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

**Reserved on: July 06, 2018
CRA-D-152-DB of 2013 (O&M)
Date of decision: July 27, 2018**

Narinder Kumar

.....Appellant

Versus

State of Punjab

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE B.S. WALIA**

Present: Mr. H.S. Jugait, Advocate for the appellant.

Mr. H.S. Grewal, Addl. AG Punjab.

A.B. CHAUDHARI, J

Being aggrieved by judgment/order dated 21.01.2013/24.01.2013 passed by the learned Additional Sessions Judge, Barnala, in Sessions Case No.7 dated 13.03.2012, by which the learned trial Judge convicted the appellant-Narinder Kumar for commission of offence punishable under Sections 376(2)(g), 366, 366A of Indian Penal Code, 1860 (for short 'IPC') and sentenced him to undergo Rigorous Imprisonment for life and to pay fine in the sum of ₹10,000/-; in default of payment of fine, to further undergo Rigorous Imprisonment for six months, the present appeal has been preferred by him.

In support of the appeal, learned counsel for the appellant vehemently argued that there is a basic defect with the judgment of the trial Court that it has rejected the contention about non-holding of D.N.A. Test, if really child born to the prosecutrix was as a result of the alleged sexual

intercourse by the appellant-Narinder Kumar and the other accused Harwinder Kumar. As a matter of fact, the said scientific test would have revealed the truth and according to the defence, it was Budh Ram who was responsible for committing offence of rape upon the prosecutrix. He then submitted that the prosecution has failed to prove date of birth by not producing the Birth Certificate of the prosecutrix, all the more because radiological evidence indicated her age between 15 to 17 years and adding two years, the age of the girl would be 19 years. Therefore, the trial Court committed an error in holding that the prosecutrix was minor. Learned counsel for the appellant then contended that there was delay in lodging the report and therefore, the trial Court was not right in ignoring the said delay. According to him, consent was writ large in the present case as can be seen from the prosecution evidence itself that prior to 05.09.2004, the sexual intercourse was going on for about 7-8 months, which ultimately indicated that there was consent. The trial Court got impressed by the fact that the prosecutrix was deaf and dumb, but then she was mentally sound and therefore, no benefit could be derived therefrom for recording finding of conviction. Learned counsel contended that the story of the prosecution is highly improbable and the evidence of doctor Neera Seth showing that she was habitual of sexual intercourse, indicate that she was consented party. He, therefore, submitted that the judgment of the trial Court is perverse and will have to be set aside and the appellant will have to be acquitted. In the alternative, he submitted that the sentence of imprisonment of life is on higher side. The minimum sentence provided by law at the relevant time was 10 years and therefore, this Court may reduce the sentence of the appellant-

Narinder Kumar.

Per contra, learned State counsel vehemently opposed the appeal preferred by the appellant-Narinder Kumar and submitted that the trial Court's judgment is legal, correct and proper and based on settled legal position. No fault can be found out with the same. He, therefore, prayed for dismissal of the appeal.

We have gone through the entire evidence pointed out by the counsel for the rival parties.

This Court has delivered a judgment in appeal bearing number, i.e. CRA-D-198-DB-2013 against acquittal of Harwinder Kumar and other accused persons, with reasons in the same subject matter. However, the present appeal being separate, this judgment is being recorded separately.

Learned counsel for the appellant pointed out to us hand written note by the prosecutrix 'R' which we have carefully seen. It is true that in the said note, the name of Budh Ram is mentioned, but then the defence never demonstrated as to who the said Budh Ram was. The prosecution agency made thorough investigation and ultimately, on the basis of investigation found that it was Narinder Kumar and Harwinder Kumar who were indulging in sexual intercourse for number of months with a deaf and dumb minor girl, ultimately resulting in the delivery of child out of pregnancy. We, therefore, reject the submission about the name of Budh Ram as the culprit. At any rate, the perusal of the said note itself shows the name of Narinder Kumar and in the substantive evidence, the name of Harwinder Kumar is also referred.

In so far as the date of birth of the prosecutrix is concerned, the

trial Court has given reasons for holding that the girl was around 14 years of age and having gone through the said reason, we are fully satisfied that the reasons are based on evidence and are legal. We quote the reasons given by the trial Court in Paragraphs-12, 13, 14 and 15 of the impugned judgment, which read thus:-

“12. *Before appreciating his such submission, I would like to refer the authority of the Hon'ble Supreme Court of India in which it was held that where direct evidence of the parents and date of birth entry in the school is available, then medical evidence regarding age of the prosecutrix cannot be taken into consideration. The Honourable Apex Court in Babloo Parsi v. State of Jharkhand and Another [(2008) 13 SCC 1331] held that in a case where the accused had failed to produced evidence/certificate in support of his claim, medical evidence can be called for. The court held that the medical evidence as to the age of a person, though a useful guiding factor is not conclusive and has to be considered along with other cogent evidence.*

13. *In Shah Nawaz v. State of Uttar Pradesh and Another [(2011) 13 SCC 751], the Hon'ble Supreme Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The court had held entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.*

14. *It is also well settled that scientific opinion is*

always based on assumptions and guess work whereas direct evidence of the parents regarding age of their children is most valuable and authentic. No other person knows better about the birth of a child except his/her parents.

15. *It is proved from the statement of PW3 Paramjit Kaur mother of the prosecutrix that at the time of occurrence she was 13 years of age, it was also deposed by PW5 Santosh Chadha, Principal of Deaf and Dumb, School, Barnala that prosecutrix was student of her school and as per admission register entry, which is proved as Ex.P3, date of birth of the prosecutrix was mentioned as 10.11.1990. Such authentic evidence of the record of school in which the Prosecutrix was studying corroborated by the mother of the prosecutrix, who is the best witness being one of the parents of the prosecutrix to know her age, is most believable and trustworthy and therefore opinion rendered by PW1 Dr. Jasbir Kaur on the basis of ossification test cannot be given any credence. It is therefore held that prosecution has been able to prove beyond reasonable doubt that age of the prosecutrix at the time of occurrence was much less than 14 years and thus the theory of consensual sex by the accused with the prosecutrix because of having not reported the same to her parents for a period of about 22 weeks of pregnancy is insignificant. Rather on the other hand it is proved from the impeccable and trustworthy statement of PW3 Paramjit Kaur as well as PW4 (prosecutrix) that on 5.9.2004 accused was caught red handed in one of the rooms of his house while catching the prosecutrix from her arms when one of his companions was doing sexual intercourse with her. It was deposed by the prosecutrix that she was forcibly taken by the accused and his companion. The companion of the accused forcibly did sexual intercourse with her whereas the present accused bolted the door from inside and kept on watching his companion committing rape on her person and at that stage the*

interpreter requested the court to ask the witness to give the names of the rapists in writing and vide Annexure B prosecutrix wrote the name of accused Narinder Kumar and others of being her rapists. She further deposed that her mother came from outside and pushed the door which became open and thus the rapists ran away and she was covered with clothes by her mother and then she was taken to the doctor. Such commission of rape by the accused and his companion with the prosecutrix has been corroborated from the medical evidence on record because PW2 Dr. Neera Seth deposed that on 5.9.2004 she conducted medical examination on the person of the prosecutrix and found that her hymen was absent and as per her opinion possibility of rape could not be ruled out. She further deposed that on police application she made endorsement Exd.PW2/F that rape was being committed with the prosecutrix quite often as she was also having pregnancy of about 22 to 24 weeks. She further deposed that age of the prosecutrix was seemed to be 14 years at that time.

The view taken by the trial Court on the evidence oral as well as documentary is perfectly legal, correct and proper and cannot be faltered.

In so far as the submissions regarding D.N.A. Test, made by the learned counsel for the appellant is concerned, the trial Court has given sound answer in Paragraph-16 of the impugned judgment and order. We quote the paragraph-16 as under:-

“16. *It has been next contended by the learned defence counsel that it is admitted case of the prosecution that prosecutrix has delivered a child shown to have been fathered by the accused and his companion and therefore the police could have got conducted DNA test which would have proved the paternity of the child. I have considered this submission of the learned defence counsel but do not find any force in it*

because the court is to evaluate the evidence which has been brought before it and it is not to speculate the evidence. Once from the trustworthy and believable statements of the prosecutrix and her mother and further corroborated from the medical evidence on record, it is proved that prosecutrix was sexually exploited by the accused and his companion or a continuous period of about 24 weeks and ultimately he along with his companion were found committing gang rape with her by the mother of such hapless deaf and dumb minor female child, the non conducting of DNA test cannot be considered fatal to the case of the prosecution. That would have been another limb of scientific evidence against the accused but such negligent act of the investigating officer is not sufficient to disbelieve the aforesaid authentic and believable oral and medical evidence of the prosecution against the accused.”

We are agree with the aforesaid reasons given by the trial Court and that non-conduct of D.N.A. test would not result into acquittal as the prosecution has direct evidence in the present case, in the form of prosecutrix herself and her mother when the accused persons were caught red-handed. We, therefore, reject this submission as well.

The next submission made by the learned counsel for the appellant is that the prosecutrix was consenting party. In view of the specific finding that the prosecutrix was below the age of 16 years, we do not think the said submission has any relevance. At any rate, we find that the prosecutrix herself stated in her evidence that she had resisted the attempt of rape, but then she had to succumb. We do not find any fault inasmuch as two well built persons caught hold of hands of the prosecutrix and forcibly committed sexual intercourse with her.

As regard the delay in lodging the FIR, the evidence of Paramjit Kaur is most relevant. Her evidence is most natural. She stated in her evidence that it was only on 05.09.2004, when she came to know about sexual intercourse by the accused persons upon her daughter and then she realised that there was pregnancy also and on that very day, she took the prosecutrix to the Hospital. Looking to the status of the parties, it cannot be accepted that mother and father being working, they would have reported earlier. When the mother actually caught the accused persons, and she realised pregnancy of the prosecutrix, therefore, the report was lodged with the police station. We therefore, find no merit in the submission so also regarding theory of consent.

In so far as the prayer regarding reduction of sentence is concerned, what we find is that the offence would fall in the category of gang rape, i.e. 376(2)(g) of IPC, which provides for imprisonment for life. The incident is of 05.09.2004. The minimum sentence provided by Section 376(2)(g) at that time was to be not less than 10 years, but it may go for life and also with fine. The Court also was given power to award sentence lesser than 10 years. In the present case, we do not find any reason much less at any rate or special reason to impose sentence lesser than 10 years. However, in so far as the imprisonment for life awarded by the trial Court is concerned, we think the sentence of life should be brought down to 10 years without any remission. In other words, the appellant will have to undergo actual sentence of 10 years. In the result, we make the following order:-

ORDER

- (i) **CRA-D-152-DB of 2013** is partly allowed;

- (ii) Impugned judgment convicting the appellant for commission of offence punishable under Sections 376(2)(g), 366, 366A of IPC, is affirmed;
- (iii) Impugned order sentencing the appellant to undergo imprisonment for life, is set aside and is modified and it is ordered that the appellant-Narinder Kumar shall undergo actual imprisonment for a period of 10 years without remission;
- (iv) He shall be given set off;
- (v) Impugned order imposing fine amount upon the appellant, is maintained.

(A.B. CHAUDHARI)
JUDGE

(B.S. WALIA)
JUDGE

July 27, 2018

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No