

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-D-96-DB-2013

DATE OF DECISION: SEPTEMBER 23, 2017

Shayama alias Dadi

.....Appellant

VERSUS

State of Haryana

....Respondent

**CORAM:- HON'BLE MR.JUSTICE M.M.S.BEDI
HON'BLE MR.JUSTICE AUGUSTINE GEORGE MASI**

Present: Ms. Mayuri Lakhanpal, Advocate,
(Legal Aid Counsel),
for the appellant.

Ms. Shubhra Singh, Addl.A.G., Haryana,
for the State.

AUGUSTINE GEORGE MASI, J.

1. Appellant, who has been convicted and sentenced to undergo life imprisonment for commission of an offence punishable under Section 376 of Indian Penal Code (for short, "IPC") alongwith fine of ₹25,000/- and shall not be released from jail till his death and further sentenced to undergo RI for a period of seven years alongwith fine of ₹5,000/- for commission of an offence punishable under Section 506 IPC, with both substantive sentences to run concurrently, vide order dated 13.10.2012, has preferred the present appeal challenging the judgement of conviction dated 09.10.2012 as also order of sentence dated 13.10.2012.

2. The brief facts, as per the prosecution, are that prosecutrix, who was a 16 years old minor girl, studying in Class IV in Government School, Bhuna, met ASI Baljit Singh alongwith her mother, Rajwanti, while he was on patrolling duty in the area of Bus Stand, Kangthali on 04.01.2011.

Statement of the prosecutrix, Ex.PG, was recorded, as per which she had two married sisters as also two unmarried brothers. Her father was employed as a Sweeper in Mumbai and since he was ill, her mother, Rajwanti alongwith her younger brother Shekhar had gone there to take care of him, because of which her elder sister, Seema, had come to the parental house to stay.

3. Rajwanti, mother of the prosecutrix, was working as a Sweeperess in the School at Bhuna. On 26.12.2010, which was a Sunday, the prosecutrix had gone to clean the school premises in place of her mother, who had gone to Mumbai. The main gate being locked, she scaled the wall to enter the school premises. Appellant, Shayama alias Dadi son of Pala Ram (hereinafter referred to as "appellant"), who is her Uncle in relation, was already present in the School cutting branches of the trees. As soon as the prosecutrix entered a room of the School, the appellant too came there and bolted the room from inside and committed rape with her. When the prosecutrix resisted and tried to raise alarm, her mouth was gagged by the appellant and criminally intimidated and threatened her with dire consequences. Her elder sister, Seema, came to the School and on seeing her, the appellant fled away from the scene of occurrence. The prosecutrix then narrated the entire occurrence to her sister.

4. On the basis of the statement of the prosecutrix, Ex.PG, FIR No.4 dated 04.01.2011 under Sections 376 and 506 IPC was registered at Police Station Siwan, recorded by ASI Mehar Singh (PW1). An application, Ex.PJ, was moved in CHC, Siwan, for medical examination of the prosecutrix by a lady Medical Officer. As no lady Medical Officer was available, the prosecutrix was taken to General Hospital, where she was

medico legally examined by Dr.Suman Lata (PW10). Samples of swabs were taken and the worn clothes of the prosecutrix were converted into sealed parcel and delivered to the Investigating Officer.

5. On 05.01.2011, on an application submitted to Ilaqa Magistrate, Guhla, statement under Section 164 Cr.P.C. of the prosecutrix (Ex.PR) was recorded by Sh.Davinder Singh, Sub Divisional Judicial Magistrate (PW15). Statements of other witnesses were also recorded under Section 161 Cr.P.C.

6. Appellant, Shayama @ Dadi, was arrested on 22.01.2011. He was medico legally examined by Dr.Yashpal Momia (PW8) vide MLR Ex.PF. The appellant was found capable of committing intercourse. His clothes were converted into sealed parcel alongwith sample seal, which was taken into custody. Certificate from the School with regard to the date of birth of the prosecutrix, copy of admission form as also photo copy of the register maintained for the purpose of admission and withdrawal in the school was obtained. The sealed parcels were sent to the Forensic Science Laboratory, Madhuban (for short, "FSL"). The ossification test of the prosecutrix was conducted by Radiologist, Dr.Lajja Ram (PW9), according to which the age of the prosecutrix was 17 years, plus minus 2 years. As per the report of the FSL, no human semen was found on any of the samples. However, as per the medical report of the prosecutrix, it was apparent that there had been intercourse, although there were no clear marks of any external injury on the body of the prosecutrix. On completion of the investigation, report under Section 173 Cr.P.C. was submitted.

7. On the basis of the evidence led by the parties and on assessment thereof, the Court has held appellant guilty of commission of offences under Sections 376 and 506 IPC and sentenced him.

8. Learned counsel for the appellant and the State counsel have been heard and with their assistance we have gone through the evidence.

9. Counsel for the appellant submits that there is an inordinate and unexplained delay of 9 days in recording of FIR as the incident is of 26.12.2010 whereas the FIR has been recorded on 04.01.2011. She states that there is no explanation for the delay, although the same has been sought to be explained by stating that Rajwanti, mother of the prosecutrix, had gone to Mumbai but in the same breath, it has been said by PW13 Seema that their mother was informed while she was in Mumbai and that her paternal Uncle had come on hearing about the incident but still no FIR was got registered. Rather, on coming back of the mother, there is again delay of more than 4 days. This period has been utilized for the purpose of making out a totally false story.

10. She submits that neither any eye witness nor any independent witness has been associated or produced although one of the teachers of the school, namely, Joginder Singh, as per the evidence, had come there but for unknown reasons, the said person has not been examined, who would have been an independent witness. As per the report of the FSL, no human semen has been found either in the swabs or clothes of the prosecutrix nor on the clothes of the appellant. Further as per the medico legal reports and the evidence of the doctor, who had conducted the medical examination of the prosecutrix, no external injury marks were found on her person nor the doctor emphatically stated that rape was committed on her. She asserts that the report of the doctor, thus, cannot be relied upon. This shows that there has been no rape committed on the prosecutrix.

11. Her further contention is that the age of the prosecutrix, as has

come in the ossification test, has been found to be 17 years. Dr.Lajja Ram, while appearing as PW9, has stated that it could be plus/minus two years and rather had asserted in the cross-examination that it could be 19 years. Therefore, it cannot be said that the prosecutrix was minor and rather it could very well be a case of consent. Assertion has also been made with regard to admissibility of the evidence of the prosecutrix herself, who has been found to be mentally retarded as the Board of Doctors found her to be 50% intellectually impaired with intelligence quotient of 62 only. She, thus, contends that no reliance can be placed on the statement of the prosecutrix and if her statement is found to be not reliable, there is no evidence on record which would show any rape having been committed on the prosecutrix.

12. She accordingly prays that the appeal be allowed and the appellant be acquitted of the charges by setting-aside the order of conviction and sentence. In any case, she submits that the sentence, as has been imposed upon the appellant, is on higher side and is rather harsh keeping in view his age being 24 years at the time when the offence is alleged to have been committed and, thus, it may be reduced.

13. On the other hand, counsel for the State has vehemently argued that the delay of 9 days in lodging the FIR has been duly explained by the prosecution. It should not be lost sight of the fact that the family of the prosecutrix belongs to lower strata of Society and most of them were illiterate and, therefore, in the absence of their mother, the sister and the prosecutrix were unable to take a decision on this crucial issue where dignity of the family and especially young minor unmarried girl was at stake. That apart, it was within the family, as the accused was an Uncle in

relation that such an unfortunate incident had taken place. The mother has also duly explained the delay by stating that on her return from Bombay, first she had complained to the parents of the appellant and when no response was received nor any action was taken by them for about three days, she had approached the police authorities.

14. It is further contended that the absence of the human semen on the samples, which were sent to the FSL, would not affect the case of the prosecution when it is established from the statement of the prosecutrix, which is duly corroborated by the statements of other witnesses, including the medical evidence brought on record. The ossification test may be one of the aspects with regard to the age of the prosecutrix but other evidence clearly shows, especially the school records, that the age of the prosecutrix was merely 16 to 17 years.

15. As regards the non-admissibility of the evidence of the prosecutrix because of her mental impairment is concerned, the contention, as raised, is rebutted by the counsel for the State by asserting that the Court has satisfied itself with regard to the factum as to whether the prosecutrix was in a position to understand, comprehend and convey the incident and, thus, competent to make the statement that the Court has proceeded to record her statement. She has withstood the test of cross-examination. On these basis, counsel for the State prays for dismissal of the appeal with a further assertion that in the given facts and circumstances of the case, no leniency is required to be shown to the appellant.

16. Having considered the submissions made by counsel for the parties and having gone through the evidence on record, we are of the considered view that the prosecution has been able to establish its case

beyond doubt that the offence has been committed by the appellant, for which he was duly charged and has been convicted.

17. To start with, the process of investigation was put into motion on the statement of the prosecutrix on 04.01.2011 about an incident which had taken place on 26.12.2010 i.e. the FIR stands lodged after a delay of 9 days but the same has been duly explained. The prosecutrix is a minor girl of 16 to 17 years of age (16 years as per the school records produced and duly proved by the prosecution, which includes the birth certificate, admission form and the school register maintained for the purposes of admission and withdrawals and the ossification test, which reveals her age to be 17 years). It has also been proved on record that the prosecutrix, at the time of incident, was an intellectually impaired Class IV student of the School. Such a young minor child, who had gone through a harrowing experience of rape, that too by her own uncle, would not only be totally shatter physically and mentally but emotionally, as well and thus, would instinctively look for the solace, love and affection towards her mother, who had been taking care of the children in the absence of the father who had been staying far away in Mumbai although her elder sister was with her. The waiting period, therefore, for the mother to come was quite natural. Mother, Rajwanti (PW14), on return waited for the matter to be resolved at the family level at the first instance as it was a case where an uncle had committed the crime and she had lodged her protest and complained to the parents of the appellant. But when she realised that nothing was being done by his parents, she was forced to approach the police, which action of a mother is quite normal and natural keeping in view our culture and society.

The delay has been duly explained, which cannot, therefore, be said to be

fatal as would belie the case of the prosecution altogether.

18. The material aspect would be the evidence which is led by the prosecution relating to the commission of offence of rape. The most crucial and important evidence would be that of the prosecutrix who appeared as PW7. Initially it was observed by the Court in order dated 24.05.2011 that she was unable to respond in a proper manner and appeared to be mentally deranged. The Court, thus, referred her to the Chief Medical Officer, Civil Hospital, Kaithal, for constituting a Board of Medical Officers and to submit a report and in case of there being no proper arrangement for assessing the intelligence quotient of the prosecutrix, she was to be referred to PGIMS, Rohtak or PGIMS, Chandigarh. The Chief Medical Officer referred her to PGIMS, Rohtak, where a Board of three Medical Officers was constituted, which examined the prosecutrix and concluded in its report that the prosecutrix was having mild mental retardation. She thereafter again appeared in Court on 19.04.2012 where the Court, after questioning her and on being duly satisfied about her fitness to comprehend, understand and respond, proceeded to record her statement. When she appeared in the Court she in very clear and categorical terms explained the incident, identified the appellant as accused and detailed the incident. She was subjected to critical cross-examination, which she withstood without any difficulty and, therefore, there is no reason to discard her evidence. We have also gone through the report Ex.D1 of the Board of Doctors constituted at PGIMS, Rohtak and have also taken into consideration the statement of Dr.Hitesh Khurana (DW1) as also the orders passed by the trial Court on 24.05.2011 and 19.04.2012, when the statement of the prosecutrix was recorded i.e. one, prior to constitution of the Board of Medical Officers and the other

subsequent to the report having been received from the PGIMS, Rohtak and are satisfied that there is nothing which would indicate that her mental retardation has in any manner influenced, impinged or affected her evidence, which would cast any dent with regard to its admissibility or reliability.

19. That apart, the statement of PW10 Dr.Suman Lata, who had examined the prosecutrix, in her evidence does not rule out the possibility of sexual assault upon the prosecutrix. Unfortunately because of the time lapse, some benefit has gone to the appellant because had the medical been conducted earlier, the things would have been much clear but even if such a benefit is given to the appellant, the same would not be enough to grant him the benefit of acquittal, especially when the statement of Seema (PW13) has corroborated the statement of the prosecutrix about the incident, where she has in very clear and categoric terms explained the unfortunate incident she had to face. Not only that, Seema (PW13) has categorically stated that when she reached the school, on seeing her, the appellant had run away from the scene of occurrence, which is unnatural and strange, especially when he is related to the prosecutrix's family being an Uncle in relation and were on visiting terms.

20. As regards non-examination of Joginder Singh, the School Teacher as a witness, would not in any manner cast any doubt on the case of the prosecution as he was not a material witness to be cited or examined by the prosecution, especially when Seema, sister of the prosecutrix, was similarly placed and has fully supported the prosecution case.

21. The assertion of counsel for the appellant that there is no eye witness to the offence also cannot be a ground for not accepting the

prosecution story. It is an established fact that on the date of occurrence i.e. 26.12.2010, it being Sunday, school was closed and, therefore, the main gate was locked. The mother of the prosecutrix was working as a Sweeperess in the School and she being out of station as she had gone to Mumbai to look after her husband, the prosecutrix stepped in as a substitute for her and scaled the wall of the school to clean the premises, as the next day being Monday, the school was to reopen. The appellant was already present in school premises, cutting the branches of the trees. He followed her into the room bolted the door and committed the offence. Not only did he commit the offence of rape upon her but also threatened her with dire consequences and gagged her mouth with a piece of cloth. Crimes of these nature are not carried out in the open and are generally committed in isolation. It is not the case of the defence that there were other people around, which would point to the possibility of eye witness but the school was closed and even the main gate was locked so there was no one around. Taking benefit of the same, the appellant committed the offence on the victim. The guilt is further apparent from the fact that the appellant on seeing Seema, elder sister of the prosecutrix coming, ran away from the spot.

22. On consideration of the evidence, we have reached a conclusion that the appellant has committed the offences for which he has been charged and rightly held guilty. The prosecution has been able to prove its case beyond any shadow of doubt and, therefore, the conviction of the appellant by the trial Court under Sections 376 as well as 506 IPC is hereby upheld.

23. As per the learned counsel, the appellant, who is a young man,

has been sentenced to imprisonment for life and has been ordered not to be released from jail till his death. She, thus, contends that the sentence as awarded is very harsh and the same deserves to be reduced to enable the appellant to get a chance to reform himself.

24. Mandate of the statute, especially Section 235(2) of the Code of Criminal Procedure casts a responsibility on the Court to impose punishment, for which no hard and fast rules have been laid down which would best serve in interest of justice. The discretion, when exercised by the Court, should be based on assessment of various factors, circumstances and facts of that case with an avowed object of imposing appropriate sentence balancing the rights of the accused with the pain and suffering of the victim. Such a sentence is required to be imposed which not only fulfills the mandate of the statute but also reflects the conscience of the society as the crime committed is not only against a victim but also against the society, to which even the accused-convict belongs. The Court has to delicately balance the aggravating and mitigating factors while awarding the sentence. Thus, a duty is cast on the Court to award proper sentence keeping in view the nature of the offence, its manner of execution etc.

25. Hon'ble Supreme Court in State of Madhya Pradesh Vs. Saleem alias Chamaru, 2005 (3) RCR (Criminal) 749 has held as follows:-

“7. 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 really relevant circumstances in a dispassionate manner by the

*court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in **Dennis Councle McGautha v. State of California (402 US 183)** that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.”*

26. It has come on record that the appellant was only 24 years of age at the time of commission of offence. On consideration of the facts and circumstances of the case, his previous clean record and his subsequent conduct in jail as is reflected in the custody certificate, according to which he has undergone more than 6 years and 6 months of actual sentence and that too without any jail offence, we are of the considered view that the sentence as imposed by the trial Court under Section 376 IPC, which qualifies that the appellant shall not be released from jail till his death, appears to be on the higher side and, therefore, we reduce the same to 15 years actual custody period, excluding parole, furlough, remissions etc., if any earned/granted or to be earned/granted, if permissible as per law. This is with a hope that the appellant is able to rejoin the mainstream of the society as a reformed person. Rest of the sentences shall remain unchanged.

27. With the above modification in the sentence under Section 376
IPC, the appeal stands disposed of.

(M.M.S.BEDI)
JUDGE
September 23, 2017
khurmi

(AUGUSTINE GEORGE MASIH)
JUDGE
Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No