

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

(1)

CRA-D-465-DB of 2016

Akash

.... APPELLANT

Versus

State of Haryana

..... RESPONDENT

(2)

CRA-D-544-DB of 2016

Narender alias Ninder

.... APPELLANT

Versus

State of Haryana

..... RESPONDENT

Reserved on : 29.01.2019
Date of decision : 06.02.2019

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

Present: Mr. J.S. Bedi, Senior Advocate, with
Mr. Sunil Sihag, Advocate,
for the appellant in CRA-D-465-DB of 2016.
Mr. Rahul Rathore and Mr. Rajender Mathur, Advocates,
for the appellant in CRA-D-544-DB of 2016.
Ms. Shubhra Singh, Addl. A.G., Haryana.

* * *

RAJIV SHARMA, J.

1. Since common questions of law and facts are involved in these

two appeals, CRA-D-465-DB and CRA-D-544-DB of 2016 therefore, these are taken up together and being disposed of by a common judgment.

2. These appeals are instituted against the judgment dated 18.03.2016 and order dated 21.03.2016, rendered by learned Additional Sessions Judge, Faridabad, in Sessions Case No. 112 dated 03.06.2015, whereby both the appellants, who were charged with and tried for the offences punishable under Sections 363, 376D, 506 read with Section 34 of the Indian Penal Code and Section 4 of the POCSO Act, were convicted and sentenced as under :-

<i>Name of convicts</i>	<i>Offence under which convict has been sentenced</i>	<i>Period of imprisonment</i>	<i>Amount of fine imposed</i>	<i>Imprisonment in default of payment of fine (rigorous imprisonment)</i>
Narender alias Ninder and Akash	363 read with section 34 IPC	Rigorous imprisonment for five years	₹ 5,000/- each	Rigorous imprisonment for six months
	376-D read with section 34 IPC	Rigorous imprisonment for twenty years	₹ 25,000/- each	Rigorous imprisonment for two years
	323 read with section 34 IPC	Simple imprisonment for one year	₹ 5,000/- each	Simple imprisonment for seven days
	506 IPC	Rigorous imprisonment for three years	₹ 5,000/- each	Rigorous imprisonment for one month
	4 POCSO Act	Rigorous imprisonment for seven years	₹ 10,000/- each	Rigorous imprisonment for one year

All the substantive sentences were ordered to run concurrently. The amount of fine, if paid, was ordered to be disbursed to victim/prosecutrix as per provisions of Section 376D IPC.

3. The case of the prosecution, in a nutshell, is that SI Indu Bala (PW.10) received an information on 29.03.2015 regarding the alleged

occurrence. She reached Police Station Saran. Complainant Dharamraj (PW.5) son of Dharam Pal along with his wife Shashi and daughter (name withheld) met her. Dharamraj got recorded his statement to the effect that his daughter, aged 14 years, student of 9th class, was studying in Rawal International School. It was alleged that on 22/23.03.2015 at around 1.30 AM in night, Ninder son of Rishi and Akash son of late Kanwar Singh residents of village Nawada took away his daughter by alluring her. They told his daughter that they would be going to Kalkaji temple. However, they took his daughter to boundary of Primary Government School in village Nawada. They started committing obscene acts with her. Both the boys tried to commit rape with her and when his daughter tried to escape, she was slapped and also given blows by Ninder. She sustained injuries. Akash was standing outside as guard, when Ninder was trying to commit obscene acts with the prosecutrix. She was advanced threats by the accused. On 29.03.2015, the prosecutrix narrated the entire incident to her parents. Thereafter, FIR was registered. Statement of the prosecutrix was also recorded under Section 164 Cr.P.C. She was medico legally examined.

4. Investigation was completed and challan was put up after completing all the codal formalities.

5. The prosecution examined as many as 14 witnesses in support of its case. The accused were examined under Section 313 Cr.P.C. They denied the case of the prosecution. They also examined six witnesses in support of their case. They were convicted and sentenced, as noticed herein above. Hence, these appeals.

6. Learned counsel appearing on behalf of the appellants 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.

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

8. The prosecutrix has appeared as PW.1. The proceedings were held in camera. She deposed that on the intervening night of 22/23.03.2015, accused Narender and Akash made a call to her at about 5.00/6.00 PM in the evening. They had intended her to accompany them to Kalkaji Mandir, Delhi. She told them to think over it. She received a call at about 1.30 AM in the night from Narender. He asked her to come out of house. She was carrying duplicate key of the lock. She opened the door and went outside. She noticed Narinder alias Ninder and his brother Akash standing outside. They started from there on foot. There was a Primary School at the distance of one kilometer from her house. They took her to Primary School instead of Kalkaji Mandir. Accused Akash remained standing outside to guard, so that nobody come there. Accused Narender had taken her inside the verandah outside the room. Narender had taken off his T-shirt and he pressed her breasts. He pulled down her pant and tried to touch his penis with her vagina. She felt pain. She pushed him away and wore her pant. Thereafter, he had given her slaps. She received bruises when she was running away from there. Accused Akash was standing there. He tried to stop her from leaving. He also gave beatings to her. Both the accused advanced threats to her. They told her that they would leave her at her house only on the condition that she would not disclose the incident to any one. Thereafter, they took her towards her house. She was left at a long distance from her

house. On 29.03.2015, she had disclosed the incident to her mother in the morning. She narrated the incident to her father. Her statement Ex.PA was recorded. She was medico legally examined at B.K. Hospital, Faridabad. The Magistrate also recorded her statement under Section 164 Cr.P.C. vide Ex.PB. She had forgotten the name of Akash in her statement recorded before the learned Magistrate. Thereafter, her supplementary statement was recorded by the police. She identified the accused in the Court. She was cross-examined. According to her, her elder sister was studying in 12th standard. She was second in siblings. Her youngest sister was studying in 9th standard. She along with her other sisters used to go to Rawal International School by bus. She along with her grand-mother and younger sister used to sleep in a room on the first floor. Her father, mother and brother used to sleep on the ground floor. The duplicate key was got prepared by accused Narender alias Ninder. Her family members were not knowing about the possession of duplicate key by her. On the day of incident, she was having a mobile phone with her which was given to her by accused Narender. It was given to her one month prior to the incident. She also admitted that to visit Kalkaji Mandir was her personal decision. She also admitted in her cross-examination that she knew Narender and she was friendly with him. She also admitted that she was not asked by accused Akash to come out of the house. She also admitted that accused Akash was not having any weapon with him. Her parents did not wake when she went out of the house. It was dark in the school. She could not see Akash from the place where she was with accused Narender.

9. The prosecutrix was medico legally examined by PW.2 Dr. Narinder Kaur. She tendered her evidence by filing her affidavit

Ex.PW.2/A. According to her, there was no mark of injury on the private parts of the prosecutrix. In her cross-examination, she admitted that she had found hymen torn with healed margins which suggest that possibility of sexual intercourse could not be ruled out. According to Ex. PW.2/A, possibility of sexual intercourse could not be ruled out. Howsoever, possibility of sexual assault on the said date and time could not be ruled out.

10. PW.3 Charitravir Singh is Principal of Rawal International School. He has proved Certificate Ex.PE issued by him. The date of birth of the prosecutrix, as per serial number 4679 dated 03.04.2014 of the admission and withdrawal register, was 17.08.2000. In his cross-examination, he had admitted that in Admission Form Ex.D1, there was separate column which was to be used by the school authorities and no entry had been made in that column.

11. PW.5 Dharamraj is the father of the prosecutrix. He deposed that on the intervening night of 22/23.03.2015 at about 2.00 AM in the night, his wife woke up to take water from the tap. She noticed that lock of the main gate was open. She called him. He saw that lock of the main gate was open. Thereafter, he went inside. He found his daughter missing. Thereafter, they searched for their daughter. On 29.03.2015, his daughter disclosed before them that Narender and Akash had made a call to her. They had asked her to accompany them to Kalkaji Mandir, Delhi, in the evening at about 6.00 PM. At about 1.30 AM in the night, she received a call from Narender and Akash. They asked her to come out from the house. They both were standing outside. They took her to school near her village instead of taking her to Kalkaji Mandir. Accused Akash stood outside the school. Narender had taken her inside. After removing her clothes, he had tried to

commit bad act with her. When she resisted, she received injuries at the hands of both the accused. They left her near her house. He had submitted application Ex.PF to the police on 29.03.2015. His daughter was medico legally examined at B.K. Hospital, Faridabad. In his cross-examination, he deposed that age of his eldest daughter was 17 years. He did not remember her date of birth. His elder daughter was born after about three years of his marriage. His marriage was solemnised on 31.06.1996. The gap between his first baby and second baby was about two and half years. The prosecutrix was his second child. He did not get any entry made with any authority with regard to birth of his daughter, as she was born at home. He admitted that the date of birth had been mentioned by him on the basis of record, maintained by him. He had made entries of his children regarding their date of birth in Bahikhata. He had not brought the same in the Court. He further deposed in the cross-examination by the learned defence counsel for accused Akash that they had given treatment to the prosecutrix in the house. They did not take her to hospital as the injuries were very small in nature. She had remained very tense from 22.03.2015 to 29.03.2015. She did not go to school during this period.

12. PW.6 Dr. Manish Dayal had medico legally examined both the accused.

13. PW.9 Dr. Sushil Kumar deposed that on 07.04.2015, he conducted ultrasound examination of the prosecutrix. He found that her uterus was normal and no adnexal mass was seen. She was advised to review after two weeks with fresh status of urine for her pregnancy test. He proved his report Ex.PM. On 22.04.2015, he again conducted ultrasound examination of the prosecutrix. He again found that her uterus was normal

and no adnexal mass was seen. He proved his report Ex.PM.

14. PW.10 Indu Bala is the Investigating Officer. She deposed that formal FIR Ex.PO was registered. She recorded statements of parents of the prosecutrix. Thereafter, she along with the prosecutrix, her parents and the police officials went to the spot. Demarcation was carried out. She got conducted medical examination of the deceased from B.K. Hospital, Faridabad. She also got recorded statement Ex.PB of the prosecutrix before learned Ilqa Magistrate. The accused were also medico legally examined. The father of the prosecutrix handed over school certificate Ex.PE to her. The accused were interrogated. Accused Narender alias Ninder and Akash made disclosure statements Ex.PS and Ex.PT, respectively. She prepared the site plan. In cross-examination, she deposed that the prosecutrix was wearing jeans and top and undergarments on the day of incident. She had not taken into possession clothes from the prosecutrix.

15. PW.13 SI Satyadev deposed that the accused were interrogated on 30.03.2015. They made their disclosure statements Ex.PS and Ex.PT and got the spot demarcated.

16. We have also gone through the statements of witnesses produced by the appellants in their defence.

17. The date of birth of the prosecutrix is 17.08.2000, though her father did not get her date of birth registered in the Municipal Corporation. PW.3 Charitravir Singh has proved the date of birth of the prosecutrix to be 17.08.2000. She was less than 18 years of age at the time of occurrence. According to the medical report, duly proved by PW.2 Dr. Narinder Kaur, possibility of sexual assault could not be ruled out. The incident is dated 22/23.03.2015. The prosecutrix was under shock. She had narrated the

incident to her parents on 29.03.2015. Thereafter, her statement Ex.PA was recorded by the police and her statement was also got recorded under Section 164 Cr.P.C. before the Magistrate vide Ex.PB. Thereafter, her supplementary statement was also recorded.

18. In her statement recorded vide Ex.PA, the prosecutrix explained the manner she was allured to come out of the house at 1.30 AM in the night. She came outside. Appellants Narender and Akash took her to the boundary of a Primary Government School in village Nawada, instead of Kalkaji Mandir. Statement of the prosecutrix, as mentioned above, was also recorded vide Ex.PB under Section 164 Cr.P.C. She did not mention the name of one of the appellants, namely Akash, though in her supplementary statement, she had named Akash. In her cross-examination, the prosecutrix categorically admitted that she was not asked by accused Akash to come out of the house. According to her Akash had also asked her to accompany them to Kalkaji Mandir when he had made a call in the evening. She could not tell the mobile number of accused Akash. She also could not give the exact time when she talked to Akash on the day of incident. She also admitted that she has not given the time in her statements before the police and before the Magistrate. She also admitted that she had gone out of the house of her own. She also admitted that Akash was not carrying any weapon with him. In case, Akash was with Narender, the prosecutrix could not forget to mention his name in the statement recorded under Section 164 Cr.P.C. She may be minor at the time of the incident, but she was intelligent girl. She was in possession of duplicate key of the lock, which according to her was provided by Narender. She went out of the house to visit Kalkaji Mandir in night. It is not believable that a girl would leave home at night to pay

obeisance at 1.30 AM in the night. Temples open in the morning hours. The case of the prosecution is that the appellants gave beatings to the prosecutrix. However, PW.5 Dharamraj, father of the prosecutrix, has admitted in his cross-examination that she was not taken to the hospital, since the injuries received by her were very small in nature. PW.10 Indu Bala should have taken into possession all clothes of the prosecutrix.

19. The FSL report is Ex.PX. According to this report, human semen was detected on exhibit 2 (underwear of Narender). The prosecution has failed to link appellant Akash with alleged commission of offence. The learned trial court has erred in convicting and sentencing him. However, the prosecution has proved its case against appellant Narender alias Ninder.

20. The appellants have been convicted under Section 376D read with Section 34 of the Indian Penal Code. Since appellant Akash is not involved in the crime, conviction of appellant Narender alias Ninder under Section 376D IPC is not maintainable. He is convicted under Section 376 (2) (i) IPC.

21. Appeal of Akash bearing CRA-D-465-DB of 2016 is allowed. The judgment dated 18.03.2016 and order dated 21.03.2016 qua Akash are set aside. Appellant Akash is acquitted of the charges framed against him. He is on bail. His bail and surety bonds are discharged.

22. Appeal of Narender alias Ninder bearing CRA-D-544-DB of 2016 is partly allowed. The judgment dated 18.03.2016 and order dated 21.03.2016 qua Narender alias Ninder is modified to the extent that conviction of the appellant Narender alias Ninder is converted from Section 376 D IPC to Section 376 (2) (i) IPC. His conviction and sentence under other offences are, however, upheld.

23. The State is directed to produce appellant Narender alias Ninder on February 22, 2019, to be heard on the quantum of sentence.

(RAJIV SHARMA)
JUDGE

February 06, 2019
ndj

(HARINDER SINGH SIDHU)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes