



IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-D-7-2022(O&M)

Virender

. . . . Appellant

Vs.

State of Haryana

. . . . Respondent

CRA-D-8-2022(O&M)

Darshan

. . . . Appellant

Vs.

State of Haryana

. . . . Respondent

Reserved on: 20.11.2024

Pronounced on:13.12.2024

CORAM: HON’BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON’BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. R.N. Lohan , Advocate
for the appellant (in CRA-D-7-2022).

Mr. Vivek Suri, Advocate
for the appellant (in CRA-D-8-2022).

Mr. Apoorv Garg, Sr. DAG-cum Public Prosecutor, Haryana.

SANJAY VASHISTH, J.

1. By way of this common judgment, appeals filed by two convicts, namely, Virender s/o Bharat Singh (CRA-D-7-2022) and Darshan s/o Ramphal (CRA-D-8-2022) are being decided which have been filed after they were held guilty by the Court of learned Additional Sessions Judge, Fast Track Special Court, Protection of Children from Sexual Offences, Jind. The offences under



which the appellants have been convicted and the period of sentence awarded is as under:

Name of Convict	Offence under Section	Period of Sentence	Fine Imposed	Period of sentence in default of payment of fine
Virender	363 IPC	RI for five years	Rs.20,000/-	SI for one year
	366 IPC	RI for five years	Rs.20,000/-	SI for one year
	4 of POCSO Act	RI for twenty years	Rs.100,000/-	SI for two years
Darshan	6 of POCSO	RI for twenty years	Rs.100,000/-	SI for two years

2. On account of the missing daughter of the complainant-Surender Jain one FIR No. 484 dated 04.09.2018, under Sections 363 and 366-A of Indian Penal Code, 1860 (for short, ‘IPC’) was registered at Police Station City Jind, District Jind with the allegations that daughter of the complainant (hereinafter referred to as ‘victim’), aged 13 years, studying in 9th class and of the height of 5’ feet and having fair complexion, wearing Black Pant and Blue Shirt and also having hair style like boys is missing since 03.09.2018, 5:00 p.m. He apprehended that someone had kidnapped his daughter and she be traced out. FIR was registered at about 01:02 hrs on 04.09.2018 (the intervening night of 03.09.2018 and 04.09.2018).

As a pursuit of the police action, victim is shown to be recovered from Hindua Railway Station, Rajasthan at the instance of ASI Yashbir in the presence of L/C Monika on 04.09.2018 itself. Thereupon, on moving an application by SI Kamlesh Devi on 05.09.2018 statement of the victim was



recorded by Judicial Magistrate First Class, Jind, under Section 164 Cr.P.C. in which she stated as under:

“Mxxxx daughter of Surender Jain, Age-13 years, resident of Sunder Nagar, Jind

I asked the police officials to leave the room so that she can make her statement without any pressure. I asked her the following questions:

Q1 In which class do you study?

Ans. I study in 9th Class at Apex High School..

Q2. Are you pressurized by someone?

Ans No.

Q3. I am satisfied that she voluntarily wishes to give her statement. Therefore I Proceed to record it as follows:-

My heart had gone astray. I went to Delhi at my own will day before yesterday evening. Now I want to live with my family members. I met Virender in Delhi. I was living in the house of his namely Naresh. Then I went to Rajasthan with Virender. From there the police apprehended me. Now I want to live with my parents.

RO & AC

SD/- (In

English)

SD/- (In Hindi)

(Shivani Rana)

Mxxxxxx

JMIC, JIND

05.09.2018”

3. On the same day i.e. 05.09.2018 at 5:20 p.m. victim was medico legally examined by Dr. Jyoti and there also on being told by the victim, the previous history was recorded and same is reproduced herebelow:

“As per history told by herself in 2017 nearly May/June a person named Darshan Saini Electrician by occupation came to her house and they went to field where he did sexual intercourse with her. After that within 2-3 months 2-3 intercourse occur between them. He blackmailed her that he is having a video recording of their sexual intercourse and if she will not come when he call her, he will viral the video.

She is wearing a blue colour top and black coloured jeans at the time of examination.



On physical examination-No any mark of injury (externally) seen over face, limbs, back, abdomen.

Secondary sexual character are well built.

On local Examination -Hymen rupture at 5 'O' clock position. Healed. No congestion redness present over labia majora, minora, fubic."

On 05.09.2018 itself at 5:08 p.m. another statement of the victim was recorded before Child Welfare Committee in the presence of bua, namely, Saroj and Brother namely Vikas. There is a footnote to the effect that the *'parents/ mother of the victim was also present at the time of recording of the statement'*. In the said statement allegations come up primarily against appellant-Darshan (hereinafter referred to as 'A-1'). While qua the name of appellant-Virender (hereinafter referred to as 'A-2') victim did not allege anything against him rather he is said to have helped her. It is alleged in the statement that A-1 used to blackmail her for sending the video clips prepared by him to her brother and used to demand an amount of Rs.50,000-60,000/-. In the statement she stated that A-1 had raped her in the year 2017 and at that time the video clips were also prepared by him. However, no definite date or place of committing the forceful rape upon her is mentioned in the said statement. After completion of the investigation the final report under Section 173 Cr.P.C. was prepared and submitted to the Court.

4. At the first instance on 26.1.2018, A-1 was charge-sheeted for committing offence under Section 6 of the POCSO Act and Section 376(3) of IPC. A-2 was charge-sheeted for committing offence under Section 363 and 366-A IPC.

Subsequently, on 03.12.2021 charge-sheet was amended:



A-1 and A-2 were jointly charge-sheeted for committing of offence under Sections 363/34, 366/34, and 376(3)/ 34 of IPC. Also,A-1 was separately charge-sheeted for committing an offence under Section 376 (2) (n) of IPC and Section 6 of POCSO Act. A-2 was also separately charge-sheeted for committing an offence under Section 4 of POCSO Act.

Both the accused (A-1 and A-2) were arrested on 05.09.2018 and thereupon on 06.09.2018were subjected to a medical examination by Doctor Vijender Dhanda(PW12).

5. Prosecution Evidence

PW1 L/C Monika proved that she was accompanying ASI Yashvir Singh during the investigation and victim was recovered by preparing a recovery memo (Ex. P1) from Hindua Railway Station, Rajasthan on 04.09.2018. She could not give details of the private vehicle, its driver, or even the registration number by which they went to Rajasthan alongwiththefather of the victim.

She admits in cross-examination that in her statement under Section 161 Cr.P.C. accompanying of the father of victim is not mentioned by her and that at the time of recovery from the spot prosecutrix and accused (no name) were present. This witness also admits that Bua and the victim's mother were called to Police Station and thereafter her statement was recorded which was reduced in writing by Lady Advocate and SHO Madam in her presence. She accepted that prosecutrix had gone without any pressure and at her own will.

PW2 L/C Annu proved that on 05.09.2018 she took the prosecutrix to Government Hospital, Jind where she was medico legally examined by the



Doctor. She also proved the fact of handing over to her the parcels by the Doctor. She also explained that on the statement of the victim, her signatures were affixed and that victim told her of leaving the house without any pressure and on her own sweet will. There was no disclosure of a factum of committing any wrong act with her by anybody and they had visited the hospital at about 2:00 p.m.

PW3 is the statement of victim, wherein she stated to be the eldest of two sisters and one brother. The allegations of committing forcible rape upon her in the year 2017 by A-1(Darshan) in the field near Rajbaha/canal and the preparation of a video and demanding of Rs.50,000-60,000/- were reiterated. However, in the statement, she somehow stated against A-2(Virender) also by alleging that on the day of Janmashtami, he took her to the Railway Station and then to Delhi in a train, where he kept her in his room, where one Naresh met them. In the statement before the Ld. Court, she alleged committal of rape by A-2also and of issuing threats of killing, if this fact is disclosed to anybody thereupon, she says that she was taken by A-2 to Rajasthan at the residence of his friend, where mother of the friend rang up to the police and the police recovered her from there. This way, victim tried to justify her recovery from there. Also, she proved her statement, recorded under Section 164 Cr.P.C. before the Magistrate (P-3) recorded on 05.09.2018, medico-legal examination and the statement before CWC (P4)

She tried to explain the fear created upon her by A-1 and A-2, however, admitted in clear terms the leaving of house voluntarily for purchasing the eatables from the shop, which is at the distance of approximately 10 shops from her house. She also admitted that my brother and



buas were present while deposing before CWC qua accused A-1. It is stated that he kidnapped her from the street where she resides but the date and time of the year 2017 are not remembered. There was one friend namely, Rajat of A-1 also. The suggestions given by A-1 were completely denied by her.

PW4 Surender Jain, father of the victim proved his original application/ruqa (Ex. P5) regarding missing of his daughter. Also proved that he deposed that his daughter was recovered on 05.09.2018. This witness deposed that his daughter disclosed to him and his wife that she was forcibly taken away on motorcycle by A-1 and then rape was committed in the bathroom. Other allegations were also reiterated by him. This witness produced the birth certificate of the victim (Ex. P7) to the police.

PW5-Ms. Shivani Rana, Judicial Magistrate First Class, Jind, appeared and proved the statement recorded by her under Section 164 Cr.P.c. (Ex. P9) and also proved some Zimni orders and applications.

PW6-HC Satish Kumar, stated that complainant-Surender Jain met ASI Yashvir Singh and produced one application (Ex. P5) and that he was also accompanying the patrolling team.

PW7-CT Sunil Kumar, submitted his affidavit (Ex. P13) by explaining the sealed parcels, which he took to the FSL and deposited the same there.

PW8 L/CSudesh, being a member of the Investigation team with SI/SHO Kamlesh Devi proved the disclosure statement of A-1 (Ex. P14) and disclosure statement of A-2 (Ex. P-15) and the recovery of the motorcycles bearing Registration No. HR-31E-2153 (fromA-2) and HR-31E-4940 (from A-



1) respectively. Also proved the recovery memos Ex. P-17 and Ex. P-18 respectively.

PW9-ESI Raghbir Singh, who was posted as MalkhanaMoharar in the Police Stationand tendered his affidavit (Ex. P-20) stating that on 05.09.2018 sealed parcels of the victim were handed over to him and on 06.09.2018 another set of parcels pertaining to A-1 and A-2 were also handed over to him by L/SI Kamlesh Devi. Later, these parcels were handed over to Constable Sunil Kumar (PW7) for depositing to the RFSL, Sunaria.

PW10-ASI Yashveer Singh No.154 also stated in tune of PW6-Satish.

PW11-EASI Dilbagh Singh proved the scaled site plan Ex. P21.

PW12-Dr. Vijender Dhanda, while posted at Government Hospital Jind, on 06.09.2018 and tendered in evidence his affidavit Ex. P-23 and proved the Medico-legal examination of A-1 i.e. MLR (Ex. P26) and MLR of A-2 (Ex. P-25) and also taking the sample parcels of the accused.

PW13-ASI Yashvir Singh No.856, proved that he alongwith LC Monika recovered victim from Hindua Railway Station, Rajasthan vide recovery memo Ex. P1, which was duly signed by the victim and LC Monika.

In cross-examination, he admitted that father of the victim and SPO Rajpal accompanied them and that on same day i.e. 04.09.2018 at about 7:00 p.m., they reached the place of recovery, where victim was found alone at the Railway Station Hindua, Rajasthan, thereupon local police was informed, but he was unable to show any document from the file regarding visiting the Police Station. Also accepted that no site plan of the place of recovery was prepared



by him and denied that he never recovered the victim or never visited the place of recovery.

PW14- Dr. Jyoti, proved the medico-legal examination conducted by her on 05.09.2018 at 5:20 p.m. of the victim aged 13 years, wherein she opined as under:

“Possibility of sexual intercourse could not be ruled out. Final opinion after FSL report”.

While examining the victim, doctor recorded that:-

“GC conscious cooperative well oriented with time, place and person. BP 110/72 mm Hg PR 84/min, LMP- 29/08/2018

Physical examination: no external mark of injury seen.”

Apart from this, Doctor proved the preparation of the sealed parcels etc.

In the cross-examination, this Doctor clearly admitted it to be correct that hymen is ruptured and is old healed and that hymen can be ruptured during cycling, horse riding etc.

During the evidence, this witness has not been shown the report of FSL (Ex. P-22), nor any opinion of her medical examination of victim vis a vis the FSL report has been obtained.

PW15-SI Kamlesh Devi proved the investigation done by her on 05.09.2018, while she was posted as SI/SHO at Police Station Women Jind. She also proved the handing over of the victim to her parents vide memo Ex.P6 and also the arrest done by her of A-1 from Patiala Chowk, Jind and A-2 from Bus Stand, Dariyawala. Thereupon, the recording of the disclosure statements and in pursuance thereto recovery of the motorcycles and that she presented the



final report under Section 173 Cr.P.C. to the Court after completion of the investigation.

In cross-examination, this witness admitted in clear terms that no audio and video recording or mobile phone was recovered from any of the accused. No call details regarding the conversation between any of the accused and victim have been taken into police possession by her and no investigation has been conducted with regard to the video recording or photos of the victim. Also admitted during investigation that except for the statement of victim and her parents no evidence was collected showing the prior connection between the accused A-1 and victim. There is nothing qua A-1 by victim in her statement under Section 164 Cr.P.C.(Ex. P9).

PW16 HC Dharampal registered formal FIR (Ex.P5/b).

PW17-Naresh Kumar, Computer Operator, Municipality Jind,
proved the birth certificate of the victim Ex. P7 and recording of Date of Birth as 24.02.2005.

On 05.02.2021 RFSL report (Ex. P22) was tendered and witness i.e. Director RFSL was given up. Other witnesses i.e. PW-Ms.Pinki Jain, and Inspector Dinesh were given up being unnecessary. Thereupon, evidence of the prosecution was closed on 12.10.2021.

6. In the statement recorded under Section 313 Cr.P.C. accused/appellant/A-1 (Darshan) got recorded his statement of being completely innocent and false implication in the case. He also clearly denied capturing of any video and Photographs of the victim.



Similarly, accused/appellant/A-2 also got recorded his statement of being innocent and having been involved falsely in the case. He also stated that he neither enticed the victim, nor took her away, and also denied the committal of rape or issuance of threat to her.

No defence evidence has been led by the appellants.

Arguments of learned counsel for the appellants (A-1 and A-2)

7. Opening the submissions, Mr. R.N. Lohan, learned counsel for appellant/accused/A-2 submitted that the prosecution has completely failed in proving its case, as the prosecution evidence is full of discrepancies. Victim has been shown to be recovered from Rajasthan, but the investigation was conducted at Jind. He also pressed upon the fact that victim in her statements recorded at different times does not allege of committing of any wrong act by A-2; rather states that she herself had gone to Delhi on her own and never met to accused-2. Learned counsel also points out that in medico-legal report, no allegation of committing any wrong is recorded against A-2. Learned counsel further points out that in the medical report, no injury has been recorded and hymen of the victim is found as ruptured and healed which admittedly is possible due to cycling, swimming, and horse riding also.

8. Learned counsel for the appellant/A-2 also points out to the statement recorded under Section 164 Cr.P.C. (Ex. P9), wherein no allegation has been recorded against A-2, rather an allegation of committing rape is against one Naresh, who is neither here nor there in the case of the prosecution. Even said Naresh is neither cited as a witness by the police, nor has been joined in the investigation. He also points out the statements of the victim which were



recorded by the police, thereafter, by Child Welfare Committee (CWC) and then the improved statement before the Court after due application of mind or being tutored. While referring to the cross-examination of the victim, learned counsel for the appellant points out the unnatural deposition that of meeting A-2 near her home and then being taken by him to the Railway Station and then to Delhi in a Train where they met one Naresh and after sending his friend in a room on the upper floor, he committed rape upon her and threatened her not to disclose anything to anyone. While referring to the said part of the cross-examination, learned counsel for the appellant points out to the other statements made by the prosecutrix during investigation i.e. before the Police, 164 Cr.P.C., before Child Welfare Committee and even before the Doctors, wherein no such facts have been recorded. Learned counsel also points out to the faulty investigation conducted by the police. Even the prosecution has projected that victim was recovered from Hinduwa Railway Station (Rajasthan), whereas, victim in her statement states that she was recovered from the house of Naresh. Thus, there is a material contradiction in the statements of the witnesses about the recovery of the victim. Surprisingly, said Naresh has neither been questioned during investigation, nor has been produced before the Court as an accused or as a witness. It is also pointed out that it is A-2, who allured the victim by saying that the videos were there with A-1 and same would be deleted by him and therefore, she accompanied A-2, but no such video or even photographs have ever been recovered by the police during investigation from anyone.

9. Mr. R.N. Lohan, Advocate for appellant/A-2 relied upon the judgment passed by this Court (Punjab and Haryana High Court), in the case of **Rakesh**



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10. While arguing on behalf of A-2, Mr. R.N. Lohan, Advocate, submitted that the only place of occurrence given by the victim is in relation to A-1, therefore, in the absence of any other place of occurrence, having been pointed out in specific by the victim or acknowledged by the police during investigation the allegation of rape against A-2 is not believable, rather such an allegation is raised only in air. Thus, by saying that the story of the prosecution against A-2 is completely unbelievable and beyond probabilities and therefore, is not worth warranting conviction and thus, prayed for acquittal of A-2.

11. While arguing on behalf of appellant/accused/A-1, Mr. Vivek Suri, Advocate repeated some of the arguments already addressed by Mr. R.N. Lohan, Advocate, and also submitted that there is no medical evidence in support of the prosecution version, and once victim herself admits of her leaving the house and going to Delhi with her own sweet Will without naming any person in specific, all subsequent allegations are afterthought and without any basis. Even police has not collected any evidence in support of the allegations of rape committed by A-1 allegedly in the year 2017. Even no sign of rape could be verified for the alleged rape and therefore, without any supporting evidence sole version given by the victim that too after concoction and deliberations is not worth for convicting someone for such a heinous crime and then to sentence for decades.

Regarding the allegation of rape committed in the year 2017 by A-1 neither any date and time, nor any particular place has been specified during the investigation. Therefore, merely saying that victim was pressurized by the



accused does not carry any weight. Also submits that allegedly victim was taken when she was at a shop, a few yards away from her house, but no hue and cry has been made by her. Admittedly, the house of the victim is in a crowded street, and merely by stating that she was raped at a canal (Rajbaha) on Kaithal road, where the videography and photographs were done by A-1 is not enough to convict the appellant/A-1, until the said photographs or video is recovered during the course of investigation by the police and then being proved before the Court.

12. Further submitted that not only Naresh, one Rajat has also been named by her in the statement, but in the statements before the police or before Child Welfare Committee, her parents were with her and despite that, no such name ever appeared in the said statements. Even in the statement before the Court, victim has stated that one Vineet had prepared photography, when A-1 was committing rape upon her. Here the name of Rajat has been replaced with the name of Vineet. By referring all the aforementioned statements, learned counsel for the appellants submits that the prosecution has completely failed in proving its case and thus, both the accused plead for acquittal.

13. On the other hand, Mr. Apoorv Garg, Sr. DAG-cum Public Prosecutor, Haryana, argues that the case of the prosecution is fully proved. It is submitted that the age of the victim in the case is 13 years at the time of occurrence; rather, she was being victimized. Prior to the date of her missing from the house as by that time she had been raped by A-1, therefore, she was under a big mental trauma and thus, might be that the correct version was not initially got recorded by her during investigation. Learned State counsel also argued that the recovery of the prosecutrix has been well proved with the



statement of LC Monika (PW1), wherein she claims to be a member of the team headed by ASI Yashvir Singh No. 856.

14. Learned State counsel also argued that in the medical examination conducted by Dr. Jyoti (APW-14) though no external injury mark was seen but as per medical opinion the possibility of sexual intercourse could not be ruled out therefore, no benefit can be extended to the accused on the allegations raised at the instance of the victim. He also pointed out that even as per medical examination, hymen is found as ruptured, may be old healed. Learned State counsel also submitted that had there been any malice in the mind of the complainant-Surender Jain (PW4), he himself would have mentioned the names of the accused at the time of presenting the application. Not only this, just after recovery of the victim, during medical examination, the name of A-1 (Darshan Saini Electrician) was disclosed by her, thus allegations seems to be true atleast against A-1.

In response to the arguments that the statements of the prosecution and of the victim is self-contradictory, respondents/State submits that with the longevity of the period, the victim child might have got confused on smaller issues and some of the facts could have faded out from the memory and small mistakes might have been committed and on account of such minor mistakes or contradiction no benefit can be extended to the accused.

Discussion and Findings

15. We have heard the arguments of learned counsel for the parties and have also examined the record available before the Court. We find that as per the first factual aspect narrated by the complainant in the FIR, victim was



missing from his house since 03.09.2018, 05:00 pm. No allegation is levelled against anyone in the missing complaint presented by complainant-Surender Jain however it turned in registration of FIR on 04.09.2018.

Investigation proceeded and as per the statement of LC Monika (PW-1), she alongwith ASI Yashvir Singh No. 856 was present at Hinduwa Railway Station, Rajasthan, and from there the prosecutrix was recovered vide recovery memo (Ex. P1). Said recovery memo has been signed by victim, LC Monika and ASI Yashvir Singh No.856 only. During cross-examination, she admits that IO enquired from the prosecutrix/victim and accused for 20 minutes and their statements were recorded on the spot. She also admits that only prosecutrix and accused were present at the spot and that they had left the police station at about 9:15 am and reached the spot of recovery at about 5:00 p.m. On the other hand, if the statement of ASI Yashvir Singh No. 856 (PW 13), is examined he states that SPO Rajpal and complainant-Surender Jain also joined them to the place of recovery, but neither any statement of complainant has been recorded, nor his signatures are obtained on recovery memo. Therefore, this part of the statement of the witness ASI-Yashvir seems to be doubtful. This witness further stated that it was victim alone who was standing at Hinduwa Railway Station and was identified by her father. On the other hand, another team member i.e. LC Monika (PW1) states that only victim and accused, both were present at the spot at the time of recovery.

Thus, statements of two official witnesses (PW1-PW13) are at variance on the point of recovery of victim.

16. Official witness also admitted that the local police Station was informed by him but expressed his inability to refer any document on the file regarding



visiting any such police station. Not only this, even site plan of recovery of place was not prepared by him. While keeping in mind the statements of both the witnesses PW1 and PW13, we have also examined the statement of complainant-Surender Jain (PW4), who nowhere in his statement states about his visit with the police (PW1 and PW13) to Hinduwa Railway Station, Rajasthan for the purpose of recovery of his daughter.

Therefore, deposition of the official witnesses appears to be completely false and much beyond truth. Even in the statement of victim (PW3) she gave a new version before the Court and stated that this was A-2 who took her to Rajasthan at the residence of his friend, where mother of his friend was residing and she rang up the police whereupon police recovered her from there by recording her statement by the police. Victim nowhere states anything of her being recovered from the place which is narrated by the official witnesses of the investigation team (PW1 and PW13), this court has no hesitation to hold that on account of false deposition and more to the convenience of the police officials, the story of recovery of the victim is most likely developed by the police on their own and therefore, the recovery of the victim as projected by the prosecution agency seems to be completely false.

Moreover, admittedly there is no evidence led by the prosecution of any nature showing that at any point in time the investigating agency had visited the Hinduwa Railway Station or even anywhere in the State of Rajasthan. No documentary or even oral evidence has been brought on record by their own witnesses as discussed hereabove, rather they all are materially in contradiction with each other and therefore, this Court reaches to the conclusion that



recovery of the victim as projected by the Investigating Agency is completely false.

17. Missing of prosecutrix is w.e.f. 03.09.2018 at about 05:00 p.m. and the FIR is registered on 04.09.2018, at about 01:02 hrs on 04.09.2018 (the intervening night of 03.09.2018 and 04.09.2018). Prosecutrix is shown to be recovered from Rajasthan. Thereafter on 05.09.2018, an application for recording statement of victim was moved and by that time nowhere prosecutrix had alleged anything against any person rather, in the statement under Section 164 Cr.P.C., she expressed her voluntary action at all stages without alleging anything against any person. Rather she states as “*my heart had gone astray*’.

Naresh in whose house she had stayed has neither been produced before the Court as an accused nor as a witness. It is an admitted case of the prosecution that after recording the statement under Section 164 Cr.P.C., custody of the victim was handed over to her parents. On 05.09.2018 and at about 5:20 victim was medico legally examined by Dr. Jyoti (PW14), wherein allegations of committing rape with her in the field only by A-1 was recorded. Another allegation was that she was blackmailed as there were video recordings of sexual intercourse with A-1. First of all, there is nothing mentioned against accused/appellant/A-2 in this endorsement made in MLR at the instance of Victim. Secondly, uptill the time of recording of the statement under Section 164 Cr.P.C. that too same day and obviously prior to medical examination, nothing is alleged against anybody.

18. The question arises as to how victim got the courage or empowerment to allege such allegations against A-1, wherein nothing is mentioned against A-2.

This Court has gone a little deeper also to examine the recording of factum of



rape committed by A-1 by the doctor in MLR, but finds that in statement of Dr. Jyoti (PW14) this endorsement has neither been stated or corroborated except proving of the medical examination of the victim by preparing MLR (Ex.P29). There is no explanation that the fact already recorded by the Doctor in the MLR on the information given by the victim, why same is not proved by the doctor while appearing in the witness box. Therefore, recording of said part of the allegation of rape committed in the year 2017 by a person namely Darshan Saini Electrician/A-1 is left unproved by prosecution. It impliedly means that no such fact was stated by the victim at the time of her medico-legal examination as has been recorded in the MLR.

19. Further, while examining the medical evidence, it is also found that Dr. Jyoti (PW14) expressed her opinion as “***possibility of sexual intercourse could not be ruled out. Final opinion after FSL report***”. In RFSL report (Ex. P22) dated 17.09.2018 human semen has been detected on the underwears of both the accused, however, in none of the other articles/exhibits semen could be detected by forensic laboratory. Even said report has not been put to Dr. Jyoti for re-seeking her firm opinion about the committal of any sexual intercourse upon the victim. Regarding the rupturing of hymen, doctor admitted that same is old healed and can rupture during cycling, horse riding, etc.

From the medical evidence coupled with other circumstances available on record, it comes out that there is incomplete medical evidence and the allegation of committing of the sexual intercourse with the victim is not fully proven.



Therefore, the only evidence, which requires its deeper study is the statement of victim and the official witnesses i.e. investigating officer i.e. ASI Yashvir Singh (PW-13), SI Kamlesh Devi (PW-15) and LC Monika (PW-1).

20. In the first part of the investigation, it is ASI Yashvir Singh No. 856 (PW-13) who by accompanying LC Monika (PW1) had gone to Rajasthan on 04.09.2018 and recovered the victim from Hinduwa Railway Station, Rajasthan by preparing a recovery memo (Ex. P1), where the victim was standing all alone. On the next day i.e. on 05.09.2018, investigation was taken over by SI/SHO Kamlesh Devi (PW15), who recorded the statement under Section 161 Cr.P.C. of the victim and thereafter produced before the Magistrate, where the statement under Section 164 Cr.P.C. (Ex. P9) was recorded. After recording the statement by learned Magistrate (Ex. PW5) victim was subjected to medical examination at Government Hospital, Jind at the instance of SI Kamlesh Devi (PW15) and thereupon victim was handed over to the parents. On the same day, i.e. 05.09.2018 A-1 was arrested from Patiala Chowk, Jind and A-2 from Bus Stand, Dariyawala. On the basis of the disclosure statements of both the accused, motorcycles were recovered. Motorcycle bearing Registration No.HR-31E-4940 from A-1 (recovery memo Ex. P-18) and motorcycle bearing registration No. HR-31E-2153 was recovered from A-2 (recovery memo Ex. P17).

However, during cross-examination, this investigating officer clearly stated that no investigation was done regarding the kidnapping of victim by the accused from the persons residing near the place of occurrence. Also admits that no evidence such as audio/video recording or mobile phones were recovered from the accused. Even no detail of conversations at any point of



time between the prosecutrix/victim and the accused persons were taken in possession by her. Investigating Officer clearly admits that no investigation in regard to the allegation of video recording or photography of the victim was conducted. There is a bold admission also that except for the statement of the victim, she was unable to collect any evidence showing prior connection with the victim. Material part of the statement recording admissions of non-availability of evidence and not conducting of investigation in its extracted form as stated by SI Kamlesh Devi/Investigating officer (PW-15), is reproduced herein below:

“ I did not investigate regarding the kidnapping of victim by the accused from the persons residing near the place of occurrence. Victim did not disclose regarding the registration number of the bike on which she had been kidnapped by the accused. No audio/video recording and no mobile phone was recovered from any of the accused. No call details regarding the conversation between any of the accused and victim has been taken into police possession by me. I did not investigate regarding that video recording or photos of the victim. It is correct that during my investigation except the statement of victim and her parents, I could not collect any evidence showing the prior connection between the accused Darshan and victim. Volunteered accused suffered his disclosure statement admitting their relation. It is correct that except the statement of victim recorded under Section 164 Cr.P.C., parents and family members of victim were with her during recording of her statements. It is correct that in her statement Ex.P9 under Section 164 Cr.P.C. victim did not name accused Darshan. The disclosure statements of both the accused were recorded at Police Station City Jind. It is correct that no public witness was joined at that time.”

21. Allegations have been leveled by the victim alone, but her version also requires deeper examination. First of all, from the time of missing of the victim from her house and her recovery from State of Rajasthan is highly doubtful. Nothing, coming out uptill the time of recovery or preparation of recovery



memo as no statement of anyone was recorded at the time of recovery of victim from Hinduwa Railway Station, Rajasthan. She did not allege anything, even uptill the time of recording of statement on 05.09.2018 under Section 164 Cr.P.C. (Ex. P9). It is only thereafter that the endorsement of the allegations against A-1 is found to be recorded in the MLR against A-1 that too on the saying of the victim.

On 05.09.2018 itself, another statement in the presence of her brother namely Vikas and Bua namely Saroj was recorded before Child welfare Committee for the first time introducing the name of A-1. In the said statement, she does not allege anything against A-2, rather explains that she was apprehended by the Rajasthan Police. She also states of telling the complete facts already to her friends namely Nisha, Vandana and Shivian. Surprisingly, statements of none of them have been recorded by the prosecution. State Counsel has also not referred recording of any such statement during investigation. Here it is noticeable that suddenly the brother-Vikas and bua-Saroj of victim have appeared in the scene and from that stage allegations started coming up. It appears that thereafter victim started naming both the accused but the said part of the statement could be believed, had prosecution produced Vikas and Saroj also in the witness box or the medical evidence could have proved the allegations beyond doubt.

Nothing is available to prove the allegations of committing rape in April 2017 by A-1 or even recording of any videography and photography by him at any point in time, the allegations of demanding money of Rs.50,000-60,000/- at the instance of A-1 could carry some weight, had any videography and photography been noticed on any of the social media platforms or having been



collected by the investigating agency during the course of investigation. In the absence of any such evidence, there appears to be no truth in alleging the demand for ransom by the accused. Even there is nothing available on record that at any point of time, any such publication on social media of obscene video/photos of the victim at any point of time was made. Moreover, no date and time of committing of rape by A-1 in April 2017 has been brought on record as already discussed about medical evidence nothing definite is available to prove the allegation of sexual intercourse with the victim.

There is no allegation by victim that after recording of incident in the year 2017, she was raped again on the basis of such recording.

22. This Court has also looked at the judgments cited by the appellant, in the case of Rakesh Vs. State of Haryana (supra), Division Bench of this Court by taking note of the judgment of Calcutta High Court, titled as ‘ *Subrata Biswas Vs. State (supra)*, wherein it is held that statutory presumption under Section 29 applies when a person is prosecuted for committing offence under Sections 5 & 9 of the POCSO Act and reverse burden is imposed upon the accused to prove the contrary. The Court also held that it does not mean that prosecution has no rule to establish the primary facts constituting the offence. Discussion made in paragraph Nos. 12 and 13 as under:

“12. In the light of the contentions raised by learned State counsel, it is firstly necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused can rebut such presumption. As per this section, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, then the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, unless the contrary is proved. In our opinion, the submission that statutory presumption under Sections 3, 5, 7 & 9 of the POCSO Act is absolute, cannot be accepted as



*the well settled proposition of law is that the statutory presumption would stand activated only if the prosecution proves the foundational facts and even when the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond a reasonable doubt. If the accused is in position to create a serious doubt about the veracity of the prosecution case, or the accused brings on record material to render the prosecution version highly improbable, the same is sufficient. Reference in this regard can be made to **Subrata Biswas v. State, 2019 SCC Online Cal 1815**, wherein it was held that the statutory presumption under Section 29 applies when a person is prosecuted for committing offences under Sections 5 & 9 of the POCSO Act and reverse burden is imposed upon the accused to prove the contrary. The word "is prosecuted" in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without prosecution laying the firm contours thereof by leading reliable and admissible evidence. It was held that such an interpretation not only led to absurdity but rendered the aforesaid provision constitutionally suspect. It was further observed that a proper interpretation of Section 29 was that when a person is prosecuted under Sections 5 & 9 of the POCSO Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on preponderance of probabilities. Upon laying the foundation of its case by leading cogent and reliable evidence, the onus shifts upon the accused to prove the contrary.*

*13. Similar proposition of law was laid down in **Sachin son of Baliram Kakde v. The State of Maharashtra, 2016 ALLMR (Criminal) 4049** wherein Bombay High Court held that the presumption under Section 29 of the POCSO Act could not be said to be irrebuttable. In fact no presumption was irrebuttable in law, as it could not be equated with conclusive proof. The provision of Section 29 mandated the Court to draw the presumption unless contrary was proved. One had to keep in mind, as expressed by an eminent jurist that presumptions are bats in law, they fly in a twilight but vanish in the light of facts. Reliance can also be placed upon judgement **dated 23.04.2018 (Nagpur Bench) passed in Amol s/o Dudhram Barsagade v. State of Maharashtra, CrI. Appeal No.600 of 2017**, wherein it was observed that the statutory presumption under Section 29 of the POSCO Act would stand activated only if prosecution proves the*



foundational facts and then, even if statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or bring on record material to render the prosecution version highly improbable.

23. In view of the aforesaid judgment, we hold that the presumption under Section 29 of the POCSO Act, 2012 cannot be drawn on account of the lack of evidence.

24. Having considered the evidence which has come on record and after minutely examining the provisions of law applicable to the facts of the present case, we are of the firm view that the appellants cannot be said to be culpable of the offences alleged against them on the basis of the evidence placed before the Court. The alleged guilt of the appellants is not proved beyond reasonable doubt. Even, in the absence of the incomplete evidence, presumption under Section 29 of POCSO Act would not be applicable.

25. We also find that the investigation has not been conducted properly and the Investigation Officer has failed to perform his duty of collecting the entire evidence. Resultantly, we acquit the accused of the charges alleged against them and are directed to be released forthwith. The bail bonds shall stand accordingly discharged. The Appeal is allowed accordingly. The record of the case shall be sent back to the concerned trial Court.

Pending miscellaneous application(s), if any, shall stands disposed of accordingly.

(SANJAY VASHISTH)
JUDGE

(SANJEEV PRAKASH SHARMA)
JUDGE

13.12.2024
Rashmi

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