

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 937 / 2018

Shri. Rajkishorsingh Ranvirsing Tomar)
Age : 36 years, Occu: Mechanic)
R/o.-Om Sai Ram Chawl, Room No.2)
Guralvalipada, Khadavli Road, Kalyan)
Dist. Thane, Native- Kankalipura)
At Lavedi, Tal & Dist.Itawa, U.P.
(Presently detained Nasik Prison, Nasik)

....Appellant
(Orig.Accused)

V/s.

The State of Maharashtra
Through Kalyan Taluka Police Station
C.R.No.I-113/2014

....Respondent

* * * *

Ms. Anjali Patil a/w. Mr. Arun Rajput, Advocate for the
applicant.

Mr. Yogesh Dabke, APP for State.

CORAM : SANDEEP K. SHINDE, J.
JUDGMENT RESERVED ON : 3RD MARCH, 2021.
JUDGMENT PRONOUNCED ON : 9TH MARCH, 2021.

JUDGMENT :

1. The questions that arise for consideration in this
Appeal are,

(i) Whether the trial Court was justified in
convicting and sentencing the appellant for the
offence punishable under Sections 376, 506 of the

Indian Penal Code (“IPC” for short) and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act” for short) for rape of his stepdaughter, when mother of the victim had turn hostile and the conviction was passed on the basis of scientific evidence in the form of Deoxyribonucleic Acid (DNA) Report ?;

(ii) Whether the learned trial Judge was justified in admitting the Report of Assistant Director of State Forensic Laboratory/Scientific Expert under Section 293 of the Criminal Procedure Code, 1973 (“Cr.P.C.” for short), in evidence though it was not admitted by the defence ?, and

(iii) Whether the trial Court was required to summon the Scientific Expert, before admitting his report in terms of provisions of Section 293 of the Cr.P.C. ?”

2. Before, adverting to the first question, I would prefer to answer the second and third question. Section 293 of Cr.P.C. provides that the report of the scientific expert may be used in evidence in any enquiry, trial or order and other proceedings of the Court. The provisions of the Section are intended to save time and avoid needless examination of experts mentioned therein, unless, the Court found it necessary to examine the expert or when the accused requested for examination of the expert. If the Court does not find it necessary to analyse the Chemical Examiner or any other expert mentioned in Sub-Section (4) of Section 293 and accused does not make any prayer to summon and examine the expert, the report can be used in evidence without examination of the expert.

3. In the case of **Dasu and Ors. V/s. State of Maharashtra, reported in 1985 Cri.L.J. 1933**, the Division Bench of this Court, while dealing with the similar issue has held in para-25 as under :

“25. The learned Counsel for the accused No. 3, Mr. Nair, submits that the learned trial Judge was not right in admitting the report of the Chemical Analyser in evidence, as he had taken objection to its validity and admissibility. According to him, the learned trial Judge before admitting on record the report of the Chemical Analyser and using it in this case should have summoned the concerned Chemical Analyser and should have examined him touching the report Ex. 27 made by him. We are unable to agree with the learned Counsel. Section 293 Cr. P.C. reads as follows:

- 293.(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.
- (2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.
- (3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed Him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.
- (4) This section applies to the following Government scientific experts, namely:
- (a) any Chemical Examiner or Assistant Chemical Examiner to Government;
 - (b) the Chief Inspector of Explosives;
 - (c) the Director of the Finger Print Bureau;
 - (d) the Director, Haffkeine Institute, Bombay;
 - (e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
 - (f) the Serologist to the Government.

It is true that when the report of the Chemical Analyser was sought to be admitted on record the learned Counsel for the accused No. 3, Mr. Nair, raised objection to its admission on record. Beyond putting an objection for its admission on

record the learned Counsel has done nothing in the matter. He never moved the trial Court to summon the concerned Chemical Analyser. He also did not at any time demonstrate in what respect the report was deficient and necessitated the calling of the Chemical Analyser before admitting it in evidence. In the absence of any request from the learned Counsel for summoning the Chemical Analyser and also in the absence of his showing in what respect the report was deficient and needed further elucidation before admitting it in evidence, in our opinion the learned trial Judge was right in admitting the report of the Chemical Analyser in evidence and in using it as evidence in this case.”

4. To conclude on this aspect, it must therefore be held that, it is not incumbent on the prosecution to examine, unless the Court is moved by the accused for issuing summon to expert or when Court, may in the circumstances may deem just and proper to summon the expert. Therefore, to be stated that the provisions of Section 293 are not controlled or regulated by the provisions under Section 294 of the Code.

5. Herein, DNA report was not admitted by the defence. However, there was no application moved by the accused for summoning the expert nor accused demonstrated in what respect, the report was deficient so as to summon the expert before admitting the DNA report in evidence. In the circumstances, the objection raised by the learned Counsel for the appellant, that the trial Court ought not to have

admitted the DNA Report in evidence without first examining the expert, is rejected. The second and third questions are answered accordingly.

6. Briefly stated, the prosecution case is, that victim's father, Rajendra Behenwal died in the year 2000 when she was just two to three years old and thereafter she was residing with her siblings at maternal grandfather's house at Shahad, District-Thane. Her mother remarried in or around 2010 and since 2012 the victim started living with her mother, sisters, stepfather (accused) and stepbrother at Titwala. At the material time, she was studying in the seventh standard. It is unfolded in the evidence that, she was born on 27th June, 2000. Her mother was a domestic help and used to leave the house in the morning at 9:00 a.m and return at around 6.30 p.m. Victim would depose that, while she was alone at home, her stepfather forced sexual assault, on her, for multiple times, which had not been disclosed either to her mother or to her schoolmates though she was attending the school. When she missed her menses, she was examined by Doctor who told to her mother, that

the victim was four months pregnant. The victim was admitted in KEM Hospital. However, before terminating the pregnancy, victim's mother lodged the report on 17th April, 2014 at Kalyan Taluka Police Station, whereupon Crime under Section 376 of the IPC Sections 3 and 4 of the of the POCSO Act, was registered against an 'unknown person'. Victim was admitted in the hospital on 17th April, 2014 and discharged on 22nd April, 2014. Dr. Hemangi Choudhary-P.W.3, after examining the victim, opined that, victim was 16 to 17.4 weeks pregnant. The fetus was terminated on 21st April, 2014. Testimony of Dr. Hemangi Choudhary reveals that, forensic staff had collected blood sample of victim and captured fetal cells, for DNA analysis. Dr. Choudhary, opined that, in view of the x-ray reports at the material time, the age of the victim was 14 years.

7. After the victim was discharged from the hospital on 26th April, 2014, the victim's statement was recorded. As well, supplementary statement of her mother was also recorded. Victim and her mother were examined as P.W.2 and P.W.1 respectively. Indeed, the FIR lodged on 17th

April, 2014 was against a 'unknown person', in as much as, the victim revealed to mother, that around the month of December, 2013 when she was returning from school, on the way, one rickshaw driver made her to sit in the rickshaw and offered to drink water, whereafter she was sexually assaulted by the rickshaw driver. Victim did not divulge better particulars. It seems that, she had disclosed the name of Manish @ Manoj Rathod, her schoolmate, a person who forced sexual assault on her. Investigation revealed, Manish @ Manoj Rathod was a fake name and no such person was studying in the school, which the victim was attending. Therefore, to be stated that, the victim initially tried her level best to hide the identity of the assailant. However, on 26th April, 2014 she revealed that, her stepfather had repeatedly forced a sexual assault on her, when nobody was at home. On these revelations, police arrested the accused, whereafter he was subjected to test as required under Section 53-A of the Criminal Procedure Code. Supplementary statement of mother was also recorded on the same day.

8. Be that as it may, regrettably, mother turned unfriendly to the prosecution. However, the victim in her testimony narrated in detail, the incident and though she was subjected to searching cross-examination, defence could not elicit any material to disbelieve her version. Her version, was cogent, consistent and trustworthy. What appears from her evidence is that, at the material time, the victim was hardly 14 years old. She had lost her father when she was two or three years old. Since after the death of her father, she was living with her maternal grandfather atleast upto 2010-11. He mother remarried, whereafter she started living with her mother and stepfather. Her stepfather was a mechanic. Thus, to be inferred from these circumstances that, she was living in a very poor state and at the mercy of her mother and stepfather. She testified that, she did not reveal the incident to anyone, as she was apprehensive and on brink of loosing the shelter. Infact, she testified, her stepfather had threatened her of dire consequences, if she would disclose the incident to anyone. It is on 26th April 2014, when her statement was recorded, she divulged the unfortunate

incident to the police, whereafter the accused was arrested. She was examined as a witness in December, 2015 and her testimony suggest that since after lodging the complaint, she was living in shelter-home and preferred not to live with her mother. This fact, clearly indicates that, before recording her statement, she was under the influence of mother and stepfather. In the circumstances, it can be said that, she was prevented from disclosing the incident, at the first instance, due to compelling circumstances, stated above. In my view, victim's conduct was not unnatural at all, and therefore simply because she did not disclose the name of her stepfather initially, that itself was not sufficient to disbelieve her, when other evidence corroborates her version.

9. The trial Court believed the testimony of the victim and also relied on the DNA Report. The Assistant Director, Forensic Science Laboratory opined that, "Rajkishor Ranvir Singh Tomar of F.S.L. ML. Case No. DNA-646/14 and victim are concluded, to be the biological parents of the DNA of ex2 sternum bone."

10. I have concluded hereinabove, that the report was admissible and has been correctly admitted by the learned trial Court under Section 293 of the Criminal Procedure Code. At the cost of repetition, it may be stated that, though this report was not admitted by the accused, the defence has not pointed out any deficiency in the report by moving the Court either for summoning the Forensic Expert or otherwise. In the circumstances, the report of an Expert has been correctly relied on by the learned trial Judge to convict the accused of the charge and sexual assault on the minor victim.

11. In the present proceedings, the learned Counsel for the appellant assailed the report on the ground that, there is no quality assurance of blood sampling of accused, victim and fetus and in absence of such evidence, tampering of samples cannot be ruled out. Before dealing with the objections and the contentions raised by the Counsel for the appellant in respect of the DNA test report, it may be stated that in the case of **Mukesh and Anr. V/s. State of (NCT**

of Delhi) and Others, 2017 (6) SCC 1, Hon'ble Apex Court, has held thus :

“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 profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.”

. In paragraph-228, it was held thus :

“228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.”

11. From the aforesaid authorities, the law laid down by the Apex Court relating to the reliability of the DNA test is that, conviction can be based on the DNA test report subject to requirement that, sampling the blood has to be proper and there should not be material indicating any tampering of samples. In this case, the evidence shows, soonafter the arrest, the Investigating Officer addressed a letter to the Medical Officer, KEM Hospital and requested for preserving the fetal cells of the victim for DNA profiling. On 18th April, 2014, grouping of victim's blood was done by pathologists. On 21st April, 2014 Dr. Hemangi Choudhary aborted the fetus and product of conception for DNA analysis were collected and preserved as could be seen from a case-paper in the handwriting of Dr. Shashank Tyagi. On the same day, Inspector attached to Kalyan Taluka Police Station, requested the Medical Officer, KEM Hospital to preserve and handover the blood samples and fetal cells to Constable, Talmaale and on the same day, the samples were forwarded to the Forensic Lab. Likewise, after arrest, the

accused blood samples were taken for DNA checking on 30th April, 2014 and on the same day, the blood samples of the accused were forwarded to the Forensic Laboratory. The chronology of the events as narrated relating to the collection of blood samples and its grouping shows, it was done properly and the samples were forwarded to the Forensic Laboratory. Infact, though Dr. Hemangi Choudhary and Dr. Manoj Parchake, Assistant Professor, K.E.M. Hospital, Forensic Medicines, were cross-examined, but were not suggested that grouping was improper or otherwise. Likewise, the defence has not suggested the Investigating Officer, that the samples forwarded to the Forensic Science Laboratory were not intact and/or were tampered. Thus, in consideration of the evidence on record, in my view, the sampling was done properly and there is no material indicating any tampering of samples. Thus, in my view, the DNA report has been rightly relied on by the learned trial Judge and it cannot be faulted with.

12. Herein, though victim's mother has turned unfriendly to prosecution, the evidence of the victim was

found cogent, consistent and trustworthy. I have no reason to disbelieve the victim's evidence. Though she was cross-examined, her evidence has not shaken at all. Thus, the impugned conviction is founded on cogent, reliable and acceptable evidence.

13. Sections 29 and 30 of the POCSO Act, provides for presumption of certain offences and presumption of culpable mental state. It provides that, in prosecution for offences under Sections 3, 5, 7 and 9 of the Act, the Court shall presume existence of culpable mental state and it shall be the defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Section 30 provides that, a fact is said to be proved only when the Court believes to exist beyond reasonable and not simply when its existence is established by preponderance of probability. In this case, the DNA test report and the evidence of the victim has proved beyond reasonable doubt, the *mensrea* on the part of the accused and further the evidence does not show the defence has rebutted the presumption at all.

14. The evidence and the material on record, has proved, though victim's mother was hostile to prosecution, the charge has been conclusively proved beyond reasonable doubt against the appellant and the trial Court was justified in convicting and sentencing the appellant under the provisions of the Indian Penal Code and POCSO Act for having committed rape on stepdaughter.

15. Therefore, the Appeal is dismissed and the judgment and order passed by the Learned Special Judge, Kalyan in Atro. Special Case No.78/2014 convicting the accused under Sections 376 & 506 of the IPC and Sections 4 and 6 of the POCSO Act, 2012 is confirmed. The Appeal stands disposed of accordingly.

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(SANDEEP K . SHINDE, J.)