

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.885 of 2015**

Vikas Bhaskar Bhalerao]
Age: 20 years, Occ. Wireman,]
R/at: Labour Camp, Solasiya]
Society, Wagholi, Tal. Haveli]
Dist: Pune.]

(At present lodged in Pune]
Central Jail, Yerwada.)] Appellant

Vs.

The State of Maharashtra]
(At the instance of Lonikand]
Police Station, Dist. Pune.)] Respondent

....

Ms. Saili Dhuru i/b Kuldeep S. Patil, for the Appellant.

Mr. P.H. Gaikwad-Patil, A.PP, for Respondent-State.

....

**CORAM: PRITHVIRAJ K. CHAVAN, J.
RESERVED ON: 27th FEBRUARY, 2020.
PRONOUNCED ON : 18TH MARCH, 2020.**

JUDGMENT:

The appellant has been convicted by Additional Sessions Judge, Pune of the offence punishable under section 376 (2) (n) of the Indian Penal Code (for short 'I.P.C') and has been sentenced to suffer Rigorous Imprisonment for 10 years with fine of Rs.10,000/-, in default, Rigorous Imprisonment for six months.

2. The judgment came to be delivered on 19th January, 2015. Aggrieved by the said judgment, the appellant has preferred this appeal.

3. Complainant is the resident of Pune. In the month of November, 2012, he was residing with his wife and children including the prosecutrix who was aged about 12 to 13 years. The prosecutrix was residing with her father-complainant. She was educated up to 4th or 5th standard. The complainant has two more elder daughters. One of them is married with the appellant, meaning thereby, the prosecutrix is the sister-in-law of the appellant. They were residing in the neighbourhood. The prosecutrix often used to visit her sister's house. The complainant, his wife and son used to leave for work at 11.00 a.m. They are labourers. They used to return late at night. The prosecutrix used to remain alone at house and, therefore, used to visit her sister's house.

4. It is alleged that 15 days prior to lodging the report on 29th November, 2012, the prosecutrix had pain in her stomach. The complainant and others took her to the Doctor. It was informed by the prosecutrix, on being asked, that since last six to seven months, the appellant used to come to her house in the afternoon when she used to be alone and used to commit forcible sexual intercourse against her wish. Due to close relations and apprehension of defamation, the prosecutrix kept mum. It is also alleged that the appellant threatened her of dire consequences if she discloses about it.

5. The prosecutrix was taken to Shakuntala Women's Hospital, Airoli, Navi Mumbai by the complainant. After examination, Doctor advised the complainant to take her to the Government Hospital. It is alleged that the appellant continued forcible sexual intercourse with the prosecutrix for 6 to 7 months, repeatedly.

6. A report came to be lodged against the appellant with the Police. The appellant was arrested. His blood samples for the purpose of D.N.A test were obtained. Samples of the prosecutrix were collected. The samples were sent for chemical analysis. The statements of the witnesses were recorded.

7. After investigation, a charge-sheet was filed in the Court of J.M.F.C, Pune. The learned J.M.F.C committed the case to the Sessions Court. A charge was framed by the learned Additional Sessions Judge below **Exhibit 15**. It was explained to the appellant to which he pleaded not guilty and claimed a trial. His defence was simplicitor denial of the offence alleged. No defence evidence has been adduced by the appellant.

8. The learned Additional Sessions Judge, after recording the evidence of the witnesses, the complainant, prosecutrix and the Medical Officer as well as other witnesses, found that the appellant indeed

committed forcible sexual intercourse with the prosecutrix who is his sister-in-law and therefore, convicted and sentenced him as above.

9. At the outset, learned Counsel for the appellant emphasized on the fact that there is delay of 7 months in lodging an F.I.R. As per the medical evidence, prosecutrix's age was 14 to 15 years and therefore, in such an age, though she understood the consequences of the act but even then she continued having intercourse with the appellant without any resistance. If she was forcibly raped by the appellant, she ought not to have again visited the house of her sister. Her silence speaks volumes.

10. In support of his contention, the learned Counsel for the appellant relied on a judgment in case of ***State of Gujarat Vs. Jayantibhai Somabhai Khant reported in Criminal Appeal Nos. 224 and 863 of 2012.*** Finally, it is contended that the appellant has already undergone 8 years of sentence out of 10 years as imposed. It is submitted that he be released by awarding the sentence that has already been undergone.

11. On the other hand, learned A.P.P drew my attention to the testimonies of the witnesses and contended that the case has been proved beyond reasonable doubts which warrants no interference in the appeal.

12. Undisputedly, the prosecutrix is the sister-in-law of the appellant. It is also an undisputed fact that the prosecutrix was minor at the time of the incident. As per the evidence of P.W.4-Dr. Gopalkrishna Vinayak Paradkar, bone evaluation of the prosecutrix was done by the Head of the Department-Dr. D.V. Kulkarni who reported that bone age of the prosecutrix was 14 to 15 years. The report is proved at **Exhibit 34**. Since the Doctor has not been cross-examined, his evidence remained unchallenged. There is no challenge even to the testimony of P.W.2-complainant father of the prosecutrix. There is no dispute about the age of the prosecutrix.

13. The testimony of the prosecutrix reveals that her parents and brother used to leave their home in the morning and used to return late at night. Sister of the prosecutrix used to go out of the house for dropping the children to the School and bringing them back. By that time, the appellant used to remain in the house alone. This aspect is sufficient to show that the appellant used to take disadvantage of the situation by committing forcible sexual intercourse with the prosecutrix. It is also brought in the evidence of the prosecutrix that the appellant also used to go to her house during the absence of her parents. The victim testified that the appellant, at the first time, removed her clothes, removed his pant and

committed rape on her by inserting his penis into her vagina. After committing such acts for some period, the prosecutrix started experiencing pain in her stomach and, therefore, she revealed this fact to her parents.

14. PW.3-Dr. Bharati More examined the prosecutrix on 22nd November, 2012 at Shakuntala Womens Hospital, Airoli, Navi Mumbai. Mother of the prosecutrix gave the history. The prosecutrix had menstruation only once and thereafter for three to four months there was no menstruation. The prosecutrix was carrying 21 weeks pregnancy. Sonography report is proved at **Exhibit 30 and Exhibit 31** which confirmed the pregnancy. This aspect is also remained unchallenged.

15. It seems that defence of enmity has been raised in the statement under section 313 of the Cr. P.C. It has not been substantiated by any suggestion to the witnesses in their cross. Un-disputedly, it is pertinent to note that it is not the defence of the appellant that there was any intimacy between him and the prosecutrix or there was any love affair. It is also not the defence that the prosecutrix was consenting party. Since the prosecutrix is minor, consent is immaterial even if it was there.

16. Even though, the evidence of the prosecutrix coupled with the medical evidence is sufficient, to some extent to bring the case nearer to the

guilt of the appellant, yet, the D.N.A report tendered by the prosecution creates a doubt about the genuineness of the evidence of the prosecutrix.

17. Even though, the evidence of the prosecutrix coupled with the medical evidence to a certain extent, indicates the complicity of the appellant in the offence with which he is charged, it cannot be lost sight of the fact that the C.A report Exhibit 38 which is a DNA profile of the appellant and Exhibit 39 which is relating to interpretable profile of hair, skin and blood of the fetus, creates a doubt about the fact as to whether the appellant is the biological father of the fetus in view of the negative report of D.N.A. Medical analyzer's reports, unfortunately, are not positive in the sense that they do not support the prosecution case establishing paternity of the fetus *qua* the appellant when the case is based on the charge that due to forcible sexual intercourse by the appellant, the victim was impregnated. There is no investigation, much less truthful probe to unearth the fact as to who was then the biological father of the fetus? The question is whether the pregnancy is the result of the rape? Answer is obviously in the negative.

18. No doubt, this is a case of ravishing a minor girl by the appellant wherein evidence is required to be viewed from a different angle.

19. In view of the ratio laid down by the Division Bench of Gujarat High Court where it has been rightly observed that not only there was a delay of eight months for reporting the matter to the Police which remained explained but the fact that the prosecution has failed to establish the pregnancy of the prosecutrix due to the act of the appellant. It is also worthwhile to note as to how mother or sister of the prosecutrix could not notice or rather turned blind eye to the pregnancy of the prosecutrix for such a long period. This factor would indeed go to the root of the case. The fact that some other person was involved in making the prosecutrix pregnant would also require serious consideration. It is not the case of the prosecution that other than the alleged rape by the appellant, the prosecutrix voluntarily otherwise had sexual intercourse with any other man.

20. In the case of ***State of Gujarat Vs. Jayantibhai Somabhai Khant*** (supra), the Division Bench has observed in paragraphs 14,15 and 16 which read thus;

14. Answers to these questions cannot be found in DNA analysis. In any case, when as per the prosecution the child was born out of the pregnancy resulting from rape by the accused, this accusation of rape against the accused must succeed or fail on the basis of DNA analysis. We have reproduced the

conclusion of the DNA expert. The report indicates that Organic Extraction method was applied to extract DNA from samples A1, B1 and C1 which were the blood samples of the accused, the child and the prosecutrix respectively. These DNA extracts were subjected to comparison of fifteen STR loci. Further the male DNA profiling using Y filer were also matched between the accused and the child. The report was conclusive and unequivocally opined that the prosecutrix was the mother of the child but the accused was not his father.

15. Unfortunately, the trial Court brushed aside such emphatic findings of highly sophisticated scientific technology which would destroy the entire prosecution case by simply suggesting that mere negative report of DNA would not mean one should discard the oral testimony of the prosecutrix. This conclusion was not backed by any discussion on scientific methodology or judicial pronouncements.

16. The DNA technology over a period of time has made significant progress and achieved sophistication to the extent that the Courts world over with increasing level of confidence, have been relying on the DNA testing. Scientific literature suggests that subject to genuineness of the samples and the laboratory analysing the samples following scientific protocols, the DNA results would be

unquestionable and may lead conclusively either to involvement or exoneration of the accused in certain cases. In a recent judgment in case of State of Gujarat v. Mohan Hamir Gohil and others (Criminal Confirmation Case No.1/2012), Division Bench of this Court after referring to various authorities on DNA technology, different methodology used for testing and the scientific advancements made world over, noticed that over a period of time the Courts across the world including in India have been placing heavy reliance on DNA results. It was observed as under:

'33. From the above literature, it can be seen that over a period, the technology of DNA testing has made great strides and achieved sophistication leading to results which can often times be used either for inclusion or exclusion of the accused. DNA of a person is considered unique to himself (except in cases of identical twins) and can be traced from smallest quantity of blood, saliva, semen, root of hair, skin, nail and such like. Subject, of course, to the laboratory analyzing the sample following the scientific protocols, the DNA result becomes absolutely unquestionable.

34. Let us now see how the courts have viewed the advancement in DNA technology. Section 53A of the Criminal Procedure Code was introduced by

Amendment Act 25 of 2005 with effect from 25.3.2006. Sub-section (1) section 53A, provides that a when a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. Consent of the accused thus in giving blood sample, etc. is no longer necessary. Sub-section (2) of section 53A provides that such medical practitioner conducting the examination shall without delay, examine such person and prepare a report of his examination giving various details including the description of the material taken from the person of the accused for DNA profiling. This provision came up for consideration before the Supreme Court in the case of Krishan Kumar Malik v. State of Haryana, 2011 Cri.L.J. 4274, in which it was observed as under:

45. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of

cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.

In the case of Raghuvir Dessai v. State, 2007 Cri.L.J. 829, learned Single Judge of the Bombay High Court observed as under:

..... The clinching evidence has come from the Senior Scientific Officer Shri Sathian PW 15 who carried out the DNA test on the basis of the material forwarded to him and which was; collected by Dr. Sapeco/PW 5. He has confirmed that the accused is the contributor of the semen which was collected by Dr. Sapeco in the form of vaginal swab. DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the

innocent and helps to convict the guilty (See page 249 of Jhala and Rajus Medical Jurisprudence Sixth Edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape of the victim/PW11.

In the case of State (through C.B.I) v. Santosh Kumar Singh, 2007 Cri.L.J. 964, a Division Bench of the Delhi High Court observed as under:

Dr. A.K.Sharma has held that while conducting post-mortem on local physical examination of private parts, it was noticed that black, curly, non-matted pubic hair and hymen intact, no tearing present, admitting one finger only. He has also given his opinion that the deceased has not been subjected to sexual intercourse. However, it is the DNA test conducted on the vaginal swabs, vaginal slide and underwear of the deceased compared with the blood sample of the accused that the experts have come to the conclusion that there is sperm present in the vaginal swabs and the DNA of the sperm so found present, matches with DNA of the accused obtained from his blood sample.

48. The next question that engages us is whether the DNA test conducted was proper? It is in

evidence of Dr.Lalji that the method used and the test conducted in determining and arriving at the conclusion were done as per standard practice as also per scientific technology suitable for such tests. The trial Court has elaborately introduced its learning based on literature which, to a large extent, was never even put to the expert witness and even otherwise there is no positive evidence on record to show that the test so conducted by the experts were perverse and/or not in keeping with the standard scientific methodology. We may make useful reference to judgments of the Supreme Court in AIR 1954 SC 28 : (1954 Cri LJ 257); Sundar Lal v. State of Madhya Pradesh, AIR 1957 SC 589 : (1957 Cri LJ 889); Bhagwan Das v. State of Rajasthan wherein it has been held by the Supreme Court that findings of an expert witness can not be set aside by a Court by making a reference to some literature/book without confronting the expert with them and directing his opinion on it. In another case decided by the Honble Supreme Court in AIR 1982 SC 1157 : (1982 Cri LJ 1243): Gambhir v. State of Maharashtra, it was held that the Court should not usurp the function of an expert by arriving at its own conclusions contrary to the one given by the expert witness. There has been great effort made by counsel for the accused to discredit the test conducted as such by referring to either possibility

of contamination and/or with reference to snippets of replies given by the experts in cross-examination but we find that at no stage has any of the expert witness said that the tests conducted by them have given a wrong result or there is a possibility that the test so conducted by them would have given a wrong result. On the contrary, they have categorically ruled out any such possibility of contamination and/or erroneous results.

In the case of Thogorani v. State of Orissa, 2004 Cri. L.J. 4003, a Division Bench of the Orissa High Court observed as under:

11. Before answering the above contentions raised by the learned counsel for opponent No.3 it would be apt to note that the DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results in case in which the previous testing had been inconclusive. Moreover, DNA sampling may also impinge on familial privacy where information obtained from one person's sample provides information regarding his or her relatives.

In the case of Pantangi Balarama Venkata Ganesh v. State of A.P. 2003 Cri.L.J. 4508, a Division Bench of the Andhra Pradesh High Court described DNA as a perfect science and observed as under:

Thus, the evidence of DNA expert is admissible in evidence as it is a perfect science. In the cross-examination PW.46 has deposed as under:

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 million world population.

It means that DNA test gives the perfect identity. It is very advanced science.

In the case of Sajeera v. P.K.Salim, 2000 Cri. L. J. 1208, learned Single Judge of the Kerala High Court observed that DNA fingerprinting test has been much advanced and resorted by the courts of law to resolve the dispute regarding paternity of the child. It was observed as under:

15. It has been held in several cases that blood test is an important piece of evidence to determine the paternity of the child. Though by a blood test it

cannot positively establish the paternity of the child, it can certainly exclude certain individual as the father of the child. Therefore, while the negative finding in a blood test is definite, the positive finding only indicates a possibility. Now the DNA fingerprinting test has been much advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child. It is true that without the consent of the person blood test cannot be conducted and there is no law in India enabling the Court to compel any person to undergo blood test as available in England.

35. From the above, it can be seen that several courts in India over a period of time have accepted DNA analysis as totally reliable, of course, as long as, the laboratories employ sufficient skill and care in doing so. DNA analysis is employed by various countries for criminal investigation and prosecution. Various countries have created data banks of DNA profile of the persons who are already convicted which can be matched with DNA profile of the samples collected from crime scene. We are aware that creating such database has several legal and constitutional issues. We are, however, in the present case, neither required nor called upon to enter such arena. We are only trying to demonstrate effectiveness of the DNA technology and that when

properly done its results are infallible.

36. We are not unmindful of a decision of this Court in the case of Premjibhai Bachubhai Khasiya v. State of Gujarat, 2009 Cri. L.J. 2888 wherein a Division Bench of this Court observed that if the DNA report is the sole piece of evidence, even it is positive, cannot conclusively fix the identity of the miscreant, but if the report is negative, it would conclusively exonerate the accused from the involvement or charge. It was observed that science of DNA is at a developing stage and it would be risky to act solely on a positive DNA report. This decision was rendered more than four and half years back. Science and Technology has made much advancement, and world over DNA analysis technology is being relied upon with greater confidence and assurance. We do not think that the Indian Courts need to view the technology with distrust. Of course, subject to the laboratory following the usual protocols, DNA result can be of immense value to the investigators, prosecutors as well as courts in either including or excluding a person from involvement in a particular act. The said decision of this Court must be viewed in the background of the facts in which it was rendered. It was a case where the accused were charged with offence under Sections 363, 366, 376 read with

Section 114 of the Indian Penal Code. All important witnesses including the prosecutrix herself had turned hostile and did not support the prosecution. Despite which, the trial Court handed down conviction primarily on the basis of DNA report which opined that the DNA profiling of the foetus matched with that of the appellant original prime accused. It was in this background while reversing the conviction, the above noted observations were made. It can thus be seen that mere establishment of the identity of the father of the foetus in any case would not be sufficient to record conviction of the accused for rape and gang-rape under sections 363, 366 and 376 of the Indian Penal Code. The said decision, in our opinion, therefore, cannot be seen as either rejecting the reliability of the DNA technology or laying down any proposition that in every case the DNA result must be corroborated by independent evidence before the same could be relied upon”.

21. The decision of the Gujarat High Court is squarely applicable to the present case.

22. Taking into consideration the aforesaid aspects which the learned trial Court has failed to take into consideration, it would not be safe to subscribe to the findings returned by the said Court holding the

appellant guilty. The learned trial Court has failed to appreciate this vital aspect and lacunae in the prosecution case. Consequently, the impugned judgment and order needs to be quashed and set aside. Now, to the order.

: ORDER :

- [1] The appeal is allowed.
- [2] Impugned judgment and order of conviction passed by the Additional Sessions Judge Pune on 19th January, 2015 in Sessions Case No.333 of 2013 is quashed and set aside.
- [3] The appellant is acquitted of the offence under section 376 (2) (n) of the I.P.C.
- [4] The fine amount, if paid, be refunded to the appellant after the period of appeal.
- [5] The appellant be released forthwith if not required in other case.

[PRITHVIRAJ K. CHAVAN, J.]