

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

1. CRA-D-1128-DB -2013

Ravi

... Appellant

Versus

State of Haryana

... Respondent

2. CRA-D-1243-DB -2013

Mintu and another

... Appellants

Versus

State of Haryana

... Respondent

Reserved on : 14.05.2019
Date of decision : 24.05.2019

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

Present: Ms.Jasleen Kaur, Legal Aid Counsel
for the appellant in CRA-D-1128-DB-2013.

Ms.Sonia Rani, Legal Aid Counsel and
Ms.Manpreet Kaur-II, Legal Aid Counsel
for appellant No.1-Mintu in CRA-D-1243-DB-2013.

Mr.Karan Dev Sharma, Advocate
for appellant No.2-Hoshiara in CRA-D-1243-DB-2013.

Ms.Shubhra Singh, Addl.A.G. Haryana.

RAJIV SHARMA, J.

Since common questions of law and facts are involved in the
aforesaid appeals, therefore, these are taken up together and disposed of by
a common judgment.

2. These appeals are instituted against judgment dated 05.08.2013 and order dated 08.08.2013 rendered by the Additional Sessions Judge, Kaithal, in Sessions Case No.35 of 2013 whereby the appellants, who were charged with and tried for offences punishable under Sections 376-D and 506 read with Section 34 of the Indian Penal Code (in short 'IPC') have been convicted thereunder and sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- each for the offence punishable under Section 376-D read with Section 34 IPC and to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.2000/- each for offence punishable under Section 506 read with Section 34 IPC. In default of payment of fine, they were to further undergo rigorous imprisonment for a period of six months each. Both the sentences were ordered to run concurrently.

4. The case of the prosecution in a nutshell is that on 11.04.2013, ASI Narinder Singh (PW-11) along with other police officials was present at Rajound Chowk, Rajound. In the meanwhile, the prosecutrix PW-9 (name withheld) along with her mother Fatti and brother Govind (PW-1) came there. The prosecutrix got her statement recorded vide Ex.PH to the effect that she had studied upto 5th standard. On 08.04.2013, her mother had gone to meet her relatives. Her father was out of house for his labour work. At about 1.30 P.M., she had taken out the buffalo in open. While she was coming back and reached near the Balmiki temple, accused Ravi son of Karambir asked her to collect *parshad* from the temple. She went inside the temple. Thereafter accused Ravi dragged her in a room of the temple. Accused Mintu son of Kali Ram, Hoshiara son of Mansa Ram and one other

unknown young boy were already present in that room. Accused had bolted the door from inside and after removing her clothes, committed gang rape upon her. Thereafter she was forced to go out of the room. She was extended threats. She narrated the incident to her mother Fatti and brother Govind. FIR (Ex.PJ) was recorded. Accused were arrested. Investigation was completed. The challan was put up after completing all the codal formalities.

5. The prosecution examined a number of witnesses. Statements of accused were recorded under Section 313 Cr.P.C. They denied the case of prosecution. The appellants were convicted and sentenced, as noticed hereinabove. Hence these appeals.

6. Learned counsel appearing on behalf of the appellants has vehemently argued that the prosecution has failed to prove the case against the appellants.

7. Learned counsel appearing on behalf of the State has supported the prosecution case.

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

9. PW-2 Dr.Amandeep Chahal had medico legally examined the prosecutrix. It was a case of alleged rape on the prosecutrix by the boys. The patient was conscious. Clothes were not changed after incident as told by the patient. There was no injury on genitals and breast. Hymen was absent. There was no tenderness. Vaginal swabs, cervical swab and vulval swab were collected. According to her opinion, the possibility of intercourse with the prosecutrix could not be ruled out. She had seen FSL report Ex.PS before giving her opinion.

10. PW-1 Dr.Sandeep Jain has led his evidence by filing affidavit Ex.PA. He had examined accused Ravi, Hoshiara and Mintu. In his opinion, there was nothing to suggest that accused were incapable of performing sexual intercourse.

11. PW-8 Himanshu Singh had recorded the statement of the prosecutrix under Section 164 Cr.P.C. Statement is Ex.PQ. The contents of the statement were read over to the prosecutrix and she after admitting the same to be correct appended her signature underneath the statement. He also issued certificate Ex.PQ/1. The prosecutrix was identified by the investigating officer.

12. PW-9 is the prosecutrix. She testified that on 08.04.2013 her mother had gone to meet her relatives. Her father was out of house. At about 1.00/1.30 P.M. she had taken out buffalo to the pond. When she was coming back and reached near Balmiki temple, accused Ravi was already present there. He asked her to collect *parshad* from the temple. She went inside the temple. Thereafter accused Ravi dragged her in a room. She identified Ravi in the Court. Mintu, Ravi and Hoshiara were present along with one another person whose name she did not know. Her clothes were removed. She was laid down on the ground. Rape was committed by accused Ravi at the first instance. Thereafter accused Mintu committed rape upon her and thereafter accused Hoshiara committed rape upon her. She identified accused Mintu as well as Hoshiara in the Court. She raised hue and cry. Her mouth was gagged by accused Mintu. She came back to her house. She did not narrate the incident due to fear. On 11.04.2013 she narrated the incident to her mother Fatti and brother Govind. Her statement Ex.PH was recorded. Police

prepared rough site plan. Her clothes were taken in possession. She was also produced before the Magistrate for recording her statement Ex.PQ. In her cross-examination, she deposed that there were 2/3 persons in the name of Hoshiara in village Rajound. She admitted that in her statement recorded by the Magistrate, she did not disclose father's name of Hoshiara. Though she had named Hoshiara who had committed rape upon her, but he was not present in Court. She admitted that Bus Stand Rajound was situated at a distance of about one kilometer from the temple. She denied that she had illicit relations with Deepak prior to the occurrence. She had studied upto 5th standard in Government School, Rajound. She did not know the father's name of Hoshiara. She denied the suggestion that she had intentionally deposed against accused Ravi and Mintu. She was re-examined on the point of identity of accused Hoshiara. When her examination-in-chief was recorded though she named Hoshiara who committed rape upon her but he was not the same Hoshiara who was present in the Court at the time of recording statement on 23.05.2013. However she admitted that accused Hoshiara present in the Court belong to her community.

13. PW-10 Govind deposed that on 08.04.2013, the prosecutrix had taken buffalo to village pond. Near the temple, Ravi was standing. Ravi asked the prosecutrix to take *parshad*. Thereafter she went inside the temple to take *parshad*. She was dragged in a room of temple. Accused Mintu, Ravi, Hoshiara and one unknown person were already in the room. They committed rape upon her sister. They extended threats to her sister. This incident was narrated to him and his mother by the prosecutrix on 11.04.2013. Statement of the prosecutrix Ex.PH was recorded. In his cross-

examination, he deposed that there were 3 / 4 persons in village Rajound, who were known by the name of Hoshiara. Her sister had not disclosed the father's name of Hoshiara to them. The test identification parade of accused Hoshiara was not conducted by the police in their presence. He had seen accused Hoshiara first time in the Court when he was produced in custody. Accused Hoshiara present in Court was not involved in the commission of crime for which he was facing trial.

14. PW-11 ASI Narinder Singh had recorded statement of the prosecutrix Ex.PH. He prepared the rough site plan Ex.PB. He was handed over 15 parcels by the lady medical officer which were not sealed. When he got back to the police station, all the parcels and material objects were entrusted to MHC of the police station. Since certain objections were raised by the office of Director, FSL, Madhuban, then all the parcels were sealed by using the seal of the Medical Officer. Sample seal was also delivered to him. All the parcels were taken into police possession vide recovery memo Ex.PX. In his cross-examination, he admitted that test identification parade of accused Hoshiara was not arranged by him. The place of occurrence was situated at a distance of 1 ½ kilometer from Police Station Rajound.

15. PW-12 Sukhdev has produced the school leaving certificate mentioning date of birth of prosecutrix Ex.PBB. The date of birth of the prosecutrix was 02.06.1995. According to him, the name of the prosecutrix was at serial No.5576. As per the register she was admitted in the school on 15.05.2001 and after passing 5th class she left the school on 31.03.2006.

16. The FSL report is Ex.PS. The human semen was detected on exhibit-9a (vaginal swab slide lateral-2), exhibit-10a (cervical swab slide),

exhibit-12 (washing from vagina), exhibit- 14a (salwar), exhibit 14-b (lady's shirt), exhibit-15 (underwear of Ravi) and exhibit-16 (underwear of Hoshiara). However semen could not be detected on rest of the exhibits. According to statement of PW-1 Dr.Sandeep Jain, all the appellants were capable to perform sexual intercourse. The prosecutrix was medically examined by PW-2 Dr.Amandeep Chahal. According to her, the possibility of rape could not be ruled out. She has relied upon FSL report Ex.PS before giving her opinion. According to her, the human semen was detected on vaginal swab slide, cervical swab slide, washings from vagina, salwar and lady's shirt. All were belonging to the prosecutrix. The underwear at serial No.15 belongs to Ravi. Human semen was detected on it. Similarly on the underwear mentioned at serial No.16 in the report of FSL belongs to Hoshiara. Human semen was detected on it.

17. The prosecutrix while appearing as PW-9 has categorically deposed that she had taken the buffalo to the pond of the village. She was coming back. When she reached Balmiki temple, Ravi asked her to take *parshad* inside the temple. She was dragged inside temple. Thereafter all the appellants committed gang rape upon her. She identified the accused in the Court including Hoshiara. In statement Ex.PH, father's name of Hoshiara namely Mansa Ram was specifically mentioned.

18. Learned counsel appearing on behalf of the appellant Hoshiara has vehemently argued that the prosecutrix had given clean chit to Hoshiara. The fact of the matter is that accused Hoshiara was identified by her in the Court while recording her examination-in-chief. Though in her cross-examination, she deposed that she did not know father's name of Hoshiara

namely Mansa Ram. She has also admitted that Hoshiara belongs to her community. The prosecutrix in her cross-examination also deposed that there were 2/3 persons in the name of Hoshiara in village Rajound. However, the appellants have not led any evidence that name of Hoshiara's father was not Mansa Ram. PW-10 Govind in his cross-examination has also deposed that her sister did not disclose father's name of Hoshiara. However, the fact of the matter is that father's name of Hoshiara was given by the prosecutrix in her statement Ex.PH. The date of birth of the prosecutrix is 02.06.1995 as per statement of PW-12 Sukhdev based on official record. The identification parade of accused Hoshiara was not necessary since he had already been identified by the prosecutrix.

19. Learned counsel for the appellants has vehemently argued that DNA test has not been conducted as per Section 53-A of the Code of Criminal Procedure.

20. Learned counsel for the appellant Hoshiara has placed strong reliance upon judgment of Hon'ble the Supreme Court in ***Krishan Kumar Malik vs. State of Haryana, (2011) 7 SCC 130***. Their Lordships of Supreme Court have held that when the male semen found in undergarments of prosecutrix, but was not sent to forensic laboratory for getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix, the lacuna on the part of the prosecution proves to be fatal.

21. However, their Lordships of the Supreme Court in the latest judgment ***Sunil vs. State of Madhya Pradesh, (2017) 4 Supreme Court Cases 393***, have held that conviction may still be possible based on

remaining evidence even in the absence of holding DNA test or failure to prove DNA test report or DNA test favouring accused. Their Lordships have held as under:-

3. At the very outset we deal with the arguments advanced on behalf of the appellant that in the present case the report of DNA testing of the samples of blood and spermatozoa under section 53A of the Code of Criminal Procedure, 1973 has not been proved by the prosecution. The prosecution has, therefore, failed to prove its case beyond reasonable doubt. Reliance in this regard has been placed on the decision of this Court in Krishan Kumar Malik v. State of Haryana.

4. From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar (supra) it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44) Section 53A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.

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9. Having dealt with the contention of the learned counsel for the appellant with regard to the requirements of the provisions of Section 53A of the Code and having regard to the various circumstances against the accused proved by the evidence and

materials on record, we find no reason to differ with the findings of the learned trial Court as upheld by the High Court insofar as the conviction of the appellant under sections 363, 367, 376(2)(f) and 302 of the IPC.”

In the instant case also, even in the absence of DNA test, statement of the prosecutrix is duly corroborated by medical evidence.

22. Accordingly, there is no merit in the appeals and the same are dismissed.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

May 24, 2019.
Davinder Kumar

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