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

+ **CRL.A. 141/2009**

GULSHER SINGH

..... Appellant

Through: Mr. Sumeet Verma and Mr.
Mahinder Pratap Singh,
Advocates with appellant.

versus

STATE

..... Respondent

Through: Mr. Satish Kumar, APP for the
State with Inspector Pawan
Kumar, P.S. Alipur.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

12.01.2023

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SWARANA KANTA SHARMA, J. (ORAL)

1. The present Appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the appellant assailing the impugned judgment dated 27.08.2008 passed by learned Additional Sessions Judge, Rohini Courts, Delhi in SC No. 403/2006 whereby the appellant was convicted for offence punishable under Section 376 of Indian Penal Code, 1860 ("I.P.C."). The appeal further assails the order on sentence dated 01.09.2008 whereby the appellant was sentenced to undergo rigorous imprisonment for seven years with fine of Rs. 5,000/- (Rupees Five Thousand) and in default of payment

of fine, further simple imprisonment for six months.

2. The present appeal was admitted on 17.02.2009 and sentence of the appellant was suspended by virtue of order dated 14.07.2009.

3. In brief, the case of the prosecution is that on 05.09.2005, on receipt of DD no. 3A W/SI Parvati was sent to BJRM Hospital where prosecutrix/victim along with her mother Mamta met the IO and the statement of prosecutrix was recorded to the effect that she along with her parents resided in Ram Pal Ka Gher, Village Bakauli as tenants. One Gulsher Singh i.e., appellant/accused herein, also resided as a tenant in the same property. On 05.09.2005, prosecutrix had gone to school and at about 10:40 a.m. she returned to her house during recess period with her friend Lucy. It was alleged that Lucy went to her own house and prosecutrix came to her house where she saw that main gate of the property was locked from inside due to which prosecutrix tried and climbed the terrace of the adjoining house and reached the courtyard of her own house. It was alleged by the prosecutrix in her statement that she asked appellant, who was a co-tenant, regarding the whereabouts of her parents. It was further alleged that when prosecutrix started to return, appellant pulled her to his room and bolted the same from inside. Prosecutrix raised alarm but appellant shut her mouth and laid her on the floor and committed rape. It is alleged by the prosecutrix that appellant threatened her not to tell any person about the same. In the meantime, prosecutrix's mother reached and she narrated the entire incident to her mother. On the statement of prosecutrix, an FIR bearing no. 339/2005 for the offence punishable under Section 376 of IPC was registered at Police Station Alipur,

Delhi against appellant.

4. In the present case, prosecutrix was medically examined and the samples which was collected by the doctor were sent to FSL as well as the statement of the prosecutrix under Section 164 of Cr.P.C. was also recorded before the Magistrate. Thereafter, charges were framed against the appellant for the offences punishable under Section 376 of IPC.

5. By way of impugned judgment dated 27.08.2008, the learned Trial Court after considering the evidence and material available on record held that appellant is guilty of offence punishable under Section 376 of IPC. The concluding part of the impugned judgment dated 27.08.2008 reads as under:

“11.1. For the reasons aforesaid in para no. 9 and 10 above, I am of the opinion that prosecution has successfully established its case beyond all reasonable doubts, that prosecutrix was subjected to sexual intercourse by the accused on 05.09.2005 at about 11 am. As discussed in para no. 9 above, prosecutrix was about 14 years of age at the time of occurrence and was a student of class 3. The elements of consent is, of course, not even remotely established or suggested. Thus, I am of the opinion that prosecution has successfully established the charge for offence punishable under Section 376 IPC against the accused. He is accordingly convicted for the aforesaid charges”.

6. Learned counsel for appellant states that appellant has been facing trial since 2005 which is almost 17½ years. It is further stated by learned counsel for appellant that appellant has undergone three years and ten months out of seven years, the punishment awarded to him by learned Trial Court. It is further stated by learned counsel for

appellant that neither the FSL report nor the MLC supports the case of the prosecution. Learned counsel for appellant submit that the appellant do not propose to assail the conviction order on merits and would like to confine his submissions in the appeal, to the order of sentence alone, by requesting that the sentenced be reduced to the period already undergone by them. It is further submitted by learned counsel for appellant that no useful purpose will be served in requiring the appellant to undergo the remaining portion of sentence at this belated stage, therefore, the sentence be reduced to the period already undergone.

7. On the other hand, learned APP for the State states that considering that the age of victim at the time of commission on offence was between 12-15 years, therefore, no leniency shall be granted by the Hon'ble Court.

8. I have heard arguments and gone through the entire material on record.

9. The FIR in the present case was registered in the year 2005. The appellant has faced trial for almost 17½ years out of which he remained on bail for about 13½ years and remained in custody for more than three years. The appellant has served 3 years and 10 months in jail out of imprisonment of 7 years awarded to him. Perusal of the Trial Court Record ("TCR") also shows that FSL report filed in this case does not support the case of prosecution as well as the medical evidence also does not support prosecution story. However, learned counsel for appellant states that he does not want to press his appeal as far as conviction is concerned and prays for setting aside of order on

sentence.

10. In ***Raj Kumar @ Raju Yadav @ Raj Kumar Yadav vs. State of Bihar (2006) 9 SCC 589***, the Hon'ble Supreme Court has held as under:

“5. Keeping in view the fact that there was a delay of three days in lodging the FIR and the fact that the doctor (PW6), who examined the victim, in her testimony has deposed that she did not find any confirmatory evidence of rape on the victim, in the peculiar facts and circumstances of the present case, we deem it appropriate to reduce the sentence awarded to the appellant to the period already undergone. Ordered accordingly.

6. The appellant be released forthwith if not required in any other case. The appeal stands disposed of accordingly.”

11. It is noted by this Court as well that there is no specific evidence against the appellant and as far as FSL report is concerned, it is noted from FSL report that semen could not be detected on exhibits '2A' & '2B'. Therefore, after perusing the FSL report this Court is of the opinion that FSL report does not support the prosecution's case.

12. In ***Brij Pal @ Baiju vs. State of NCT of Delhi, 2011 SCC Online Del 2500***, the Hon'ble Supreme Court held as under:

“9. The quantum of sentence has to be decided on the basis of the facts and circumstances of each case, the mitigating and the aggravating factors have to be considered and thereafter the delicate balance has to be arrived at. While exercising the discretion for awarding sentence below the statutory minimum, adequate and special reasons are to be noted. In the present case the MLC of the prosecutrix, wherein she has given the history herself, says that she had willingly gone with the Appellant. Her subsequent conduct of not informing anybody or

*raising any alarm while she was on the bus also shows that she had willingly accompanied the Appellant. Thus, all these factors persuade this Court to take a lenient view in the matter by awarding sentence less than the minimum prescribed. **The Appellant has been in custody for more than four years now and it would be thus in the interest of justice to reduce the sentence of imprisonment awarded to the Appellant to the period already undergone.***

(Emphasis supplied)

13. Further, the Hon'ble Supreme Court in ***Hemchandra Dan vs. State of Jharkhand, 2022 SCC Online Jhar 135***, has been held as under:

“28. In summing up, viz. drawing parallels from the above cited judgments, delay of seven days in lodging complaint, incident occurred 20 years ago in 2000, age of the appellant at the time of incident being 21 years, no criminal antecedents of the appellant and overall appellant had already undergone more than three years nine months of the imposed sentence of seven years and hence, in the facts and circumstances of the case, proviso to section 376(1) IPC is invoked for awarding lesser sentence”.

14. In case titled as ***Pawan Kumar vs. State (Govt. of NCT of Delhi) & Anr, CRLA. 737/2014***, it has been held as under:

“.....In the peculiar facts & circumstances of this case, the substantive sentence awarded to appellant is reduced to 1 ½ years i.e. marginally less than the minimum sentence of 7 years. In addition, the sentence of four months already undergone by appellant over and above the sentence of 6 ½ years, is treated as sentence in default of payment of fine for the offences in question. It is noted in the Nominal roll of appellant that in pursuance to order of 3rd May, 2017, appellant has been released on bail on 16th May, 2017. Since the entire sentence awarded to appellant is reduced

to the period already undergone by him, so the bail-bonds furnished by him are discharged. In view of the aforesaid, the sentence awarded to appellant is modified to the extent as indicated above. With aforesaid directions, this appeal is disposed of.”

15. Coming back to the case in hand, this Court takes note of the fact that incident took place in the year 2005 i.e. prior to the amendment in Section 376 of IPC in the year 2013. *Vide* Criminal Amendment Act 1983 i.e. prior to the amendment in Section of 376 IPC in the year 2013, Section of 376 IPC read 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 case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both;”

16. It is not disputed that appellant/accused is not involved in any other criminal case. Learned Counsel for appellant prays that at present appellant is 65 years of age and has three daughters of marriageable age. It is further stated that the appellant has settled in his life and is looking after his daughters and wife as a responsible citizen and in this regard learned counsel for appellant also place school certificates of the appellant's daughter which clearly shows that appellant as a responsible citizen took care of his family and also raising his daughters as well as educating them. Therefore, no useful purpose will be served to send the appellant behind the bars after so

many years.

17. This Court after considering the overall facts and further taking note of the proviso of Section 376 IPC prior to amendment in the year 2013, is of the opinion that the sentence be reduced to the sentence already undergone. Proviso of Section 376 of IPC reads as under:

“Provided 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,”

18. In view thereof, this Court deems it appropriate and find it a fit case to set aside the sentence and reduce the sentence for the above mentioned special reasons to the period he has already undergone i.e. imprisonment of 3 years and 10 months.

19. In view of above terms, the appeal is disposed of.

20. The assistance of Mr. Sumeet Verma, learned counsel for appellant is appreciated by this Court.

21. The order be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J
JANUARY 12, 2023/kss