

**HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT
CHANDIGARH****CRR-623-2015****Date of decision:24.8.2015**

Mahinder Kumar

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

1. To be referred to the Reporters or not ?
2. Whether the judgment should be reported in the Digest ?

Present: Mr.Vikram Singh, Advocate for the petitioner.

Mr.Ashish Yadav, Addl. A.G., Haryana.

RAMESHWAR SINGH MALIK, J. (Oral)

Present criminal revision petition is directed against the impugned judgment dated 7.2.2015 passed by the learned Additional Sessions Judge, Karnal, whereby appeal of the petitioner was dismissed with modification in the order of sentence, reducing sentence of the petitioner from three years to one year, upholding the judgment of conviction dated 17.11.2011, passed by the learned Sub Divisional Judicial Magistrate, Assandh.

Brief facts, as noticed by the learned Additional Sessions Judge in para 2 of his impugned judgment, are that on 8.7.2003, complainant Dharamvir son of Ganga Ram, resident of village Salwan presented a complaint under section 156(3) of the Code of Criminal Procedure ('Cr.P.C.' for short) before the learned Illaqa Magistrate on the allegations that accused Mahinder alongwith his father and mother were living at the house of complainant on the ground floor on rent. On 30.5.2003,

complainant alongwith his mother and wife had gone to Delhi to attend last rites of his sister namely Kapoor Devi by leaving his son named "X" aged about 8 years (hereinafter called as the victim) and Pooja aged about 5 years slept on separate cots in the house. At that time, Pooja heard a shriek of the victim and she got up. Ram Bir son of Budh Raj, who is another tenant of the complainant, also attracted to the spot. Both of them saw that accused had removed clothes of the victim and he was voluntarily having carnal intercourse against the order of nature with the victim son of the complainant. On seeing Ram Bir, accused Mahinder put on his clothes. Meanwhile, many neighbours collected at the spot. On seeing them, the accused ran away from the spot. The villagers caught hold of the accused and caused him thrashing, on which, accused started begging apology. Then, complainant came from Delhi alongwith his wife and mother. Keeping in view the future of his son, the complainant thought it proper to patch up the matter but thereafter, accused with an ulterior motive got himself medically examined and lodged a complaint before SHO against the complainant and only thereafter, he got medico-legally examined his son. Thereafter, the complainant lodged his version with the police but the police did not take any action. Learned Illaqa Magistrate sent this complaint to the concerned Police Station where the present case was registered. Investigation was set into motion. Statements of the witnesses under section 161 Cr.P.C. were recorded. Accused Mahinder was formally arrested in this case.

The police report under Section 173 Cr.P.C. having been presented to the court, copy thereof along with documents attached therewith was supplied to the accused, as envisaged under Section 207

Cr. P.C.

Having found a prima facie case, charge was framed against the accused for committing the offence punishable under Section 377 of the Indian Penal Code ('IPC' for short). The accused pleaded not guilty and claimed trial. With a view to prove its case, prosecution examined as many as six prosecution witnesses, besides producing other relevant documentary evidence. On conclusion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. All the incriminating material available on record was put to the accused. He denied all the allegations, alleged false implication and pleaded complete innocence. However, the accused did not lead any evidence in his defence.

After hearing the learned counsel for the parties and going through the record of the case, the learned trial Court came to the conclusion that the prosecution has proved its case bringing home the guilt against the accused. Accordingly, accused was convicted for the offence punishable under Section 377 IPC, vide impugned judgment of conviction dated 17.11.2011. Thereafter, vide order of sentence dated 22.11.2011, convict was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.2,000/- In default of payment of fine, the accused was ordered to undergo simple imprisonment for a period of 30 days.

Feeling aggrieved against the above-said impugned judgment of conviction and order of sentence, petitioner filed his appeal which also came to be dismissed by the learned Additional Sessions Judge, upholding the conviction vide impugned judgment dated 7.2.2015, however, sentence of the petitioner was reduced from 3 years' RI to 1 year's RI. Hence this

criminal revision petition.

Notice of motion was issued.

Learned counsel for the petitioner submits that he does not intend to press this petition on merits. He further submits that let the conviction of the petitioner be upheld and the present petition may be considered only for the limited purpose of reduction of sentence to the period already undergone by the petitioner. While highlighting mitigating circumstances in favour of the petitioner, learned counsel submits that in terms of the custody certificate filed by way of affidavit dated 19.8.2015, petitioner has already undergone for a period of 9 months and 6 days as on 19.7.2015, including the period of remission, out of the total sentence awarded to the petitioner for 1 year's RI.

Learned counsel for the petitioner, while referring to the medical evidence discussed by the learned trial Court at page 40 of the paper-book, submits that the medical evidence would clearly show that in the present case no force was used. In this regard, learned counsel for the petitioner places reliance on a judgment of the Hon'ble Supreme Court in **Fazal Rab Choudhary v. State of Bihar, 1983 CriLJ 632**, to contend that in almost identical fact situation, the Hon'ble Supreme Court reduced the sentence from 3 years to 6 months. He prays for allowing the present petition, by reducing the sentence of the petitioner to the period already undergone by him.

Per contra, learned counsel for the State vehemently opposes the prayer made by the learned counsel for the petitioner, contending that, petitioner has committed a serious crime. He further submits that owing to the age of the victim, petitioner is not entitled for any reduction in sentence.

He prays for dismissal of the present petition.

Having heard the learned counsel for the parties, after careful perusal of record of the case and giving thoughtful consideration to the contentions raised, this Court is of the considered opinion that in the peculiar facts and circumstances of the case, the present criminal revision petition deserves to be partly allowed by upholding the conviction of the petitioner and reducing his sentence to the period already undergone by him. To say so, reasons are more than one, which are being recorded hereinafter.

A bare combined reading of the impugned judgments, particularly the discussion by the learned trial Court on the medical evidence, the present case has been found squarely covered by the judgment of the Hon'ble Supreme Court in **Fazal Rab Choudhary's** case (supra). During the course of hearing, when a pointed question was put to the learned counsel for the State as to how the present case is distinguishable from **Fazal Rab Choudhary's** case (supra), he had no answer and rightly so, it being a matter of record. Having said that, this Court feels no hesitation to conclude that it is just and expedient to reduce the sentence of the petitioner to the period already undergone by him.

The observations made by the Hon'ble Supreme Court in para 3 of its judgment in **Fazal Rab Choudhary's** case (supra), which can be gainfully followed in the present case, read as under:-

“The offence is one under Section 377, Indian Penal Code, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking. However in judging the

depravity of the action for determining quantum of sentence, all aspects of the matter must be kept in view. We feel there is some scope for modification of sentence. Having examined all the relevant aspects bearing on the question of nature of offence and quantum of sentence, we reduce the substantive sentence to R.I. for 6 months. To the extent of this modification in the sentence, the appeal is allowed.”

A glance at the medical evidence discussed by the learned trial Judge at page 40 of the paper-book would show that the possibility of the injury could not be ruled out, if someone falls in a way perennial area strikes on some hard object as stated by the Dr.Kulbhushan Mehta (PW-4). Thus, learned counsel for the petitioner has been found justified in contending that no force seems to have been used in the present case and that is how, this case is squarely covered by the judgment of the Hon'ble Supreme Court in **Fazal Rab Choudhary's** case (supra). Further, neither the petitioner is a previous convict nor he has been found involved in any other criminal case. Thus, sentence of the petitioner deserves to be reduced to the period already undergone by him, for this reason also.

The above-said view taken by this Court also finds support from the judgment of Hon'ble the Supreme Court in **Braham Dass v/s State of Himachal Pradesh 1988 (2) RCR (Criminal)**. The relevant observations made by Hon'ble the Supreme Court in **Braham Dass's case** (supra), which can be gainfully followed in the instant case, read as under:-

“Coming to the question of sentence, we find that the appellant had been acquitted by the trial court and the High Court while reversing the judgment of acquittal made by the appellate Judge has not made clear reference to clause (f). The occurrence took place about more than 8 years back. Records show that the appellant has already suffered a part of

the imprisonment. We do not find any useful purpose would be served in sending the appellant to jail at this point of time for undergoing the remaining period of the sentence, though ordinarily in an anti-social offence punishable under the Prevention of Food Adulteration Act the court should take strict view of such matter.”

In another case titled as “**Umrao Singh v. State of Haryana, 1981 AIR (SC) 1723,**” the Hon'ble Supreme Court observed as under:-

“After hearing counsel for the parties, we are satisfied that this is a case falling under the proviso of Section 16 (1)(a) (i) and therefore, for adequate and special reasons, the sentence lower than the minimum prescribed could be awarded. The High Court itself felt bound to award the minimum sentence but on merits was satisfied that if the legal position warranted the appellant could be given lesser sentence. We are in agreement with the view of the High Court. The appellant/ petitioner is aged about 70 and suffering from asthma illness and has a clean past record. Besides, the percentage of deficiency that was noticed in the milk sold by him was 0.4% in the fat contents.

Having regard to these facts, the expression of the view of the High Court was justified. We accordingly reduce the sentence of the appellant to the period already undergone. The sentence, of fine is maintained and we are informed that he has already paid the fine. Since he is already on bail, he should be released forthwith.”

An identical question had arisen before this Court in **Des Raj v/s State of Haryana 1996(1) RCR (CrI.) 689**. The relevant observations made in para 9 of the judgment aptly apply here and the same read as under:-

“Now, it is well settled that the right to speedy and expeditious trial is one of the most valuable and cherished

rights guaranteed under the Constitution. Fundamental rights are not a teasing illusion to be mocked at. These are meant to be enforced and made a reality. Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that the speedy trial is also in public interest or that it serves the social interest also, does not make it any-the-less the right of the accused. Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. This is how the Courts shall understand this right, and have gone to the extent of quashing the prosecution after such inordinate delay in concluding the trial of an accused keeping in view the facts and circumstances of the case. Keeping a person in suspended animation for 8 years or more without any case at all cannot be with the spirit of the procedure established by law. It is correct that although minimum sentence to be imposed upon a convict is prescribed by the statute yet keeping in view the provisions of Article 21 of the Constitution of India and the interpretation thereof qua the right of an accused to a speedy trial, judicial compassion can play a role and a convict can be compensated for the mental agony which he undergoes on account of protracted trial due to the fault of the prosecution by this Court in the exercise of its extra-ordinary jurisdiction.”

Reverting back to the fact situation of the present case and respectfully following the law laid down by the Hon'ble Supreme Court as well as this Court, in the judgements referred to hereinabove, coupled with the reasons aforementioned, conviction of the petitioner is upheld. However, his sentence is ordered to be reduced to the period already undergone by him.

Resultantly, with the above-said modification in the impugned

judgments, the instant criminal revision petition stands partly allowed.

Petitioner is directed to be released forthwith, if he is not required in any other case.

Disposed of, accordingly.

24.08.2015
mks

(RAMESHWAR SINGH MALIK)
JUDGE