

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D No. 1631-DB of 2015 (O&M)

Reserved on : 12.3.2019

Date of decision : 19.3.2019

Modi and another Appellants

versus

State of Haryana ... Respondent

Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Kuldip Singh

Present Mr. S. K. Garg Narwana, Senior Advocate with
Mr. Naveen Gupta, Advocate, for the appellants.
Mr. Vishal Garg, Additional Advocate General, Haryana.

Rajiv Sharma, J.

1. The present appeal is instituted against the judgment dated 29.10.2015 and order dated 7.11.2015, rendered by learned Additional Sessions Judge, Bhiwani, in Sessions Trial No. 72 RBT of 2015, by appellants Modi and Subhash, who were charged with and tried for the offence punishable under Sections 363, 366A, 376(2), 452, 506, 511, 354, 354A, 201 IPC and Sections 67, 67B of IT Act. Accused Subhash was convicted and sentenced as under:-

<i>Under Section</i>	<i>Sentence imposed</i>
Section 4 of the POCSO Act	To undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹ 8,000/- and in default of payment of fine, to further undergo the imprisonment for a period of four months.
Section 6 of the POCSO Act	To undergo rigorous imprisonment for a period of twelve years and to pay a fine of ₹ 8,000/- and in default of payment of fine, to further undergo the imprisonment for a period of four months.

<i>Under Section</i>	<i>Sentence imposed</i>
Section 14 of the POCSO Act	To undergo rigorous imprisonment for a period of four years and to pay a fine of ₹ 2,000/- and in default of payment of fine, to further undergo the imprisonment for a period of one month.
Section 452 IPC	To undergo rigorous imprisonment for a period of three years and to pay a fine of ₹ 2,000/- and in default of payment of fine, to further undergo the imprisonment for a period of one month.
Section 506 IPC	To undergo rigorous imprisonment for a period of two years.
All the sentences were ordered to run concurrently.	

Accused Modi was convicted and sentenced as under:-

<i>Under Section</i>	<i>Sentence imposed</i>
Section 18 of the POCSO Act	To undergo rigorous imprisonment for a period of five years and to pay a fine of ₹ 4,000/- and in default of payment of fine, to further undergo the imprisonment for a period of two months.

2. The case of the prosecution in a nutshell is that on 14.11.2014, the prosecutrix (name withheld), resident of Bawanikhera, tendered an application addressed to the SHO, Police Station, Bawanikhera. According to the averments made therein, around four months ago, Subhash, her neighbour gave her something by mixing in the juice on 15.7.2014. She was alone at home on that day. She became unconscious. When she gained consciousness, Subhash told her that he had committed wrong act with her. He had also prepared a CD in this regard. If she disclosed this fact to anyone, then she and her family members would be killed and the CD would be shown to all. She out of the fear of the family members remained silent. In the night of 8.11.2014 at about 11.00 P.M., Subhash entered the house by jumping the wall and shown her the CD and threatened her that if she disclosed this fact to the family members, he would make it public. After that accused Modi tried to rape her and he also gave her beatings. Twice an amount of ₹ 500/- was taken and once the amount of ₹ 3,500/- had been

taken. At About 11.00 A.M. on 9.11.2014, she was sent to Hansi and he followed her in the other bus. He sent her in the shop of goldsmith in the market, where she sold her golden ring for ₹ 2,700/- and he took ₹ 2,700/- from her and handed over her ₹ 100/-. After taking the money, he sent her at Bus-stand in the Auto and he himself came at the Bus-stand, Hansi. He asked her to board the bus to Delhi. He told her that Virat would meet her over there and he had sent her photographs to him. She got down from the bus. Virat met her. He enquired that whether she had been sent by Subhash Beniwal. After that he took her to his room and committed wrongful act with her and left her at Gurudwara Shishganj Sahib at 4.00 A.M. In the night on that day, accused Subhash gave her a telephonic call that she had not to return at Bawanikhera, rather she had to go to his friend, namely, Bharpur in Gujarat. Her brother reached Delhi in the morning and she came back to her residence. Accused Subhash had committed wrongful act with her many times and had threatened her and her family members to kill. It is in these circumstances, the FIR was registered. The statement of the prosecutrix was also recorded under Section 164 Cr.P.C. on 15.11.2014. She was medico-legally examined from General Hospital, Bhiwani. Accused Subhash was arrested on 25.11.2014. He made his disclosure statement. DSP, Bhiwani found the commission of offences under Sections 354, 354A(1) IPC against accused Modi Lal. Hence, these provisions were also added. He was arrested on 19.12.2014. Investigation was completed and challan was put up after completing all the codal formalities.

3. The prosecution examined a number of witnesses in support of the case. The statements of the accused were also recorded under Section 313 Cr.P.C. They were convicted and sentenced, as noticed hereinabove.

Hence, the present appeal.

4. 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 trial Court below.

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

6. PW10 Dr. Munesh has proved MLR, Ex.P22. According to him, there was evidence of recent sexual intercourse in this case. In his cross-examination, he deposed that the duration of exact time of sexual intercourse in this case could not be opined. There was no external mark of injury on the person of the prosecutrix at the time of her medico legal examination conducted by him. In the absence of DNA profile, it could not be opined as to whether accused had committed sexual intercourse or not. He admitted that there was no date for history of assault mentioned in MLR, Ex.P22. Volunteered that she did not tell him specific date.

7. FSL report is Ex.P3. Human semen was detected on exhibit-3 (swab) and exhibit-4 (slide), exhibit-5 (swab) and exhibit-7 (underwear). However, semen could not be detected on rest of the exhibits.

8. PW2 Satish Kumar is the father of the prosecutrix. He deposed that her age was about 18½ years. He deposed that accused, namely, Subhash and Modi Lal, present in the Court, never abducted or committed rape upon her daughter at any point of time. She was not threatened. He was declared hostile and was cross-examined by the learned Public Prosecutor.

He denied the statement, Ex.P2. He had not stated to the police that on 14.11.2014, his daughter disclosed him and his wife after coming back from Delhi Railway Station that on 15.7.2014, accused Subhash came in their house when she was present alone. He served juice with some intoxicated substance to his daughter, on which she became unconscious. He was confronted with portion A to A1 of Ex.P2, wherein it is so recorded. He had also not stated to the police that when his daughter regained consciousness, then accused Subhash told her that he committed rape upon her and prepared a CD of that. If she told this fact to anyone, then her family members would be killed and he would show the CD to everyone. He was confronted with portion B to B1 of Ex.P2, wherein it is so recorded. He had also not stated to the police that whenever his daughter was called by accused Subhash, she had to go there and she was shown CD 2-3 times. On 8.11.2014, accused Subhash entered in their house at about 11.00 P.M. and shown same CD to his daughter and threatened and accused Modi tried to commit rape. Accused Modi also caused injuries to her. He had also taken ₹ 500/- twice and ₹ 3,500/- once from his daughter. He had also not stated to the police that on 9.11.2014 at about 11.00 A.M., she was sent to Jeweller Shop at Hansi and he also accompanied her in a separate bus. He had also not stated to the police that his daughter went to Railway Station, Delhi from Delhi Bus-Stand where she met Virat. Virat took her in a room and committed rape upon her and left her at Sish Ganj Gurudwara, Delhi, at 4.00 A.M. He denied the suggestion that he was resiling from his statement, Ex.P2, intentionally and deliberately due to comprise outside the Court. He was cross-examined by the learned defence counsel. He deposed that they

had made thorough inquiries and accused present in the Court never abducted and committed rape upon her daughter. No CD of any kind was prepared by accused at any point of time. His daughter had gone away from the house without informing them. Nothing had happened with his daughter. His daughter was pressurised by the police officials and the villagers to make statement before the Magistrate against the accused persons.

9. PW4 Renu Bala is the mother of the prosecutrix. She disclosed the age of her daughter as 17½ years. Accused Subhash and Modi Lal, present in the Court, never abducted or committed rape upon her daughter at any point of time nor she was threatened. She was declared hostile and cross-examined by the Public Prosecutor. She denied her statement, Ex.P5. No such statement was ever made by her to the police at any point of time. She had not stated to the police that on 14.11.2014, her daughter disclosed her and her husband after coming back from Delhi Railway Station that on 15.7.2014, accused Subhash came in their house when her daughter was alone. Accused Subhash served juice with some intoxicated substance to her daughter, on which the prosecutrix became unconscious and accused Subhash committed rape upon her daughter and prepared a CD. She was confronted with portion A to A1 of Ex.P5, wherein it is so recorded. She had also not stated to the police that whenever her daughter was called by accused Subhash, she had to go there and she was shown CD 2-3 times and on 8.11.2014, accused Subhash entered in their house at about 11.00 P.M. and shown the CD and he threatened the prosecutrix and accused Modi tried to commit rape again upon her daughter. She was confronted with portion C to C1 of Ex.P5, wherein it is so recorded. She had also not stated to the

police that on 9.11.2014 at about 11.00 A.M., her daughter was sent to the Jeweller Shop at Hansi by accused Subhash and he also accompanied her (the prosecutrix) in a separate bus and sold the gold ring of her and she was made to sit in Auto and asked to go to Delhi, where she would meet Virat. She was also confronted with portion D to D1 of Ex.P5, wherein it is so recorded. She had also not stated to the police that her daughter went to Railway Station, Delhi. She met Virat, who took her in a room and committed rape upon her and left her at Sish Ganj Gurudwara, Delhi at 4.00 A.M. She also denied that she was resiling from her statement, Ex.P5. She also denied that the accused present in the Court had committed rape upon her daughter or that she was deposing falsely. She was also cross-examined by the defence counsel. They had made thorough inquiries and accused present in the Court never abducted and committed rape upon her daughter. No CD of any kind was prepared by accused at any point of time. Her daughter had gone away from the house without informing them. Nothing had happened with her daughter. Her daughter was pressurized by the police officials and some villagers to make statement before the Magistrate against the accused persons.

10. PW5 ASI Radheysham testified that on 27.11.2014 accused Subhash demarcated the place where he sold the gold ring. He was interrogated by DSP Ravinder Kumar. He made disclosure statement, Ex.P7. He again suffered disclosure statement, Ex.P8. Accused Subhash got recovered two mobile phones in pursuance to his disclosure statement. These were taken into possession vide recovery memo Ex.P9.

11. PW7 ASI Sandeep deposed that he provided computer generated call details record of mobile sim no. 90347-92055 and call details

record of mobile sim no. 90174-14243, vide Ex.P10 and Ex.P11. In his cross-examination, he admitted that the identity details of subscriber of mobile sim numbers was provided by the company along with the call details record. He admitted that except information provided at point 'A' in Ex.P11, no other documentary proof was sent by the company along with call details record of mobile sim no. 90174-14243. No record of contents of conversation between the said numbers was provided along with call details record. He did not remember at what time the record was taken from him by the Investigating Officer. He did not remember, who had come to collect the aforesaid records from him.

12. PW9 SI Suman Bala deposed that the prosecutrix along with her parents came in the police station and submitted hand written complaint, Ex.P14. She visited the spot. The prosecutrix was produced before the Medical Officer at General Hospital, Bhiwani for medico-legal examination. The prosecutrix was also produced before the learned Area Magistrate for recording her statement under Section 164 Cr.P.C.

13. PW11 DSP Ravinder Kumar deposed that on 25.11.2014 he was posted as DSP, Bhiwani. He arrested accused Subhash Chander. Subhash Chander was also got medico-legally examined. He also took mobile call details from Constable Prem Kumar posted at Cyber Cell, Bhiwani, vide memo, Ex.P25. He also recovered two mobile sets of make Samsung along with two sims.

14. PW13 Suresh Kumar deposed that on 9.11.2014, he was present in his shop. At about 11.00 A.M., the prosecutrix came in his shop and produced one gold ring for selling. It was around one gram in weight. He gave ₹ 1,700/- to her. In his cross-examination, he admitted that he did

not have any proof or record regarding ownership of 'Balaji Jeweller'. He did not make any inquiry from the prosecutrix about her name and address. She was not known to him earlier. She was not having any kind of pressure. He did not inform the police about this matter.

15. PW14 is the prosecutrix (name withheld). She was student of 10th Class. Due to poor performance in the study, she went to Delhi out of depression, where her brother reached and took her back to Bawanikhera. Volunteered that neither she was taken by anyone nor any wrong act had happened with her. Accused Subhash and Modi Lal were known to her being her neighbours. Volunteered that they have not done any wrong act upon her nor they had threatened her at any point of time. She was declared hostile and was cross-examined by the learned Public Prosecutor. She denied the statement, Ex.P14. Volunteered that her signature was obtained on blank sheet by the police. She did not mention in her complaint that four months ago i.e. on 15.7.2014, accused Subhash gave her some intoxicant substance in juice, which made her semi-conscious and she was raped by accused and he prepared her CD (confronted with Ex.P14, wherein it is so recorded). She did not mention in her complaint that accused Subhash told her when she regained consciousness that he had raped her and prepared CD and if she would tell about this to anyone, he would kill her and would show the CD to everyone. (confronted with Ex.P14, wherein it is so recorded). She did not mention in her complaint that he had shown her that CD 2-3 times or that on 8.11.2014, he jumped into their house and shown that CD and threatened that if she would tell this fact to anyone, he would kill her or that his brother accused Modi Lal also tried to do wrong act with her. She admitted her statement, Ex.P16/A, which bore her signatures at point 'A'.

Volunteered that she was under pressure of police and other family members when her statement was recorded. She did not tell this fact being under pressure to the Magistrate at that time. She denied the suggestion that statement, Ex.P16/A, was given by her without any kind of pressure. She denied the suggestion that she was raped by accused Subhash Chander present in the Court. She also denied the suggestion that when she regained consciousness, then accused Subhash told her this fact and also threatened her with dire consequences. She also denied the suggestion that she was blackmailed and harassed. She also denied the suggestion that on 8.11.2014 accused Subhash Chander trespassed into their house and also shown the CD and extorted ₹ 4,500/-. She also denied the suggestion that accused Modi also attempted to do wrong act upon her or she was forced to sell gold ring. In her cross-examination by the learned counsel for the accused she deposed that accused Subhash and Modi Lal never took her to any place nor committed rape or attempted to rape upon her at any point of time.

16. PW16 Rajesh Kumar, Nodal Officer, Vodafone Digilink Limited, produced summoned record pertaining to mobile no. 98992-02190 from 1.11.2014 to 10.11.2014, Ex.P30. He also produced call details, Ex.P31, and location chart, Ex.P32, and certificate under Section 65-B of the Evidence Act, Ex.P33. In his cross-examination, he deposed that from the call details, it could not be ascertained, who were the persons talking to each other. He admitted that sim card was issued to the person after verifying the person and after seeing the original documents.

17. PW17 Mangal Singh, Clerk in Adarsh High School, Bawanikhera, produced the original admission and withdrawal register pertaining to the prosecutrix. He was working as a Clerk and maintained the

school record. Ex.P35 was issued by Headmaster, Adarsh High School, Bawanikhera. In his cross-examination, he deposed that Ex.P35 was issued on the basis of register, which he had brought to the Court. He admitted that register was not paginated. The same had not been certified by any authority of the school. He also admitted that even last entry made in the register had not been certified by any authority of the school.

18. PW24 Naveen Kumar, Retired DSP, deposed that on 19.12.2014, he arrested accused Modi Lal. He took into possession call details of two mobile numbers produced by ASI Sandeep Cyber Cell, Bhiwani, vide memo, Ex.P12, available on judicial record. In his cross-examination, he admitted that CD which was produced by Constable Deepak, was not prepared in his presence. He got it checked from Incharge Cyber Cell, Hisar. He had not checked the CD at his own. No disclosure statement of accused Modi Lal was recorded by him.

19. The precise case of the prosecution is that the prosecutrix was blackmailed, threatened and raped by appellant Subhash. At the time of deposition in Court, she was 17½ years of age. According to her, she was student of 10th Class. Due to her poor performance in the study, she went to Delhi out of depression. She was neither taken by anyone nor anything wrong had happened with her. She also deposed that accused Subhash and Modi Lal were known to her being her neighbours. They have not done any wrong act upon her nor they have threatened her at any point of time. Thus, she has not supported the case of the prosecution. According to her, she had gone on her own. Though she had identified her signatures on her statement, Ex.P16/A, but stated that she was under pressure of police and other family members when her statement was recorded. She was declared hostile. She

was thoroughly cross-examined, however, she denied the case of the prosecution that she was raped, blackmailed and harassed by accused Subhash Chander and Modi Lal.

20. The father of the prosecutrix, PW2 Satish Kumar had given the age of the prosecutrix at the time of deposition about 18½ years. He also deposed that she was never abducted or raped upon at any point of time by the accused. Though he was also declared hostile, however, he was cross-examined by the learned Public Prosecutor at length. He has also not supported the case of the prosecution. Mother of the prosecutrix, PW4 Renu Bala has also not supported the prosecution version. She was declared hostile and cross-examined by the Public Prosecutor. She has denied her statement, Ex.P5.

21. The prosecutrix was medico-legally examined by PW10 Dr. Munesh, who proved MLR, Ex.P22. According to his opinion, there was evidence of recent sexual intercourse. However, in his cross-examination, he admitted that the duration of exact time of sexual intercourse in this case could not be opined. No external mark of injury on the person of the prosecutrix at the time of her medico legal examination was found. In the absence of DNA profile, it could not be opined as to whether accused has committed sexual intercourse or not.

22. As regards the call details, PW16 Rajesh Kumar, Nodal Officer, Vodafone Digilink Limited, in his cross-examination, has admitted that it could not be ascertained, who were the persons talking with each other.

23. In the present case, the prosecutrix (PW14), her father PW2 Satish Kumar and mother PW4 Renu Bala have not supported the case of

the prosecution. All the three were declared hostile and were cross-examined at length by learned public prosecutor. Thus, the prosecution has failed to prove the case against the appellants beyond reasonable doubt. Accordingly, the appeal is allowed. The judgment of the trial Court is set aside. The appellants are acquitted of the charges levelled against them. They should be released forthwith, if they are not required in any other case.

(Rajiv Sharma)
Judge

19.3.2019
vs

(Kuldip Singh)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No