

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.A 35/2013

Reserved on : 31.01.2020

Date of Decision : 11.03.2020

IN THE MATTER OF:

VICKY SAIN

..... Appellant

Through: Mr.Sumeet Verma, Advocate.

versus

STATE

..... Respondent

Through: Dr.M.P.Singh, APP for State with
SI Sachin Yadav, P.S. Vikas Puri.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present appeal is directed against the judgment dated 02.03.2012 whereby the appellant was convicted for the offence punishable under Section 342 read with Sections 376 and 506 IPC, arising out of FIR No.70/2007 registered under Sections 363/366/428/342/376/506/120-B IPC at P.S. Vikaspuri.

2. Vide order on sentence dated 15.03.2012, the appellant was sentenced to RI for 10 years along with fine of Rs.50,000/- for the offence punishable under Section 342 read with Section 376 IPC and in default of payment of fine, the appellant was directed to undergo SI for 6 months. The fine amount was directed to be paid to the prosecutrix as compensation in terms of Section 357 Cr.P.C. The appellant was also sentenced to RI for 2 years along with fine of Rs.1,000/- for the offence punishable under Section 506 IPC and in default of payment of fine, to

undergo SI for 15 days. The benefit of Section 428 Cr.P.C. was granted to the appellant.

3. After completing the investigation, a charge-sheet was filed against the appellant and his sister, Savitri. The appellant pleaded not guilty and claimed trial. The prosecution, in support of its case, examined total of 18 witnesses. The co-accused Savitri was acquitted by the Trial Court.

MATERIAL WITNESSES

4. The prosecution examined Suman Khanna as PW-7 to prove the age of the prosecutrix. The witness brought the admission register of the school, according to which the date of birth of the prosecutrix was mentioned as 21.09.1991. Relevant page of the admission register was exhibited as Ex.PW-7/A. The witness also brought the original admission form and original last school leaving certificate, copies of which were exhibited as Ex.PW-7/B and PW-7/C respectively. The witness identified the signatures of the then Vice Principal on the certificate dated 23.04.2007, certifying the date of birth of the prosecutrix as 21.09.1991. The certificate was exhibited as Ex.PW-7/D.

5. The prosecutrix was examined as PW-1. She deposed that the appellant used to reside on rent at the second floor of the same house and the co-accused Savitri was the appellant's sister. At the relevant time, the prosecutrix was aged about 15 years and was studying in Class-IX. She used to tutor the children of Savitri Devi. On 22.02.2007, the co-accused Savitri Devi took the prosecutrix to her own house which was just behind the house of the prosecutrix. As soon as the prosecutrix entered the room, the co-accused bolted the room from outside. The appellant, who

was already present inside the room, made forcible sexual intercourse with the prosecutrix against her wishes. On an alarm being raised by the prosecutrix and seeing the people from the neighborhood gathered, the co-accused opened the door from outside. Both the appellant and the co-accused fled away from the spot. The prosecutrix narrated the incident to her mother but could not narrate the same to her father. When her mother told the incident to her father, the prosecutrix felt ashamed and on the same night consumed *Tezaab* (acid), which caused burning sensation in her food pipe and chest after which she became unconscious. She was initially rushed to Surya Hospital and later to the DDU hospital, where the police recorded her statement (Ex.PW-1/A). She also proved her statement recorded under Section 164 Cr.P.C. She also stated that her underwear was seized by the doctor at the time of preparing the MLC.

6. During her testimony, the prosecutrix identified appellant as well as his co-accused in the Court.

7. In the cross-examination, she denied the suggestion that she was aged 17-18 years. She stated that she knew the appellant as he used to reside on the top floor. She denied the suggestion that no incident of forcible intercourse occurred with her.

8. Mr.Y, father of the prosecutrix, was examined as PW-2. He deposed that on 22.02.2007, the prosecutrix was aged about 15 years . He heard cries of the prosecutrix at about 11:30 p.m. while he was sleeping. He got up and found that the prosecutrix had consumed *Tezaab* and she became unconscious. He stated that the appellant was arrested on 25.02.2007.

9. Ms.X, the mother of the prosecutrix was examined as PW-9A. She deposed that in the year 2007, the prosecutrix was studying in class IX. On 22.02.2007, she found the prosecutrix very quite and later, on her asking, the prosecutrix told her about the incident. The witness was not cross-examined by the appellant.

10. Aas Raj (PW-8) was examined to prove that while the prosecutrix was staying at the ground floor, the appellant was residing at the second floor of the same house. Sukhbir Tyagi (PW-16) was examined to prove the house of the co-accused Savitri. He deposed that he was the owner of the property and Savitri was living on rent.

MEDICAL EVIDENCE

11. Dr. Shashi Lata Kabra (PW-13) was examined to prove the MLC of the prosecutrix prepared by Dr. Geetanjali, as Ex.PW-13/A. She identified the handwriting and signatures of Dr.Geetanjali on the MLC. The patient's history showed ingestion of acid and the patient was having history of vomiting with blood coming in vomitus. The prosecutrix had given the history of sexual contact three times with her consent and her hymen was found torn.

12. Dr. Arpita Gangwani (PW-14) proved the admission of the prosecutrix in Ward No.9. Dr.Narender Solanki (PW-9) proved the MLC of the appellant.

13. The remaining witnesses were police officials who deposed about various steps taken during the investigation. ASI Ram Lal, who collected the FSL report, exhibited the same as Ex.PW-17/B.

14. The learned M.M. was examined as PW-12 to prove the statement of the prosecutrix recorded under Section 164 Cr.P.C.

15. Learned counsel for the appellant contended that the present case is a case of consensual sex as is evident from the history given by the prosecutrix at the time of her MLC. It was further contended that no concrete proof of the age of the prosecutrix has come on record and even otherwise being above 15 years of age, she was of the age of discretion. In support, learned counsel for the appellant relied upon the decision of Vijay Kumar v. State of NCT of Delhi in CrI. Appeal 325/2013 decided on 14.08.2015. Lastly, it was submitted that grave prejudice has been caused as some of the prosecution witnesses, namely, PW-7, 8, 9A, 13 & 16 were not cross-examined on behalf of the appellant.

16. On the other hand, learned APP for the State has supported the impugned judgment. It was submitted that the prosecutrix was a minor at the date of the incident.

17. I have heard learned counsels for the parties and gone through the case records.

18. The prosecution has proved the age of the prosecutrix through the testimony of Suman Khanna, who proved all the relevant school records, i.e., admission register, last school leaving certificate, certificate issued by the earlier Vice Principal, according to which the date of birth of the prosecutrix is 21.09.1991. The prosecutrix as well as her mother and father have also stated that she was born on the aforesaid date and at the relevant time, was studying in class-IX. The prosecutrix denied the suggestion that her date of birth in the school certificate was wrongly mentioned by her parents to secure admission and that she was between

16-17 years of age at the time of the incident. On the basis of the oral testimony and the material evidence placed on record, this Court is of the view that the prosecutrix was a minor less than 16 years of age on the date of the incident.

19. It is a trite law that the sole testimony of a prosecutrix can be the basis for conviction provided the same is trustworthy and credible. [Refer: State of Punjab v. Gurmit Singh and Ors reported as (1996) 2 SCC 384 and State of Himachal Pradesh v. Manga Singh reported as 2018 SCC OnLine SC 2886].

20. Coming to the contention of learned counsel for the appellant that the prosecutrix being in the age of discretion was a consenting party, in catena of decisions, it has been held that the consent of a minor is of no consequence. [Ref: Jarnail Singh v. State of Haryana reported as AIR 2013 SC 3467; Lillu and Ors. v. State of Haryana reported as AIR 2013 SC 1784]

21. The reliance on the decision in Vijay Kumar (Supra) by the learned counsel for the appellant to contend that the prosecutrix was of the age of discretion, is misplaced. In the captioned case, the prosecutrix had gone with the accused and stayed with him for 8-9 days. The court came to the conclusion that the victim accompanied the accused willfully and voluntarily, which is not the fact in the present case.

22. So far as contention of learned counsel for the appellant that some of the prosecution witnesses were not cross-examined is concerned, it is noted that opportunity of cross-examination was granted, but the same was not availed by the appellant.

23. The Trial Court observed that the statement of the prosecutrix under Section 164 Cr.P.C. could be recorded after two months, as she was undergoing treatment. A perusal of the statements of the prosecutrix recorded during investigation as well as her testimony would show that she has consistently stated about her age, her going to the house of Savitri on 22.02.2007 where the appellant committed forcible sexual intercourse with her against her wishes and that she was also threatened by the appellant with dire consequences to not to disclose the said incident to anyone. She also consistently stated that on account of fear and shame, she voluntarily consumed the acid. Accordingly, this Court is of the view that the testimony of the prosecutrix is both credible and trustworthy.

24. In view of the above discussions, I do not find any substance in the contentions of learned counsel for the appellant. The judgment on conviction passed by the trial court is upheld.

25. Learned counsel for the appellant has submitted that the incident relates to the year 2007, at which time the appellant was aged about 18 years. He submitted that it has come in the testimony of PW-13 that the prosecutrix had given history of sexual contact three times with her consent with the present appellant. He also submitted that he has clean past record and his jail conduct has also been found to be satisfactory. It was further submitted that he has a widowed mother, brother and sister to look after. It was further urged that the appellant be granted relief under the proviso to Section 376 IPC and the sentence be reduced to the period undergone. In support, he has relied upon the decisions of Supreme Court in Nehnu Ram @ Narendra v. State of Rajasthan & Anr. in Crl. Appeal

No.320 of 2019 decided on 20.02.2019 and the decisions of Coordinate Benches of this Court in Mohd. Anwar v. State reported as **2019 (3) JCC 1766**, Maan Singh (supra) in Crl. Appeal No.1528/2011 decided on 05.11.2015.

26. The offence in the present case relates to the year 2007 i.e., prior to The Criminal Law (Amendment) Act of 2013. As per the status on the relevant date, the offence punishable under Section 376 IPC provided that the offence of rape of woman under 16 years of age with or without her consent was punishable with imprisonment not less than 7 years which may extend for life or for a term which may extend to 10 years along with payment of fine. The proviso to the Section further provides that the court, for adequate and special reasons to be mentioned in the judgment, may impose a sentence of imprisonment less than 7 years.

27. Recently, in Thongam Tarun Singh v. State of Manipur reported as **2019 SCC OnLine SC 709**, the Supreme Court held as follows:-

“11. So far as quantum of sentence is concerned, Section 376 IPC-punishment for rape has been amended by Act 13 of 2013 (with retrospective effect from 03.02.2013). As per the amended section, the minimum sentence of seven years is provided for the offence of rape which may extend to imprisonment for life. After the amendment, no discretion is vested with the Court to reduce the sentence. Prior to the amendment (Amendment Act 13 of 2013) for the punishment under Section 376(2)(g) IPC, it provided for 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. Prior to the amendment (Amendment Act 13 of 2013) by the proviso to Section 376(2) IPC, the Court has been vested with the discretion that 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.

12. The question falling for consideration is whether there are adequate and special reasons warranting exercise of discretion to reduce the sentence of imprisonment. What is 'adequate and special reasons' would depend upon several factors and no strait-jacket formula can be imposed. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons. They differ from case to case.

13. It is stated that at the time of occurrence, appellant no. 1 was working as a police driver and appellant no. 2 was a singer having good reputation, performing as a singer on the stage and both the appellants were aged about 24-25 years, at the time of the occurrence. It is also stated that both the appellants have no criminal antecedents and they hail from backward area. Learned counsel for the appellants have also produced certificate issued from the Jail Authorities to show that the conduct of the appellants (post conviction) are very good and satisfactory and they have been participating in the sports/garden activities and other programmes of the Jail. Considering the facts and circumstances of the case and that the appellants have no criminal antecedents and also the conduct of the appellants in the Jail (post conviction), the sentence of imprisonment of fifteen years (for the conviction under Section 376(2)(g) IPC) and sentence of imprisonment of ten years (for the conviction under Section 120B IPC) are reduced to eight years."

28. In Nehnu Ram (Supra), while relying on the decisions in Ram Kumar v. State of Haryana reported as (2006) 4 SCC 347 and Raj Kumar Vs. State of Bihar reported as (2006) 9 SCC 589, the Supreme Court held as under:-

“The present is a case where the provision of Section 376(1) proviso as it existed at the time of incident was available and not a case where minimum sentence prescribed under proviso to Section 376(1) of seven years cannot be reduced on adequate and special reasons found and therefore the sentence of seven years can be reduced as is statutorily provided.

Now, we come back to special reasons which have been placed before us. The incident took place about 30 years ago. At the time of incident, the appellant was 22 years of age and the prosecutrix was between 15-16 years. It has been stated by learned counsel on behalf of the appellant that the appellant is married and has three daughters whereas the prosecutrix is also married and has husband and kids. As noted above, this Court has already passed an order directing the State to obtain instructions on criminal antecedents of the appellant. It has been stated by learned counsel for the State before us that there are no criminal antecedents of the appellant.

Looking into the facts and circumstances of the case that incident took place 30 years ago, that both the appellant and the prosecutrix having married (not with each other) and settled in life and the appellant having already undergone the sentence of one year and seven months, we are of the view that ends of justice would be served in reducing the sentence to the sentence already undergone.

We, thus, confirm the conviction of the appellant under Section 376 and by invoking proviso to Section 376(1) reduce the sentence to the sentence already undergone.”

29. As per the nominal roll, the appellant has undergone sentence of 6 years and 24 days. In view of the mitigating circumstances pleaded by learned counsel for the appellant that the incident took place 13 years ago in the year 2007 i.e., prior to the amendment which was brought in force

in the year 2013; that the appellant was 18 years of age at the time of the incident; that as per the MLC, the prosecutrix had consensual sex with the appellant three times and also that the appellant has to look after his family compromising of his widowed mother, brother and sister, the order of sentence is modified and the appellant's sentence is reduced to the period already undergone however, the same shall be subject to the payment of fine of Rs.51,000/- out of which Rs.50,000/- shall be paid to the prosecutrix as compensation amount as directed by the trial court. In case, the fine amount is not paid, the appellant shall undergo the default sentence. The fine amount shall be paid within eight weeks from the date of passing of this judgment.

30. A copy of this order be communicated to the trial court to ensure compliance.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 11, 2020
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