and convicted under Sections 363, 366 and 376 IPC vide judgment dated September 18, 2012. He was sentenced, as detailed above, vide order of sentence dated September 20, 2012.

6. Aggrieved against the aforesaid judgment of conviction and order of sentence, the instant appeal has been preferred by the accused – appellant.

7. The main ground of attack raised by learned counsel for the appellant to the impugned judgment of conviction is that prosecution has miserably failed to establish by cogent evidence that age of the prosecutrix on the day of alleged occurrence is /was less than 16 years. Undisputably, neither prosecutrix has been subjected to ossification test to determine her age nor there is any documentary evidence brought on record by the prosecution to establish her exact date of birth. An entry, if recorded regarding date of birth after the criminal prosecution has initiated, is otherwise, inadmissible in evidence. Though, the prosecution has sought to place on record the copy of birth register Ex.PO but its preparation as well as issuance is under doubt. As such, it is of no probative value under Section 35 of the Evidence Act, especially in the absence of any other corroborative evidence. Learned Trial Court has failed to take into consideration that birth certificate Ex.P1 could not be linked with the prosecutrix. In the said certificate, father of the prosecutrix has been shown to be resident Ambala (Haryana) whereas he is a resident of Yamuna Nagar, another district of the State of Haryana. Not only this, even mother's name as depicted in certificate Ex.P1 is 'Mithlesh' whereas, as per the investigation, her name is 'Kamlesh'. There is also nothing on record to suggest that father of the prosecutrix used to reside at Ambala during the days of her birth. Thus, all the above said factors coupled with each other falsify the assertions of prosecution that prosecutrix was minor (less than 16 years) on the date of alleged occurrence. Thus, on this score alone, offences complained of against the

accused under Sections 363, 366 IPC cannot be said to be established/proved.

8. The next submission made by learned counsel for the appellant is that from the evidence available on file, it stands amply proved on record that it was a case of consent. Even, as per the case of prosecution, father of prosecutrix alongwith his wife and children has been residing in the rented house where appellant also used to reside in a tenanted room in the same building. She developed love with the appellant and ultimately, left her house at her sweet will and accord. She roamed in the park and other public places in the company of appellant, kept on silent while sitting at railway station; she did not raise any hue and cry at any point of time at all and did not move out from the company of the appellant even while sitting at Railway Station at the time of her interception. All these facts and circumstances clearly establish that she was a consenting party. Thus, even the charge of commission of rape i.e. offence under Section 376 IPC is also not made out and appellant deserves the benefit of doubt.

9. While concluding his arguments, learned counsel for the appellant has contended that if various contentions put-forth by him do not appeal to this court to form an opinion with regard to acquittal, a lenient view in the quantum of sentence be adopted, especially when the occurrence is alleged to have taken place prior to the amendment of Section 376 IPC vide Amendment Act No.2013 (13 of 2013) dated February 3, 2013, as well as in view of the admitted and proved facts i.e. (1) the appellant is a first offender and has no criminal back-ground; (2)

appellant is in custody for the last more than 4 years and 7 months continuously; (3) mother of the appellant has suffered a paralytic attack and is bed ridden; (4) appellant is the sole bread winner in the family; (5) during pendency of the trial, prosecutrix eloped with some other boy and subsequently married to him, and that, her life cannot be termed to be ruined one as she is leading a happy married life.

10. Per contra, learned State counsel has supported the impugned judgment of conviction and order of sentence submitting that same are based upon cogent and convincing evidence and are in consonance with the settled proposition of law. Thus, the same do not call for any interference by this Court.

11. After bestowing due consideration to the rival submissions made by learned counsel for the parties and scrutinizing the impugned judgment/order, and also re-appreciating the evidence available on file, this court does not find any material circumstance to meddle with the conclusion arrived at by learned Trial Court with regard to conviction of appellant under Sections 363, 366 and 376 IPC, however, finds adequate and special reasons to exercise the discretion for reduction in the sentence imposed upon the appellant.

12. As far as age of prosecutrix is concerned, prosecution has sought to establish the date of birth of the prosecutrix by placing on record her birth certificate Ex.P1 issued by the Registrar, Birth & Deaths, Ambala as well as the entry in the birth register Ex.PO. Though entry in the birth register Ex.PO does not bear the signatures or thumb impression of the informant but just on this score, it cannot be ignored or

disbelieved, especially when Mohan Lal PW-12, Clerk, Municipal Corporation, Ambala Sadar, has appeared and proved Certificate Ex.P1 who has categorically deposed that entry Ex.PO was made on the basis of hospital's record, that too, in the cross examination.

13. As far as jurisdiction of Registrar, Births & Deaths, Ambala is concerned, there is nothing on record to suggest that he was not exercising the official jurisdiction over district Yamuna Nagar at the relevant time. Birth certificate Ex.P1 has been produced during the course of evidence by PW-5 Vijay Bhan, who is none else but father of prosecutrix. He has not been questioned with regard to birth certificate Ex.P1 during his cross examination. He is the best witness to depose with regard to birth certificate as well as the connected matter(s), if any. Moreover, PW-12 Mohan Lal is an official witness. He is neither a foe of the appellant nor a friend of prosecutrix or her family. Thus, birth certificate Ex.P1 coupled with the birth entry in the register maintained regularly in the ordinary course by the office of Registrar, Births & Deaths, Ambala fully proves the case of the prosecution with regard to age of prosecutrix. It clearly depicts that prosecutrix was less than 16 years of age at the time of occurrence as unfolded by the prosecutrix as well as her father. Since prosecutrix was less than 16 years of age who was intercepted and recovered by the police from the company of appellant at Railway Station, and further that she was allured by the appellant on the pretext to marry her and subsequent thereto ravished, clearly establish the commission of offence under Sections 363, 366 and 376 IPC.

14. As regards quantum of sentence, it would be apt and proper to mention here that the offence complained of against appellant pertains to the period prior to the amendment of an offence falling within the purview of Section 376 IPC, vide which, the said offence was made more stringent and the provision for imposing less punishment than the minimum prescribed was removed. The provision existing prior to amendment would be applicable in the instant case as pointed out above. For convenience of the further discussion in the matter of reduction of sentence, it would be in the fitness of things to mention it. It reads as under:-

“376. Punishment for rape. – (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than seven years.

(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or

under any law for the time being in force of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2. – “Women's or children's institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3. – “Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

15. A glance at the aforesaid provision makes it crystal clear that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. But here it would be out of place to mention that the reasons for reduction in sentence should not only be adequate but also special. However, at the same time, no straight jacket formula can be laid down

as to what is 'adequate' and what is 'special'. All this would depend upon several factor(s) considering the facts and circumstances of a particular case. The factors which weigh in the mind of this Court for reduction of sentence can be enumerated as under: (1) that the appellant and prosecutrix were known to each other prior to the incident; (2) she left the house at her own will and accord; (3) she roamed in the park and other public places in the company of appellant, kept on silent while sitting at railway station; and (4) when the police allegedly intercepted her, she did not raise any objection at that time. Such a conduct of the prosecutrix depicts that she willingly left the house and roamed in the company of appellant. During pendency of the trial, she eloped with some other boy and subsequently got solemnized her marriage with him and is happily living with him. The mother of appellant suffered a paralytic attack and is bed ridden. The appellant has no past record of any sort of criminality. The appellant is continuously cooling his heels behind the bars for the last more than 4 years and 7 months.

16. As an upshot of the aforesaid discussion, this Court is of the considered view that though, there is nothing to meddle with conviction of appellant under Sections 363, 366 & 376 IPC which is upheld but there are ample factors to take a lenient view in the matter of sentence. Accordingly, while upholding the conviction of the appellant under the above mentioned offence, the sentence under Section 376 IPC is modified to the extent that rigorous imprisonment for a period of 7 years imposed upon by learned Trial Court is reduced to rigorous

imprisonment for a period of 5 years but with no change in punishment under Sections 363 & 366 IPC, and the fine clause(s).

17. With the above said modification, appeal stands dismissed.

August 12, 2015

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(Jaspal Singh)
Judge