

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

933 CRIMINAL APPEAL NO. 111 OF 2020

Dashrath S/o. Hiranman Johare,
Age-55 years, Occu- Agriculturist
R/o. Hangarga, Tq. Ahmedpur,
Dist. Latur

...APPELLANT
[Ori. Accused]

VERSUS

1. The State of Maharashtra,
2. Shivani Bapurao Johare,
Age-Major, Occupation-Household,
R/o. Hangarga, Tq. Ahmedpur,
Dist. Latur

...RESPONDENTS

Mr. Chandrakant P. Patil, Advocate for the appellant
Mrs. R. P. Gaur, APP for the respondent/State
Mr. Govind A. Kulkarni, Advocate for the respondent No.2

CORAM : SURENDRA P. TAVADE, J.

RESERVED ON : 18-08-2021

PRONOUNCED ON : 09-09-2021

JUDGMENT :

. Being aggrieved and dissatisfied with the impugned judgment and order dated 14-01-2020, passed by the Special Judge as per Protection of Children from Sexual Offences Act, 2012 and Additional Sessions Judge, Ahmedpur, Dist. Latur in Special (POCSO) Case No. 06 of 2018, whereby the the appellant was convicted for the offences punishable under Section 6 of the

Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') and sentenced to suffer rigorous imprisonment for ten years and pay fine of Rs. 10,000/-, in default of payment, the appellant was directed to suffer simple imprisonment for one year and in view of Section 42 of the POCSO Act no separate sentence was awarded to the accused for the offence punishable under Section 376 of the Indian Penal Code (hereinafter referred to as the 'IPC') and offence punishable under Section 4 of the POCSO Act, the appellant has preferred this appeal.

2. The facts giving rise to this appeal, can be summarized as under:-

a. The informant is the mother of victim who lodged the FIR on 23-06-2018. It is alleged in the FIR that the informant is blind. She resides alongwith her husband, son and victim who is deaf and dumb. She is having son Dhondiba who is also blind. On the day of lodging the FIR, the victim was aged about 16 years. She studied up to 7th std. in the deaf and dumb school. On 10-06-2018, the informant alongwith her brother-in-law Dashrath (appellant) and relatives performed the marriage of victim with one Maroti Bandewad resident of Vijay Nagar, Tq. Kandhar, Dist. Nanded. After the marriage, the victim went to her matrimonial house. About two days after the marriage, the victim suffered stomach ache. The husband of victim felt that the victim was carrying pregnancy, he

brought the victim to the house of the informant. On enquiry by the informant, the victim disclosed that the appellant committed rape on her in the month of February, 2018 and she also disclosed that the appellant threatened her not to disclose the incident to anybody. Hence, she did not disclose the said incident to anybody including the informant. On the basis of said information the informant went to Ahmedpur Police Station and lodged the report against the appellant.

b. The victim was referred to medical examination where she was examined by Dr. Manisha Pole (PW-2). On medical examination Dr. Manisha Pole (PW-2) came to a conclusion that the victim was carrying pregnancy of 24-26 weeks. Hence, the victim was referred for sonography. Accordingly, Dr. Pranita Somani (PW-5) carried out obstetric ultra sound examination of uterus. On the basis of medical examination, the Investigating Officer recorded the statements of witnesses. The appellant came to be arrested. He was referred to medical examination. Dr. Mahesh Pawar (PW-6) examined the appellant and held that the appellant was potent and is able to perform the sexual intercourse. The Investigating Officer also visited the scene of offence and prepared the panchanama. During the pendency of the investigation the victim delivered a female child on 02-10-2018. Hence, DNA sample of victim was collected. Similarly, the blood sample of accused was also collected and sent it to DNA examination. Forensic Lab, Aurangabad opined that the victim is biological mother of female child born to her. But

the accused is excluded to be biological father of the said child born to victim. After the conclusion of the investigation, the charge-sheet came to be filed against the present appellant. On appearance of the appellant, the charge came to be framed against the appellant at Exh.10. The appellant pleaded not guilty and claimed to be tried. The defence of the appellant is of total denial. According to him, due to land dispute with the informant, he was falsely implicated. To prove the charge against the appellant, the prosecution has relied on the evidence as many as eight witnesses. The appellant did not lead any oral evidence in support of his defence.

c. On going through the evidence on record, the trial court held the appellant guilty for the offences punishable under Sections 376 of the IPC and Sections 4 and 6 of the POCSO Act and sentenced him as mentioned above.

3. Heard learned counsel for the appellant, learned APP for the respondent/State and learned counsel for the respondent No.2.

4. Learned counsel for the appellant submits that the prosecution has failed to establish the age of victim. He also submits that on the basis of negative report of DNA, the trial court should have exonerated the appellant from the charge leveled against him. It is also contended that there is delay in lodging the FIR which is not explained. Said aspect is also not properly considered by the trial court. It is contended that due to land

dispute he was falsely implicated by the informant. The trial court has not considered the evidence on record and defence of the appellant in proper perspective and came to a wrong conclusion. Hence, he prays for acquittal of the appellant.

5. On the other hand learned APP submits that the prosecution has rightly proved the age of minority of the victim by leading cogent evidence. He also submits that in the DNA report the appellant is excluded from the paternity of child born to the victim. But, still the evidence of victim is sufficient to prove the charge beyond the reasonable doubt. Therefore, the trial court rightly accepted the evidence of victim alongwith the other evidence led on record. It is also submitted that except the suggestion nothing is brought on record to establish the enmity between the appellant and family of the informant. The trial court has rightly rejected the theory of defence and accepted the evidence of victim. Hence, the findings of trial court are proper and correct. There is no need to interfere with the judgment and order passed by the trial court. Hence, the learned APP prays for dismissal of appeal.

6. The appellant has raised the objection regarding the age of the victim. It was expected from the prosecution to establish that at the time of incident the victim was below the age of 18 years. To prove the said fact the prosecution has relied on the evidence of victim (PW-3), her mother (PW-4) and Headmaster of school where the victim had taken education. The evidence of victim was

recorded through interpreter Balaji Somwanshi. He deposed that the victim was unable to speak but, she was understanding signs made by him. The interpreter asked the questions to the victim and accordingly she gave reply either by sign or by writing on paper. The victim deposed that her age was seven years. But, subsequently in cross-examination correct age of the victim is brought on record. The mother of victim (PW-4) deposed that at the time of incident the victim was aged about 16 years. She also deposed that in the year 2018 she performed marriage of victim with one Maroti Bandewad. In the cross-examination she admits that at the time of marriage, the victim was below the age of 18 years. It is brought on record that marriage of victim was performed on 10-06-2018. If the suggestion of defence is considered then it can be said that on 10-06-2018 the victim was below the age of 18 years. So, implicitly the defence has accepted that at the time of alleged incident the victim was below the age of 18 years.

7. Be that as it may, the prosecution has examined Headmaster of Sant Gadgebaba Niwasi Karnabadhir Vidyalaya, Hadolati namely; Mr. Rajkumar Sheshrao Gawale (PW-8). He deposed that since 2008 he is working as a Headmaster of Sant Gadgebaba Niwasi Karnabadhir Vidyalaya, Hadolati. Victim was the student of his school. She studied in the school from 1st to 4th std. He produced on record the original school leaving certificate (Exh.60) and extract of General Register (Exh.61) maintained by

the school. In General Register of student there is entry at Sr. No. 54 in the name of victim. Copy of said entry is taken on record. The copy of original register tallied with the original register and after verification the said original register was returned to the witness. The witness has also produced on record the school leaving certificate of the victim, wherein the date of birth was shown as 10-11-2001. Similarly, the same date of birth was mentioned in the general register. So, on the basis of entry in the General Register and school leaving certificate, the prosecution has established that the victim was born on 10-11-2001. The alleged incident had taken place in the month of February, 2018. So, it is established that at the time of alleged incident the victim was below the age of 18 years.

8. On the basis of evidence of the victim, her mother and headmaster, learned APP has relied on the ratio laid down in the case of Jarnail Singh Vs State of Haryana reported in MANU/SC/0626/2013, wherein the Apex Court held that:

"Even though Rule 12 is strictly applicable only to determine the age of child in conflict with law, we are of the view that aforesaid statutory provisions should be the basis for determining the age even for a child who is a victim of crime. For, in our view there is any hardly any difference in so far as minority is concerned, between a child in conflict with law a child

who is a victim of crime.”

9. Thus, in view of above observation of the Apex Court the procedure to determine the age of child in conflict with law can be used to determine the age of child victim. The Juvenile Justice (Care and Protection of Children) Act, 2015 came into force w.e.f. 15-01-2016. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 reads as under:-

94. *Presumption and determination of age:*

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

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(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the committee or the Board.

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought it shall, for the purpose of this Act, be deemed to be the true age of that person.

10. In view of the provision of Section 94(2)(i) of the Juvenile Justice (Care and Protection of Children) Act, 2015, the date of birth mentioned in the school leaving certificate issued by the school or the matriculation or equivalent certificate from the concerned examination can be used to determine the age of children victim. As per Section 94(2) of Juvenile Justice (Care and

Protection of Children) Act, 2015 in absence thereof, the documents mentioned in clause 2(i) as above, the birth certificate given by Corporation or Municipality or Panchayat can be used to determine the age of victim.

11. In the present case, mother of the victim has deposed that victim was aged about 16 years at the time of incident. Similarly, by way of suggestion defence has suggested that at the time of marriage of victim, she was below the age of 18 years. Therefore, the defence has also conceded that at the time of marriage, the victim was minor. Admittedly, the alleged incident had taken place prior to the marriage of the victim. Therefore, there is sufficient evidence on record to hold that at the time of alleged incident the victim was below the age of 18 years.

12. Coming back to the evidence of victim (PW-3), she deposed that she conceived pregnancy from the appellant. She identified the appellant in the court. Admittedly, the appellant is uncle of the victim namely father's brother. She further deposed that the appellant committed sexual intercourse with her for ten times. But, the said fact is brought on record as omission. The Investigating Officer has categorically admitted that the victim did not state before her that the appellant committed rape on her for ten times. But, the facts remains on record that the victim categorically stated that the appellant committed sexual intercourse with her against her wish. She further deposed that the appellant

used to come under the influence of liquor and used to commit rape on her. Statement of victim was also recorded under Section 164 of the Code of Criminal Procedure wherein also she has stated that the appellant committed rape on her and he used to threaten her to kill if she discloses the incident to anybody. The victim has substantiated the contents of her statement recorded under Section 134 of Cr.P.C. The victim was cross-examined by the defence but except suggestion nothing has come on record. It was suggested to the victim that due to property dispute he was falsely implicated. But, the said suggestion is flatly refused by the victim.

13. The prosecution has also relied on the evidence of informant who is mother of the victim (PW-4). She deposed that she performed marriage of victim with Maroti Bandewad. The victim had been to matrimonial house for cohabitation. But, she was suffering pains in her stomach. Therefore, her husband took her to hospital. On examination, doctor opined that the victim was carrying pregnancy of four and half months. Therefore, the husband of victim brought her to her paternal house. She further deposed that she made enquiry with the victim as to how she conceived pregnancy. The victim disclosed that she conceived pregnancy from the appellant and she pointed out finger towards the house of the accused. She further deposed that the victim disclosed her that in the month of February, 2018 the appellant committed rape on her. The house of appellant is abutting to house of victim. On the basis of said information, the informant lodged the FIR (Exh.3). In the

cross-examination the informant admits that she is not able to tell exact date of marriage of victim. She admits that nobody told her to lodge the FIR against the appellant. It was suggested to the informant that the appellant purchased 13-Guntha of land from her husband. But, said suggestion is refuted by the informant. It is also suggested that in order to get the possession of the land sold to the appellant, the false FIR came to be registered against the appellant. Said suggestion is also refuted by the informant. It is also suggested that the victim had love affair with one of the boy from village and she has conceived pregnancy from said boy. Said suggestion is refuted by the informant.

14. On going through the evidence of the informant, it appears that she got information of alleged incident from the victim and on the basis of same, she lodged the FIR. It is also observed that the victim has categorically stated that the appellant committed sexual intercourse with her without her consent and also threatened her. Therefore, she did not disclose the incident of rape to anybody till she was examined by the Medical Officer. On the basis of evidence of victim and the informant, learned counsel for the appellant submits that there is delay in lodging the FIR which is not at all explained by the prosecution.

15. On perusal of FIR, it appears that marriage of victim was performed on 10-06-2018. Thereafter, she went to her matrimonial house. Within a week she was suffering from stomach

ache and hence, her husband brought her to parental house. On enquiry, the victim disclosed that she conceived pregnancy from the appellant. Therefore, FIR came to be registered on the day on which the victim returned back to her paternal house. So, it can be said that the informant was not aware of pregnancy of victim. She came to know from the husband of victim that the victim was carrying pregnancy. So, naturally she made enquiry with the victim who disclosed the involvement of the appellant. The day on which the informant came to know about the alleged act of appellant, she lodged the report. There is no delay in lodging the FIR.

16. Learned APP submits that the victim is deaf and dumb. The informant is blind lady. The appellant is real uncle of the victim. Therefore, in view of the said facts, it can be said that the reputation and the honour of the family was at stake. Similarly, the victim was threatened by the appellant. Therefore, she did not disclose the incident to anybody till she was examined by the Medical Officer. Therefore, prosecution has explained the delay in lodging the FIR. He placed reliance on the judgment in the case of Satpal Singh Vs State of Haryana MANU/SC/0537/2010, wherein the Apex Court held that ;

“So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition

bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR”

17. In view of the observations of the Apex Court the delay in lodging the FIR in sexual offence has to be considered with different yardstick. According to the informant the incident of rape was committed in the month of February, 2018. Neither informant nor the victim has given exact day, date and month of the alleged incident. But, it is the fact that the informant lodged the FIR on 23-06-2018. In the FIR, it is made clear that as soon as the victim returned home, the informant made enquiry with her regarding her pregnancy, victim disclosed the involvement of appellant in alleged rape and therefore, immediately FIR came to be lodged. So, there is no chance of concoction and embellishment on account of delay in lodging the FIR. The informant was diligent to lodge the FIR as soon as she got the information of the offence from the victim. Therefore, so called delay is not coming in the way of the prosecution.

18. Upon lodging the FIR, the victim was referred to medical examination. Dr. Manisha Pole (PW-2) was working as a Medical Officer. She deposed that on 23-06-2018 the victim was brought by the Ahmedpur Police Station for medical examination alongwith letter dated 23-06-2018 (Exh.32). She examined the victim. She had done urine pregnancy test of the victim. The urine

pregnancy test of the victim was positive. Hence, she referred the victim to Government Medical College and Hospital at Latur. She gave her report (Exh.33) regarding pregnancy of victim. In view of the report, victim was taken to the Government Medical College and Hospital at Latur. On 25-06-2018, Dr. Pranita Somani (PW-5) examined the victim. She has done obstetric ultra sound examination of victim. She found that the victim was carrying pregnancy of 24 to 26 weeks. She advised that the pregnancy be continued. Accordingly, she prepared report (Exh.44). The sonography of the victim was done by Radiologist Dr. Kanade. He prepared sonography report which is part and parcel of her report (Exh.44). The evidence of Dr. Manisha Pole (PW-2) and Dr. Pranita Somani (PW-5) was not at all challenged by the appellant. So, it is established that on examination of victim, the Medical Officer found her carrying pregnancy of 24 to 26 weeks. Admittedly, the victim delivered a female child on 02-10-2018. The Investigating Officer Sneha Pimparkhede referred the victim to the Government Medical College and Hospital at Latur for DNA examination on 26-06-2018. Accordingly, the Medical Officer took DNA sample of the victim.

19. It is come in the evidence of Investigating Officer (PW-7) that she arrested the appellant on 23-06-2018. He was referred to medical examination. Dr. Mahesh Pawar (PW-6) examined the appellant on 27-06-2018. On examination of appellant the Medical Officer opined as under:

1. *There is nothing suggestive of impotency.*

2. *There is no evidence of any external injury on the person of patient.*
3. *There are no evidence of external genital injury.*
4. *Possibility of remote sexual intercourse cannot be denied.*

. He collected blood samples of appellant for forensic examination. He issued certificate (Exh.47). He opined that the appellant is potent and able to perform the sexual intercourse. So, it is also not the defence of the appellant that he is impotent. So, it is proved that the appellant was potent and able to perform the sexual intercourse.

20. The samples of the appellant and the victim were sent to Forensic Lab, Aurangabad by letter dated 28-06-2018 (Exh.52). Forensic Lab, Aurangabad on analysis sent its report (Exh.57) to the Investigating Officer wherein it was opined that the victim is concluded to be biological mother of the child born to her. It is also opined that the appellant is excluded to be biological father of the child born to the victim. On the basis of DNA report the learned counsel for the appellant has vehemently submits that the prosecution has failed to establish the paternity of child of the victim. He also submits that there is no clinching evidence against the appellant that he committed rape due to which the victim gave birth to female child. He further submits that the appellant is excluded to be a biological father of the child born to the victim. He also submits that by accepting the DNA report the trial court should

have acquitted the appellant from the charges leveled against him. To substantiate his point, he relied on the ratio laid down in the case of State of Gujrat Vs Jayantibhai Somabhai Khant in Criminal Appeal Nos. 224 of 2012 alongwith 863 of 2012, wherein the Division Bench of Gujrat High Court held as under;

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 if 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 a 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 gangrape under section 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. On the other hand learned APP submits that DNA report is just corroborating piece of evidence to the testimony of the victim. Even though the DNA report is negative, it can be ignored and evidence of victim can be relied upon. To substantiate his point he relied on the ratio laid down in the case of Sunil Vs State of Madhya Pradesh reported in (2017) 4 SCC 393 dated 08-04-2016 wherein, the Apex Court held as under:

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 doubt. Reliance in this regard has been placed on the decision of this court in *Krishan Kumar Malik Vs 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.

22. In the case of *State of Gujrat Vs Jayantibhai Somabhai Khant in criminal appeal No. 224 of 2012* the prosecutrix and her parents did not support the case of prosecution. But, the accused was convicted on the basis of DNA report. In view of the said facts, it was held therein that mere establishment of identity of father of foetus in any case would not sufficient to record the conviction of

the accused for rape and gang-rape under Section 363, 366 and 376 of the Indian Penal Code. But, in the present case, the victim and informant have supported the case of the prosecution. Evidence of victim was supported by the medical evidence. Therefore, in view of the ratio laid down in the case of Sunil (supra) it can be said that the other material brought on record by the prosecution can be considered. Though, the DNA report exonerated the appellant, but there is sufficient evidence on record to hold that the appellant had committed rape on victim. It is pertinent to note here that the marriage of the victim was solemnized on 10-06-2018 the victim had gone for cohabitation with her husband at her matrimonial home. On the next day the husband of the victim noticed that the victim was carrying pregnancy. Therefore, she was sent to parental house on 23-06-2018 and on the same day, in pursuance of information given by the victim, her mother lodged the FIR. The prosecution has proved that the victim is a child within the meaning of Section 2(d) of the POCSO Act. Her evidence is unblemished. Therefore, there is no need to discard it.

23. In view of the evidence of victim, her mother and medical evidence, the prosecution has proved the offence punishable under Sections 4 and 6 of the POCSO Act and offence under Section 376 of the IPC. The trial court has rightly convicted the appellant for the offences punishable under Sections 6 of the POCSO Act and in view of the Section 42 of the POCSO Act no separate sentence is awarded to the appellant for the offences

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punishable under Section 376 of the IPC and Section 4 of the POCSO Act. Said findings are proper and correct. There is no need to interfere with the impugned judgment and order dated 14-01-2020 passed by the Special Judge and Additional Sessions Judge, Ahmedpur, Dist. Latur in Special (POCSO) Case No. 06 of 2018. Therefore, the appeal has no merit. Hence, the criminal appeal stands dismissed.

[SURENDRA P. TAVADE, J.]

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