

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

CRA-D No. 1877-DB of 2014 (O&M)

Reserved on : 15.12.2018

Date of decision : 20.12.2018

Hari Om @ Dhola

.... Appellant

versus

State of Haryana

... Respondent

**Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Harinder Singh Sidhu**

Present Mr. Ashwani Bhardwaj, Advocate, for the appellant
Mr. Apoorv Garg, Deputy Advocate General, Haryana.

Rajiv Sharma, J.

1. The present appeal is instituted against judgment and order dated 20.10.2014, rendered by Additional Sessions Judge (I), Rohtak, in Sessions Case No. 129 of 2013, vide which appellant Hari Om @ Dhola was charged with and tried for the offence punishable under Sections 376-D, 452 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, the POCSO Act). He was convicted and sentenced to undergo rigorous imprisonment for twenty years and to pay a fine of ₹ 1,00,000/- for commission of offence punishable under Section 376-D IPC read with Section 4 of the POCSO Act and in default of payment of fine, to further undergo simple imprisonment for one year. He was also convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of ₹ 5,000/- for commission of offence punishable under Section 452 IPC and in default of payment of fine, to further undergo simple imprisonment for three months. Both the sentences were ordered to run concurrently.

2. The case of the prosecution in a nutshell is that on 14.6.2013

Pawan Kumar had lodged a complaint with ASI Surender to the effect that he was married and residing separately from his brother. He had four daughters. Eldest was of 8 years. Younger to her was 6 years. Third daughter was of 4 years and the youngest was 1 year old. His one sister was married at Kalanaur. He had gone to attend the *Tehrvi* of her husband along with his wife, brother and parents. When they came back in the evening, the eldest daughter (prosecutrix) while crying told her mother that in their absence at about 4.00 P.M. Pardeep @ Kuka came to their house and after removing her underwear lied upon her and committed wrong act (Accused Pardeep @ Kuka was later on declared juvenile). She was suffering from severe pain and wept loudly. Thereafter, the accused fled away from the spot. In these circumstances, the complaint was lodged. The case was registered. Medico-legal examination of the prosecutrix was conducted. However, on the basis of the statement of the prosecutrix recorded under Section 164 Cr.P.C. on 22.6.2013, name of appellant Hari Om @ Dhola was also included in commission of alleged offence. The appellant was arrested and Section 376-D IPC was added. Medical examination of both the accused was also got conducted. Investigation was completed and challan was put up after completion of all the codal formalities.

3. To prove its case, the prosecution examined 20 witnesses. The statement of the accused was also recorded under Section 313 Cr.P.C. He has denied the case of the prosecution. In defence, the accused examined two witnesses. The juvenile was tried separately. Appellant was convicted and sentenced, as noticed above. Hence, the present appeal.

4. Learned counsel appearing on behalf of the appellant vehemently argued that the prosecution has failed to prove its case. Learned counsel appearing for the State vehemently argued that the prosecution has proved its case beyond reasonable doubt and supported the judgment and order of the learned Court below.

5. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

6. PW1 Pawan Kumar testified that his eldest daughter (name withheld) was 8 years old. He along with his wife and two daughters had gone to Kalanaur on 14.6.2013. The prosecutrix and her sister at number two remained at house. Around 4.00 P.M. again said at about 6.00 P.M., they came back. They found that the prosecutrix was weeping and she was lying on the bed. The second daughter (name withheld) told that Hari Om @ Dhola and Pardeep @ Kuka had come to their house. She was made to leave the house by accused Hari Om @ Dhola after giving beatings. Accused Pardeep @ Kuka bolted the house from inside. The prosecutrix was inside the room. He noticed bleeding marks on the bed-sheet where the prosecutrix was lying. Thereafter the police was informed. The police came to the spot. Underwear of the prosecutrix was taken into possession. She told the police that she was raped by one of the appellant. He moved the application, Ex.P1. The prosecutrix was taken to General Hospital, Rohtak. She was medically examined. In his cross-examination, he stated that their statements were only recorded on 14.6.2013. Volunteered, later on subsequent statement of the prosecutrix was also recorded in the Court. Earlier two policemen had come to their house. When the statement of the prosecutrix was recorded under Section 164 Cr.P.C., then they came to

know through police that earlier in previous application, the name of only one accused was mentioned. Volunteered that he had told the names of both the accused to the police on the day of incident. He denied the suggestion that on 22.6.2013 there was a dispute between him and father of the appellant and that Ashok, Rajender and other co-villagers had intervened at that time. He admitted that earlier also a case was got registered against Shri Ram @ Shama son of Balbir resident of Ghuskani for committing offence of rape of his sister. He stated that the incident had taken long back.

7. PW3 is the prosecutrix. She was found capable to give answers by the learned trial Court. She deposed that they were four sisters. On 14.6.2013 at about 4.00 P.M., Kuka and Dhola came to their house. She along with her sister at number two (name withheld) was present at home. Her parents along with her two younger sisters had gone to Kalanaur. Kuka and Dhola gave beatings to them. Her younger sister was made to leave the house. Earlier Kuka and thereafter Dhola raped her. There was bleeding from her vagina. She cried. They shut her mouth forcibly and ran away. Later on her parents had come back. She narrated the incident to them. Police came to their house. She was taken to the hospital. Her statement was recorded vide Ex.P4. In her cross-examination, she denied the suggestion that accused Dhola had not come to their house on the day of incident.

8. Similar deposition was made by PW4 younger sister of the prosecutrix. She deposed that her parents had gone to Kalanaur. Kuka and Dhola came to their house. They gave beatings. She was made to leave the house. The prosecutrix remained inside the house. Kuka and Dhola closed the door from inside. She recognised accused Dhola in the Court.

9. PW5 Saroj is the mother of the prosecutrix. She corroborated the statement of PW1 Pawan Kumar. She deposed that around 5.30/6.00 P.M., they came back and saw that the prosecutrix was weeping. The prosecutrix told that Kuka and Dhola had come to their house and gave beatings to her and her younger sister. Younger sister was made to leave the house. The prosecutrix was bleeding. She told that accused had removed her underwear and committed rape upon her one by one. Thereafter, information was given to the police. Their statements were recorded. The prosecutrix was examined. On 22.6.2013, the police took them to the Court for recording the statement of the prosecutrix. It was recorded before the Magistrate. In her cross-examination, she admitted that there was no one to look after their daughters in their absence.

10. PW6 HC Amit deposed that Investigating Officer had arrested accused Pardeep @ Kuka (declared juvenile). He was medically examined.

11. PW11 Ms. Meenakshi Goyal, Judicial Magistrate 1st Class had recorded the statement of the prosecutrix under Section 164 Cr.P.C. on the basis of application, Ex.P11. She proved statement of the prosecutrix, Ex.P12. She recorded the statement of the prosecutrix without any addition or omission. The contents of the statement were read over to the prosecutrix. She had told to the prosecutrix that there was no pressure on her to make the statement.

12. PW13 Dr. Virender Phaugat deposed that on the basis of report of X-rays, dental examination and physical appearance of the prosecutrix, she was of about 8 years.

13. PW14 Dr. Sheelkant Pajni proved MLR of the appellant vide Ex.P15.

14. PW15 Dr. Surender Singh deposed that on the basis of his assessment and assessment of orthopedic surgeon on 19.6.2013 under the chairmanship of Dr. Virender Phaugat, the age estimate certificate, Ex.P14, was issued.

15. PW17 Dr. T. S. Bagri deposed that after examination of X-ray films, Ex.P18 to Ex.P21, he has made his assessment.

16. PW18 Dr. Renu Bhambu had medically examined the prosecutrix. She has admitted in her cross-examination that in the history of the case in MLR, Ex.P25, she had not mentioned the name of the person who had committed the alleged assault. On the basis of FSL Reports, Ex.P22 to P24, she opined that possibility of sexual assault with the prosecutrix could not be ruled out.

17. As per FSL report, Ex.P22, traces of blood were detected on exhibit-1a (pants). Blood was detected on exhibit-3 (piece of a cloth). Blood could not be detected on exhibit-1b (T-shirt), exhibit-1c (Vaginal swab) (*exhibit 1a to 1c are of the prosecutrix*), exhibit 2a (Lower /trouser), exhibit-2b (underwear), exhibit-2c (T-shirt), exhibit-2d (pubic hair) (*exhibit 2a to 2d are of Pardeep @ Kuka*), exhibit-4a (underwear), exhibit-4b (swab) and exhibit-4c (pubic hair)(*exhibit 4a to 4c are of the appellant*). Human semen was detected on exhibit-2a (lower), exhibit-2b (underwear) and exhibit -4a (underwear). Exhibit-3 (Cloth piece) was stained with few small blood stains.

18. PW16 ASI Ram Niwas deposed that ASI Surender Singh had arrested and interrogated accused Hari Om @ Dhola. He was arrested at about 7.00 A.M. from his village Ghuskani.

19. PW20 ASI Surender Singh deposed that the prosecutrix was taken to General Hospital, Rohtak. He had recorded the statement of the witnesses under Section 161 Cr.P.C. He recorded supplementary statements of the prosecutrix, her mother Saroj and father Pawan. Statement of the prosecutrix was also got recorded under Section 164 Cr.P.C. by moving application, Ex.P11. On 24.6.2013, appellant was produced before them by village Sarpanch. The supplementary statements of the witnesses were recorded in the house of the complainant. He had not recorded the statement of any public witness, except of the family members of the prosecutrix.

20. The appellant examined DW1 Ashok Kumar as defence witness. He deposed that there was dispute between Hari Om and the prosecutrix. Again said it was a dispute between Roshan Lal father of the appellant and Pawan Kumar father of the prosecutrix on tying of buffalo. The scuffle had taken place. He reached the spot. He separated them. Pawan Kumar gave threat to Roshan Lal that he would teach him a lesson. Thereafter, on 24.6.2013, Hari Om was arrested by the police.

21. The appellant also produced Parmod, Sarpanch of the village as DW2. He deposed that on 14.6.2013, he heard that some incident had taken place with the daughter of Pawan Kumar. He reached the spot. The police also reached the spot. Neither the prosecutrix nor her parents named the appellant. After one week, he came to know that the police was looking for Hari Om. Hari Om was produced by him before the police.

22. What emerges from the material on record is that PW1 Pawan Kumar had gone to Kalanaur with his wife and two daughters. The prosecutrix and her second sister were left behind. They came back. The prosecutrix told about the incident. Thereafter, *ruqa*, Ex.P1, was sent. FIR,

Ex.P9, was recorded on 14.6.2013. According to the factum of FIR, Pawan Kumar and his family came back. His daughter told him and his wife that in their absence at about 4.00 P.M., Pardeep @ Kuka had come to their house. After removing her underwear, he committed wrong act with her. He fled away from the spot. She was suffering from severe pain. Police was also called. The statement of the prosecutrix was also recorded under Section 161 Cr.P.C. She had only mentioned Pardeep @ Kuka as accused.

23. The incident had taken place on 14.6.2013. FIR was registered on 14.6.2013. The name of the appellant was not mentioned in the FIR. The statement of the prosecutrix was also recorded under Section 161 Cr.P.C. The appellant was not named in the statement recorded under Section 161 Cr.P.C. Thereafter the statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 22.6.2013. It was recorded by Ms. Meenkashi Goyal, JMIC, on the basis of application, Ex.P11. It was for the first time that on 22.6.2013, the name of the appellant figured in the statement of the prosecutrix recorded under Section 164 Cr.P.C. According to the Investigating Officer, PW20 ASI Surender Singh he also recorded supplementary statements of the prosecutrix, her mother Saroj and father Pawan. The name of the appellant should have been mentioned in the FIR or in the statement of the prosecutrix recorded under Section 161 Cr.P.C. The explanation given by PW1 Pawan Kumar was that he was an illiterate person. In his cross-examination, he deposed that their statements were initially recorded on 14.6.2013. Two policemen had come to their house. He, his wife and daughter accompanied them to the Court for recording the statement. It was only after the statement recorded under Section 164 Cr.P.C. they came to know that previously the name of only one accused

was mentioned. In his cross-examination, he stated that he had told the names of both the accused to the police on the day of incident but the police had only named one accused in the FIR.

24. The witnesses produced by the defence are to be given the same evidentiary value vis-a-vis the witnesses of the prosecution.

25. It has come in the statement of DW1 Ashok Kumar that there was a scuffle between Roshan Lal father of the appellant and Pawan Kumar on 22.6.2013. He had separated them. Pawan Kumar had advanced threats of dire consequences to the father of the appellant Roshan Lal. DW 2 Parmod, Sarpanch of the village, has specifically stated that he reached the spot on 14.6.2013. Neither the prosecutrix nor her parents named about the accused. Thus, the name of the appellant having been included in the case on 22.6.2013 falsely cannot be ruled out coupled with the fact that in earlier FIR dated 14.6.2013, the name of the appellant was not mentioned. His name was also not included in the statement recorded under Section 161 Cr.P.C. The explanation given by PW1 Pawan Kumar does not inspire confidence.

26. Their Lordships of Hon'ble the Supreme Court in Mukesh vs State (NCT of Delhi) and others 2017 (6) SCC 1, have held that onus of proving guilt is always on prosecution and never shifts even in rape cases. Their Lordships have held as under: -

"382. In a case of rape, like other criminal cases, onus is always on the prosecution to prove affirmatively each ingredient of the offence. The prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts. In Narender Kumar v. State (NCL of Delhi) 200, it was held as under: (SCC p. 180, para 29)

"29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. ... There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt."

27. The prosecution has failed to prove the case against the appellant beyond reasonable doubt. Accordingly, the appeal is allowed. The appellant is acquitted of the charges framed against him. He be released forthwith, if not required in any other case. Registry is directed to issue release warrants forthwith.

(Rajiv Sharma)
Judge

20.12.2018
vs

(Harinder Singh Sidhu)
Judge

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No