
(2017) 01 RAJ CK 0025
In the Rajasthan High Court
Case No : 47 of 2010

Raju S/o Shri Nanak Ram

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 13-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 164](#), [Section 374](#) - Examination of witnesses by police - Recording of confessions and statements - Appeals from convi

Citation : (2017) 01 RAJ CK 0025

Hon'ble Judges : Gopal Krishan Vyas, Kailash Chandra Sharma

Bench : DIVISION BENCH

Advocate : Bheemkant Vyas, Vishnu Kachhawaha

Final Decision : Allowed

Judgement

1. In this criminal appeal filed under Section 374 of Cr.P.C., accused appellant, Raju S/o Nanak Ram, has challenged the validity of judgment dated 07th of January, 2010 passed by learned Addl. Sessions Judge (Fast Track) No.1, Bikaner (for brevity, hereinafter referred to as ?trial court?) in Session Case No.37/2009, whereby the accused appellant was convicted for the offence under Section 376

(2) (f) of IPC and sentenced for life imprisonment with a fine of Rs.300/- with default stipulation to further undergo three months rigorous imprisonment.

2. Briefly stated, the facts of the case are that on

07.04.2009 at about 10-11.00 AM, PW.4 Smt. Mathra W/o Jagdish Bairwa, submitted a written report (Ex.P/1) at Police Station- Mahila, Bikaner, alleging inter-alia that she along with her husband are doing labour work at quarter, which are being constructed behind 10th RAC Battalion. It is further stated that she is living at the site along with her husband children i.e. Mst. "P" (prosecutrix) aged about is six years and one son of two years.

3. On 05.04.2009 at about 08.00 PM, when she was preparing food, and her daughter was playing outside the house, at that time the accused appellant took her daughter in the nearby quarters, which were under construction. After sometime she heard cry of her daughter and rushed towards the under construction quarters, the accused appellant came their bringing prosecutrix in unconscious condition, her clothes were smeared with blood, upon enquiry accused appellant did not reply and ran away. The complainant called her husband PW.1 Jagdish, at that time, Dharma, Ramniwas (PW.3), Smt. Kamla also came there. The prosecutrix Mst. "P" was taken to the P.B.M. Hospital, Bikaner for treatment. In the complaint it is alleged that accused appellant committed rape upon the prosecutrix, therefore, action may be taken against him. Upon submission of aforesaid written report, FIR No.41/2009 (Ex.P/9) was registered against the accused appellant for the offence under Sections 323 and 376 of IPC at Police Station- Mahila, Bikaner. Thereafter investigation commenced.

4. After obtaining medical examination report of the prosecutrix, statements of prosecutrix Mst. "P" were

recorded u/s 164 Cr.P.C . before the Judicial Magistrate, Bikaner. Statements of other witnesses were also recorded u/s 161 Cr.P.C . Blood smeared soil and clothes of the prosecutrix were seized and the accused appellant was arrested on 07.04.2009.

5. The medical examination of the accused appellant was also conducted and after conclusion of investigation, a charge sheet was filed against the accused appellant in the court of learned Judl. Magistrate, First Class No.3, Bikaner, from where the case was committed to the Sessions Judge, Bikaner, but later on the case was transferred to learned Addl. Sessions Judge (FT) No.1, Bikaner for trial.

6. After providing opportunity of being heard to the accused appellant, charges were framed against the accused appellant for the offence under Sections 376 (2) (f), 323 and 367 of IPC, but the accused appellant denied the same and prayed for trial.

7. During trial, statements of 11 prosecution witnesses were recorded and 25 documents were exhibited from prosecution side. After recording the evidence of prosecution witnesses, statements of the accused appellant were recorded under Section 313 Cr.P.C., in which the appellant gave following explanation, which reads as infra: -

VERNACULAR MATTER OMITTED

8. Learned trial court thereafter granted opportunity to accused appellant to lead evidence in defence, but no evidence was led by him. Thereafter the learned trial court finally heard the arguments of both the sides and

after evaluating the evidence led by the parties, the learned trial court vide judgment impugned dated 07.01.2010 held the accused appellant guilty for offence u/s 376 (2) (f) of IPC but acquitted him from the offences under Sections 323 and 367 of IPC and passed sentenced as mentioned above.

9. In this appeal, the learned counsel for the accused appellant argued that the prosecution has failed to prove its case beyond reasonable doubt, so also, no offence as alleged by the prosecution, has been committed by him. It is argued that although prosecutrix who was six years of age, appeared before the court as PW.2, but her statements were not recorded because she does not understand the question put to her. Thereafter, the learned trial court while relying upon the statements of her mother and statements of prosecutrix Mst. "P" recorded under Section 164 of Cr.P.C., held accused appellant guilty for offence u/s 376 (2) (f) of IPC without any basis and erroneously convicted the accused appellant. Therefore, the judgment impugned deserves to be quashed.

10. Learned counsel for the appellant submitted that statements (Ex.P/3) of the prosecutrix were recorded u/s 164 Cr.P.C . but at the time of recording her statements, father and mother of prosecutrix were present and they tutored the prosecutrix to give statement but subsequently in the trial, nothing was said by the prosecutrix against the accused appellant because she was not understanding the question put to her. Therefore, in absence of any specific allegation it is obvious that

finding of learned trial court so as to hold accused appellant guilty for offence u/s 376 (2) (f) of IPC is not sustainable in law.

11. It is also submitted that the trial court after due consideration of evidence acquitted the accused appellant from the charges levelled against him u/s 323 and 367 of IPC . Meaning thereby, the prosecution has failed to prove the case for the aforesaid offence but held him guilty for the offence of rape while relying upon the testimony of PW.4, Mathra (mother of the prosecutrix) and statement of PW.7, Dr. O.P. Saini, who was one of the member of Medical Board, examined the prosecutrix. Therefore, even if this Court comes to the conclusion that there is evidence against the accused appellant for commission of offence of rape, then, also the maximum punishment provided for offence u/s 376 of IPC imposed against the accused appellant, deserve to be reduced because at the time of imposing maximum punishment, the trial court was under obligation to record reasons about seriousness of the offence, therefore, sentence of life imprisonment may be reduced to already undergone.

12. Learned counsel for the accused appellant invited our attention towards the judgment of Hon^{ble} Supreme Court in the case of Sunil Dutt Sharma Vs. State (Govt. of NCT of Delhi) reported in (2014) 4 SCC 375, which was relied upon by this Court in the case of Gyarsi Lal Vs. State of Rajasthan reported in 2016 (1) Cr.L.R. (Raj.) 415, in which while relying upon another judgment of this Court in the case of Chanda Lal @ Harchanda Vs. State of Rajasthan (D.B. Cri. Appeal

No.947/2015 decided on 26.11.2014), the Division Bench of this Court, reduced the sentence from life imprisonment to ten years imprisonment for the same offence, for which the accused appellant has been punished.

13. Per contra, the learned Public Prosecutor vehemently opposed the submissions made by the learned counsel for the accused appellant. It is argued that it is a case in which the prosecution has proved the allegations against the accused appellant for committing offence u/s 376 (2) (f) of IPC and the learned trial court while relying upon the entire evidence held the accused appellant guilty for committing rape with a six years? old female child, therefore, no lenient view is required to be taken against the accused appellant. More so, it is a case in which reliable and trustworthy evidence led by the prosecution so as to hold accused appellant guilty, therefore, the judgment impugned do not require any interference by this Court and the judgment impugned may kindly be upheld.

14. After hearing the learned counsel for the parties, we have considered the very important fact of the case that allegation levelled against the appellant is for committing rape upon a six years? old girl, who was even in a position to express or narrate the incident but the mother and father of the prosecutrix, appeared before the court along with her and in front of them, first statements of the prosecutor recorded u/s 164 Cr.P.C ., in which allegations were levelled by her against the accused appellant. It is true that in the court though prosecutrix appeared as

PW.2, but she was not in a position to understand the question put to her by the court, therefore, her statements were not recorded completely but her mother (PW.4 Smt. Mathra) reiterated the prosecution story, therefore, it cannot be said that the prosecution has failed to prove its case beyond reasonable doubt for offence u/s 376 (2) (f) of IPC with regard commission of offence of rape with prosecutrix by the accused appellant.

15. In view of above, we are not inclined to accept the argument of learned counsel for the appellant that prosecution has failed to prove its case beyond reasonable doubt. We have thoroughly considered the entire evidence in the light of judgment cited by the learned counsel for the appellant to reduce the sentence from life imprisonment to ten years? R.I.

16. In the case of Gyarsi Lal (supra) almost similar circumstances were in existence and the Division Bench of this Court while following the adjudication made by Hon?ble Apex Court in the case of Sunil Dutt Sharma (supra), while considering identical evidence for offence u/s 376 (2) (f) of IPC reduced the sentence from life imprisonment to ten years? R.I., and held as under: -

"7. Mr. Gaurav Gupta, the learned counsel for the appellant, in view of the testimony of the prosecutrix corroborated by her parents, and the medical evidence, has submitted that he will not be in a position to assail the conviction. But he still pray that it is not a case where life imprisonment ought to have been awarded.

Thus, Mr. Gupta, has prayed for reduction of

sentence. To fortify above submission, he had relied upon the judgment rendered by us in Chanda Lal @ Harchanda vs. State of Rajasthan D.B. Criminal Appeal No. 947/2005, decided on 26.11.2014, wherein after noticing contention of counsel in that case, we have held as under:-

"Mr. N.A. Naqvi, Senior Counsel has also very fairly stated that taking the entire perspective of the case, he will only urge and pray before this Court that there were no aggravating circumstances available with the trial Court to award maximum sentence i.e. life imprisonment. The learned counsel has stated that to award the maximum sentence, there must be compelling reasons for the trial court and such reasons are to be stated in the order whereby sentence is awarded. The learned Counsel has stated that recently Hon''ble Apex Court in case of Sunil Dutt Sharma Vs. State (Govt. of NCT of Delhi) reported as (2014) 4 SCC 375 while dealing with case of Section 304-B IPC had observed that Court should take notice of aggravating and mitigating circumstances while awarding sentence. The learned counsel for the appellant has also placed reliance upon Bavo @ Manubhai Ambalal Thakore V. State of Gujarat AIR 2012 Supreme Court 979 to contend that Hon''ble Apex Court considering the agony of protracted trial has awarded minimum sentence of ten years. The learned counsel states that in the present case, incident had taken place 11 years ago i.e. in the year 2003 and since then, appellant is in the corridors of the Court. It is contended before us that since, appellant was not released on bail during the trial and his sentence was also not suspended during appeal, thus he continue to languish behind the bars since 04th September, 2003, when his formal arrest was effected."

The learned Public Prosecutor except age of the prosecutrix could not divulge any other reason to persuade us to maintain the sentence awarded by the trial Court.

Hence, taking ratio of law laid in Sunil Dutt Sharma (supra) which in turn had relied upon Sangeet and Another Vs. State of Haryana (2013) Volume 2 SCC 452 and taking aggravated circumstances i.e. age of the prosecutrix and the mitigating circumstance that the appellant is sole bread earner of the family, he is in the corridors of the Court from last 11 years, we follow the mandate of law laid in case of Bavo @ Manubhai Ambalal Thakore (supra) and while maintaining the conviction of the appellant, reduce the sentence of life imprisonment awarded upon the appellant by the trial Court to ten years rigorous imprisonment. However, we enhance the fine awarded by the trial Court from Rs.5,000/- to Rs. 10,000/- while maintaining the default clause prescribed by the trial Court. "

8. We find no reason to take a different view. Therefore, relying upon our judgment in the case of Chanda Lal @ Harchanda (supra), in this case also, we reduce the sentence of life imprisonment awarded upon the appellant to ten years" R.I. However, we enhance the fine awarded upon the appellant u/s 376(2) (f) IPC to Rs. Ten Thousand, in default of payment of fine, the appellant shall undergo one year"s R.I. Sentence awarded on both counts shall run concurrently.

9. In view of above, the present appeal stands disposed of."

17. In the aforesaid judgment, the Division Bench of this Court relied upon the judgment in the case of Sunil Dutt Sharma Vs. State (Govt. of NCT Delhi) (supra), and reduced the sentenced for allegation u/s 376 (2) (f) of IPC from life imprisonment to ten years rigorous imprisonment along with fine. Accordingly and in view of above, we are of the opinion that there is no question to take a different view than the view taken by this Court in the case of Gyarsi Lal (supra).

18. Consequently, the instant criminal appeal filed by the accused appellant, Raju, is partly allowed. The findings of learned trial court arrived at by the learned trial court holding the accused appellant guilty for offence u/s 376 (2) (f) of IPC, is hereby upheld, however, the sentence of life imprisonment imposed by the trial court, is hereby reduced to ten years? rigorous imprisonment while enhancing the fine of Rs.300/- to Rs.5000/-. In default of payment of fine, the appellant shall serve sentence for six months? simple imprisonment.