

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

CRA-D-325-DB-2017 (O&M)
Reserved on : September 19, 2019
Date of Decision: January 09, 2020

Dharmender @ Dholiya

...Appellant

Versus

State of Haryana

...Respondent

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

Present: Mr. Amardeep Sheoran, Advocate for the appellant.

Mr. Vivek Saini, Deputy Advocate General, Haryana.

HARINDER SINGH SIDHU, J.

1. This appeal is instituted against the judgment and order dated 06/07.03.2017 rendered by the Additional Sessions Judge/ Special Judge, Narnaul in Sessions Case No.04 of 2016 whereby the appellant, who was charged with and tried for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (herein for short 'the Act'), has been convicted and sentenced to undergo rigorous imprisonment for a period of twelve years and to pay fine of Rs.10,000/- and in default to further undergo simple imprisonment for three years. He was also directed to pay compensation of Rs.50,000/- to the victim.

2. The case of the prosecution in a nutshell is that on 20.03.2016 at about 9.30 pm Jyoti wife of Raj Kumar resident of village Sehlang, P.S. Kanina accompanied by her husband, daughter- the victim and others came to the police station. Her statement was recorded in the presence of Legal

Advisor Ajnesh Yadav. She stated that she has two children. Vipin (son) aged about 6 years is elder and the victim (daughter) aged about 2 ¼ years. That day at about 5.00 pm she was preparing for cooking the meals. She sent both her children to bring sugar from the shop in the village. Her son Vipin came back with sugar and disclosed that his sister had been caught hold of by 'Baba' whose name he disclosed as Dharmender @ Dholiya. She searched for her daughter but in vain. Her maternal nephew Moni went in search of her daughter and brought her home. She was stained with blood. She pacified her daughter and asked her as to what had happened. Her daughter pointed towards her private parts and stated that 'Baba' had beaten her there. She suspected that Dharmender @ Dholiya had committed some wrong act against her daughter. On the basis of her statement formal FIR under Section 4/ 6 of the POCSO Act was registered. The victim was got medico-legally examined. Statement of complainant Jyoti under Section 164 Cr.P.C. was got recorded. Dharmender @ Dholiya was arrested on 21.03.2016. He was got medico-legally examined. Scaled site plan of the place of occurrence was prepared. The samples collected during medico-legal examination of the victim as well as Dharmender were sent to FSL Madhuban. On completion of investigation, the report under Section 173 Cr.P.C. was prepared and furnished in Court.

3. The prosecution examined number of witnesses in its support. The statement of the accused under Section 313 Cr.P.C. was recorded. He denied the allegations levelled against him and pleaded innocence. However, he did not lead any evidence in his defence.

4. The appellant was convicted and sentenced as referred to

above. Hence, this appeal.

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

6. PW1 Lady ASI Sharda Devi stated that on 20.3.2016 she was posted in Women Police Station Narnaul. That day on receiving information from MHC Women PS Narnaul regarding wrongful act committed on a lady she along with LHC Sheetal, EHC Bimla reached Police Station Kanina where Jyoti wife of Raj Kumar mother of the victim was present. She recorded her statement in the presence of legal advisor Ajnesh Yadav. After recording the statement she recorded the formal FIR Ex.PW1/A and sent the special report through G-mail. As the lady Medical Officer CHC Kanina was not on duty she got the medico- legal examination of the victim conducted by Lady doctor Nisha Yadav of GH Mohindergarh. After medical examination the doctor handed over the parcels of victim which were taken into possession vide memo Ex.PW1/D. Next day she visited the place of occurrence and on the pointing of mother of victim she prepared the rough sketch plan of the place where the rape was committed upon her daughter. On 25.03.2016 she moved an application Ex.PW1/F to JMHC Mohindergarh for recording of statement under Section 164 of Cr.P.C of prosecutrix's mother, i.e, Jyoti. She proved certified copy of statement Ex.PW1/G. Thereafter, she sent the file through EHC Bimla to MHC Kanina for further investigation.

7. In cross examination by counsel for the accused she denied that the statement of Jyoti was recorded by her on her own and that the latter had not disclosed that her daughter was sexually assaulted. She denied that she had manipulated facts and prepared a wrong case.

stated that she has one son namely Vipin who is aged about 6 years of age and a younger daughter -the victim aged about two and half years. On 20.03.2016 at about 5.00 p.m. her daughter had gone outside the house to play with children. After some time her daughter came to the house weeping. On inquiring as to what happened, her daughter only pointed her finger towards her under wear but did not tell anything more. On checking her underwear it was found that there was some bleeding from her private parts. PW2 stated that she made inquiries from neighbours but nobody told her as to what had happened to her daughter. Thereafter she took her daughter to PS Kanina. The police obtained her signatures on a paper. She deposed that she did not tell the police that she suspected that Dholia @ Dharmender s/o Om Parkash r/o Village Sehang had committed some foul deed with her daughter.

9. On the request of Ld. P.P she was declared hostile.

10. In cross examination by the Ld. PP she stated that she did not make any statement Ex PW 2/A to the police. But she admitted that the statement Ex PW 2/A bears her signatures at point A. She denied that she had told the police that both her children had gone to buy sugar from a shop in the village and after some time Vipin returned back and informed that the victim had been caught hold of by 'Baba' whose name he disclosed as Dharmender @ Dholiya. She also denied that she had stated before the police that she tried to search for her daughter and after some time her nephew came to the house with her and that on inquiry her daughter told her that she had been beaten by 'Baba' and she pointed out to her private parts. She also denied that she had stated before the police that she

suspected that Dharmender @ Dholiya had committed a sexual offence against her daughter and that strict action be taken. She was confronted with relevant contents of her statement Ex.PW-2/A. She however admitted her statement Ex. PW 1/G recorded under Section 164 Cr.P.C. before the Magistrate and that it bears her signatures. She denied that at the time of making the statement she was not under pressure of the police. She denied that the statements Ex. PW 2/A and Ex. PW 1/G were correctly and voluntarily made by her. She denied that the name of the accused was mentioned by her in her statement under Section 164 Cr.P.C. after due enquiry from her daughter. She denied that she had compromised the matter with the accused outside the Court. She admitted that her daughter had been medico-legally examined at GH Mohindergarh. She admitted that at the time of recording of her statement she and the Magistrate were alone in the chamber.

11. In cross examination by counsel for the accused she stated that nobody including her daughter had told her that accused Dharmender @ Dholiya had assaulted her daughter. She stated that there are many persons by the name of Dholiya in village Sehlang which is a big village. The accused present in Court is not known in the village as 'Dholiya'.

12. PW3 Manisha w/o Kanwar Singh, R/o Village Sehlang Police Station Kanina deposed that she did not know anything about this case and that her statement was never recorded by the police. On the request of the Ld. PP she was declared hostile.

13. In cross examination by the Ld. PP she denied that the statement Ex. PW 3/A was made by her before the police. She denied

having stated before the police that her house was near the house of Jyoti and that on 20.03.2016 at about 6.00 p.m when she was doing her household work she had been informed by Sharmila that some illegal act had been committed with the daughter of Jyoti. (She was confronted with the relevant part of her statement Ex. PW 3/A where it was so recorded.) She also denied having stated that thereafter she had gone to the house of Jyoti where she met the victim who was having blood stains and was weeping. (She was confronted with the relevant part of her statement Ex. PW 3/A where it was so recorded.) She also denied that she was told that Dharmender had assaulted the victim and thereafter they had all gone to the house of Dharmender but he fled away from the house. (She was confronted with the relevant part of her statement Ex. PW 3/A where it was so recorded.) . She denied that she had been won over by the accused.

14. In cross examination by counsel for the accused she stated that she was not present in the village on 20.03.2016 and had come to the village on 22.03.2016.

15. PW Sharmila was given up as being won over.

16. PW4- Raj Kumar S/o Om Parkash R/o Village Sehlang, father of the victim stated that he has one son Vipin aged about 6 years and a younger daughter aged about 3 years. On 20.03.2016 he had gone outside the village for some personal work. When he returned home at about 7.00 p.m. his wife Jyoti told him that their daughter had returned home with some bleeding in her private parts. He and his wife made inquiries from neighbors but nobody told them anything . At the request of Ld. PP he was declared hostile.

17. In cross examination by the Ld. PP he denied that he had made statement Ex PW-4/A before the police. He denied having stated before the police that he had received a telephone call from his wife that their neighbour Dharmender had committed some immoral act with their daughter. (He was confronted with the relevant part of his statement Ex. PW 4/A where it was so recorded.) He further denied that he had stated before the police that after coming home he had gone to the village shop with his son to satisfy himself that Dharmender @ Dholiya had committed the immoral act with his daughter (He was confronted with the relevant part of his statement Ex. PW 4/A where it was so recorded.). He denied that he had compromised the matter with the accused outside the Court.

18. PW5- Vijay Pal s/o Pappu, Sarpanch of Village Sehlang deposed that he did not know anything about this case. At the request of Ld. PP he was declared hostile.

19. In cross examination by the Ld. PP he denied having made the statement Ex PW-5/A before the police. He denied that he had stated before the police that on 20.03.2016 at about 6.00 pm he had received a telephone from Raj Kumar that Dharmender @ Dholiya had committed some immoral act with his daughter. (He was confronted with the relevant part of his statement Ex. PW 5 /A where it was so recorded.) He also denied having stated before the police that thereafter he had gone to the house of Raj Kumar and saw that some immoral act had been committed on the victim. (He was confronted with the relevant part of his statement Ex. PW 5/A where it was so recorded). He denied that he had been won over by the accused.

20. PW6 Dr. Shekhar Pardeep MO CHC Kanina, District Mohindergarh tendered in evidence his affidavit Ex. PW 6/A wherein he deposed that on 21.03.2016 he had medico-legally examined Dharmender s/o Om Parkash aged about 37 years with alleged history of rape at about 5.45 pm on 20.03.2016 at village Sehlang. He had some blood stain on thigh lower side and left knee. His General Physical Examination revealed that :

(i) Patient was well, thin built, well nourished 5'9" height approx. hand strong tremor present

(ii) Secondary sexual character like moustache, beard, chest hair, axillary hair, pubic hair is well developed pubic hair as had shaved before 5 to 7 days, testis are normal two in no, Penis was normal in size. No smegma present. Redness of glans present, testis was normal in texture

Samples of (a) underwear of blue colour (b) pubic hair (c) Glans penis smear were taken. PW6 opined that there was nothing to suggest that the person is not capable of sexual intercourse.

21. PW7- Dr. Nisha Yadav of GH Mohindergarh deposed that on the police request Ex.PW-1/C she conducted the medico-legal examination of the victim d/o Raj Kumar on 20.03.2016. She brought the original MLR and proved its carbon copy Ex.PW-7/A. She tendered her affidavit Ex.PW-7/B. After going through the FSL report Ex.PX, she opined that the possibility of sexual assault cannot be ruled out. In her affidavit she stated that at the time of her medico-legal examination the victim was sleeping.

externally serous discharge was seen. Minimal abrasion was seen over lower part of vaginal opening. Reddish in colour. Hymen could not be visualized. No active bleeding was seen externally. Patient was referred to PGIMS Rohtak for surgeon and Gynaecologist opinion. Copy of MLR, forwarding letter, one dress/ Frock (blue colour with yellow dots), four slides, one vial containing two vaginal swabs, sample seal (NY) were handed over to the police.

22. PW8-ASI Bahadur Singh stated that on 21.03.2016 he was posted in P.S Kanina and case file was entrusted to him by L. ASI Sharda Devi. On that day he arrested accused Dharmender @ Dholiya from his house at village Sehlang. During interrogation accused suffered disclosure statement Ex.PW8/A and he got demarcated the place of occurrence vide memo Ex.PW-8/B. On the same date accused was got medico-legally examined by moving application Ex.PW8/C. On 06.05.2016 he got prepared scaled site plan Ex.PW-8/D from Naresh Kumar. On 31.05.2016 he collected the medical report Ex.PW-8/E of the victim from PGIMS Rohtak. On 03.05.2016 after completion of investigation SI Om Parkash prepared the report u/s 173 of Cr.P.C. He identified the accused in Court.

23. PW9- HC Satender Kumar deposed that on 20.03.2016 L. ASI Sharda Devi deposited with him the parcels and belongings collected from lady doctor. On 21.03.2016 the parcels and belongings of accused Dharmender were deposited with him. On 31.03.2016 both the above stated parcels were sent to FSL through C. Pawan who after depositing the same in the FSL handed over receipt to him.

24. PW10 Constable Pawan Kumar tendered in evidence his

affidavit Ex.PW-10/A stating that on 31.03.2016 he had received the case property from MHC which he deposited in the FSL and handed over the receipt to MHC.

25. PW11- Multan Singh, Record Keeper PGIMS, Rohtak brought the summoned record pertaining to the victim daughter of Raj Kumar CR No.436991. Certificate in this regard was given by Medical Record Officer Shiv Kumar whose signatures he identified. He proved copy of BHT Ex.PW8/E and also the file of stay of the victim Ex.PW11/A.

26. As per the FSL report Ex.PX human semen was detected on exhibit-1a (slide), exhibit-1b (vaginal swabs) and exhibit-2 (dirty blue coloured underwear of Dharmender). However semen could not be detected on exhibit-1c (frock), exhibit-3 (pubic hair) and exhibit-4 (Glans Penis swab).

27. Ld. Counsel for the appellant has raised the following contentions:

(i) All the witnesses have turned hostile. So there is no evidence against the appellant.

(ii) Material witnesses namely brother Vipin of the victim and the nephew Moni of the complainant who allegedly brought back the victim have not been examined.

(iii) There is no evidence that the victim was seen with the accused.

(iv) DNA test not conducted .

28. There is no merit in the contentions of the Ld. Counsel for the appellant.

No doubt that the witnesses in this case have turned hostile.

The most material witnesses are PW 2 Jyoti the mother of the victim- the complainant and PW 4 Raj Kumar the father of the victim and their evidence needs to be scrutinized closely.

30. While deposing in Court PW2 denied having made the statement Ex.PW-2/A. However, she admitted her signatures on the statement. She was confronted with the relevant parts of her statement wherein she had stated that on 20.03.2016 at about 5.00 pm she was preparing for cooking the meals. She sent both her children to bring sugar from the shop in the village. Her son Vipin came back with sugar and disclosed that his sister had been caught hold of by Baba whose name he disclosed as Dharmender @ Dholiya. She searched for her daughter but in vain. Her maternal nephew Moni went in search of her daughter and brought her home. She was stained with blood. She pacified her daughter and asked her as to what had happened. Her daughter pointed towards her private parts and stated that Baba had beaten her there. She suspected that Dharmender @ Dholiya had committed some wrong act against her daughter.

31. She admitted her statement Ex.PW1/G recorded under Section 164 Cr.P.C. before the Magistrate and that it bears her signatures. She admitted that at the time of recording of her statement she and the Magistrate were alone in the chamber. She also admitted that her daughter had been medico-legally examined at GH Mohindergarh.

32. PW4- Raj Kumar deposed that on 20.03.2016 he had gone outside the village for some personal work. When he returned home at about 7.00 p.m. his wife Jyoti told him that the victim had returned home

With some bleeding in her private parts. He and his wife made inquiries

from neighbors but nobody told them anything. In cross examination by the Ld. PP he denied that he had made statement Ex PW-4/A before the police. He was confronted with relevant parts of his statement where he had stated that he had received a telephone call from his wife that their neighbour Dharmender had committed some immoral act with their daughter and that after coming back home he had gone to the village shop with his son to satisfy himself that Dharmender @ Dholiya had committed the immoral act with his daughter.

33. Though in their deposition in Court, PW2 and PW4 seek to exculpate the accused whom they had named in their statements before the police. However, the time of the incident and the fact that the victim had suffered a sexual assault has been affirmed by them.

34. PW7- Dr. Nisha Yadav of GH Mohindergarh had conducted the medico-legal examination of the victim on 20.03.2016. After going through the FSL report Ex.PX, she opined that the possibility of sexual assault cannot be ruled out. In her affidavit she stated that on P/V externally serous discharge was seen. Minimal abrasion was seen over lower part of vaginal opening reddish in colour. Thus, there is no doubt that the victim suffered sexual assault.

35. PW2, PW4 and the other prosecution witnesses including PW3 Manisha and PW5- Vijay Pal S/o Pappu Sarpanch of Village Sehlang all appear to have compromised with the accused and denied their earlier statements before the police.

36. As per the FSL report Ex.PX human semen was detected on exhibit-1a (four microscopic glass slides), exhibit-1b (the two cotton wool

vaginal swabs) and exhibit-2 (dirty blue coloured underwear of Dharmender). However, semen could not be detected on exhibit-1c (frock), exhibit-3 (pubic hair of accused) and exhibit-4 (Glans Penis swab of accused). No doubt DNA test of the human semen detected on the exhibits, to connect with the blood samples of the accused, was not conducted. But that of itself is not enough to exonerate the accused. It has been held by Hon'ble Supreme Court in **Sunil v. State of M.P., (2017) 4 SCC 393** that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling would not necessarily result in the failure of the prosecution case if there is other material to connect the accused with the offence. The relevant observations of the Hon'ble Court are:

“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 53-A 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 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 53-A 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.”

37. A very material circumstance connecting the accused with the offence is the MLR of the accused Dharmender. PW6 Dr. Shekhar Pardeep MO CHC Kanina District Mohindergarh deposed that on 21.03.2016 he had medico-legally examined Dharmender. He had some blood stain on thigh lower side and left knee. No smegma was present. There was also redness over the glans penis of the accused. PW 6 opined that there was nothing to suggest that the person is not capable of sexual intercourse.

38. In a case of rape the presence or absence of smegma around the corona glandis is a strong circumstance in establishing the innocence or guilt of the accused, especially if the accused had been medically examined within 24 hours. In **State of Gujarat v. Kishanbhai, (2014) 5 SCC 108**), it has been held that absence of smegma is indicative of sexual intercourse during the preceding 24 hours.

39. In **State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550**, it was observed as under:

“26.....But the evidence of PW 12 Dr More who examined the respondent on the 22nd at 8.45 p.m. reveals that he had noticed (i) absence of smegma around the glans penis, and (ii) the frenum tortuous and edematous, indicative of the respondent having had sexual intercourse within the preceding 24 hours. However, absence of marks of violence and absence of matting of pubic hair led the witness to state that no definite opinion could be given whether or not the respondent had sexual intercourse in the last 24 hours. In cross-examination an

attempt was made to show that smegma may be absent in a man with clean habits; that the frenum may be edematous if there is friction with rough cloth and tortuousness of the frenum could be due to anything that causes swelling of the skin. The witness, however, said that he had not seen marks of itching thereby negating the suggestion. Be that as it may, the evidence of this witness does show that there was evidence suggesting the possibility of the respondent having had sexual intercourse within the preceding 24 hours although the witness could not hazard a definite opinion. Therefore, the non-committal opinion of this witness cannot be said to run counter to the evidence of the prosecutrix. It may be that the evidence as to resistance may have been overstated, a tendency which is generally noticed in such cases arising out of a fear of being misunderstood by the society. That is not to say that she was in any way a consenting party. She was the victim of brute force and the lust of the respondent.”

To the same effect are the observations in **Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92 :**

“8. It may also be noticed that the appellant was medically examined on the same day by PW 10. In his evidence, he stated that smegma was present around the corona glandis. He further deposed that his examination negated sexual intercourse and for collection of smegma around corona glandis a period of 24 hours is required. This scientific evidence also did not support the prosecution. Had there been a vigorous sexual act as alleged by the prosecutrix there could not have been the presence of smegma on his private part.”

40. The incident happened on the evening of 20.03.2016. The accused was medico-legally examined on the next day i.e., within 24 hours.

The absence of smegma indicates sexual intercourse during the previous 24

hours. The accused has furnished no explanation regarding the same. His medico-legal report indicated redness over his glans penis. He has furnished no explanation regarding the same. He also did not give any explanation regarding the presence of semen on his underwear.

41. The circumstances solely point to the guilt of the accused and are inconsistent with his innocence.
42. In the face of the above, the fact that the brother of the victim and the nephew of the complainant have not been examined and there is no evidence of the victim being seen in the company of the accused, loses significance.
43. Accordingly, there is no merit in the appeal and the same is dismissed.

(RAJIV SHARMA)

JUDGE

(HARINDER SINGH SIDHU)

JUDGE

January 09, 2020

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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No