

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.202/2019

Chandrashekhar s/o Ramdas Tabhane,
R/o Bapu Nagar, Godhani Road, Zingabai Takli,
Nagpur.

... Appellant.

VERSUS

State of Maharashtra,
through Station Officer, Police Station Mankapur,
Nagpur

... Respondent

Mrs. Sunita Paul, Advocate for appellant.
Mr. V.A. Thakre, APP for respondent.

**CORAM: M.S. SONAK & PUSHPA V. GANEDIWALA, JJ.
DATE: 24-11-2021.**

ORAL JUDGMENT : (Per: M.S. Sonak, J.)

Heard Mrs. Paul, learned Counsel appointed under the Legal Aid Scheme to appear on behalf of the appellant, and Mr. Thakre learned APP for the respondent.

2. This appeal is directed against the judgment and order dated 27-07-2018 passed by the designated Judge POCSO Act and Additional Sessions Judge-2, Nagpur in Special Case Child Prot. No.156/2016 convicting the appellant for offenses punishable under Section 376 (2)(f),(i) and (n) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO

Act) and sentencing the appellant to suffer rigorous imprisonment for life and to pay a fine of Rs. 60,000/- and in default to undergo rigorous imprisonment for six months.

3. The case of the prosecution is that the appellant raped his minor stepdaughter then aged 14 years as a result of which she was pregnant and delivered a female child. The forensic/medical evidence established that the appellant and his minor daughter were the biological parents of this child. Based on all this, the charge was framed against the appellant which he denied. The prosecution examined in all 11 witnesses. The appellant was questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.). He denied the charge and even submitted a written statement suggesting that the victim had been to her maternal uncle's place and the possibility of some other person being the father of the newly born child cannot be ruled out. Despite the opportunity, the appellant did not lead any defense evidence. Ultimately, learned designated Court by the impugned judgment and order has convicted and sentenced the appellant as aforesaid. Hence, the present appeal.

4. Mrs. Paul, learned Counsel for the appellant submitted that there was no cogent evidence that the victim was a child within the meaning of Section 2(b) of the POCSO Act. She submitted that even

though the appellant may not have challenged the evidence regards the age of the victim, the Court was duty-bound to determine this important issue. She submitted that the prosecution did not examine the Headmaster of the school in which the victim was studying. Therefore, there is no legal evidence about the correct age of the victim. Mrs. Paul learned Counsel submitted that there was unreasonable and unexplained delay in lodging the FIR. The victim or her mother lodged the FIR only after the victim was pregnant in 7 months. There is no valid explanation for this inordinate delay and this casts serious doubt on the prosecution version in this matter. Ms. Paul submitted that there were serious discrepancies in the depositions of the victim (PW-2) as well as her mother (PW-4). Such discrepancies have not been considered by the learned designated Court and the conviction is therefore vitiated.

5. Mrs. Paul submits that the medical evidence, in this case, is also not quite clear. She submits that there is no proper evidence about the collection of samples. She submits that even the doctors admitted that they did not collect the blood or DNA sample from the appellant. She submits that this is a fit case where the medical /forensic evidence ought to be rejected or in any case, fresh DNA evidence should be called for. She submits that the defense raised by the appellant in his

written statement under Section 313 of the Cr.P.C. has also not been considered by the learned designated Court.

6. Mr. Paul finally submitted that sentence imposed is also quite excessive and in breach of provisions of the POCSO Act. Therefore, on all the aforesaid grounds, Mrs. Paul submitted that this appeal may be allowed and the impugned judgment and order made by the learned designated Court be quashed and set aside.

7. Mrs. Paul, learned Counsel relied upon **Sham Singh vs State of Haryana**, reported (2018) 18 SCC 34 and **Matru vs State of UP** Criminal Appeal 828/2019 decided on 28-08-2020 by the Hon'ble High Court of Allahabad in support of her submissions.

8. Mr. Thakre, learned APP defended the impugned judgment and order based on the reasoning reflected therein. He submitted that there is ample evidence to sustain the conviction in this matter. He submitted that the testimony of the victim is of sterling quality and based upon the same the conviction is required to be sustained. He submits that even though no corroboration was necessary for a matter of such a nature, there is corroboration in the form of the victim's mother's evidence (PW-4), the medical evidence of Rahul (PW-6), Anil (PW-10), and Dr. Shruti (PW-11). Finally, he submits that the results of

the DNA test are conclusive that the appellant and the victim are the biological parents of the child born to the victim. He, therefore submits that this appeal may be dismissed.

9. The rival contentions now fall for determination.

10. The first aspect to be considered in the present case concerns the age of the victim. This is because unless it is established that the victim was a child and defined under Section 2(d) of the POCSO Act, the prosecution under POCSO Act would not have been competent.

11. In this case, the victim (PW-2) deposed that she was born on 05-06-2002 and even produced her Birth Certificate (Exh.22) which she obtained from the concerned Gram Panchayat. The mother of the victim (PW-2) also deposed to the age of the victim and confirmed the Birth Certificate (Exh.22), indeed pertains to the victim. Secondly, there was no challenge whatsoever to the testimony of the victim and the documentary evidence placed on record by the prosecution. Medical evidence also supports the prosecution version about the victim being a minor at the time when the doctors examined her and when she delivered a child. Thus, there is ample evidence on record to establish that the victim was indeed a child as defined under Section

2(d) of the POCSO Act. The appellant in such circumstances was quite correctly prosecuted under the POCSO Act.

12. In this case, we have evaluated the evidence on record and upon such evaluation, we are quite satisfied that the testimony of the victim (PW-2) inspires confidence and there was no good reason to either doubt or discard such testimony. In **Sham Sing** (supra) relied upon by Mrs. Paul the Hon'ble Supreme Court has held that-

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. "

13. This position in law is reiterated in the case of **Rajit Hazarika vs State of Assam**, reported in (1998) 8 SCC 635 and **Raju vs State of M.P.**, reported in (2008) 15 SCC 133. In **State of Punjab vs Gurmit Singh**, reported in (1996) 2 SCC 384, the Hon'ble Supreme Court has held that-

"The courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults."

14. Applying the aforesaid principles to the facts of the present case we must record that the victim (PW-2) in this case has very clearly and categorically deposed about the sexual intercourse perpetrated upon her by the appellant who was her stepfather or rather who was living with her mother as her husband and whom the victim used to call father. The victim has explained that she was too scared to narrate such an incident to her mother on account of threats from the

appellant. She has deposed that such acts used to be committed by the appellant when her mother used to go to work and her sister was at school. The victim then deposed that her menstrual periods started in April 2015 and after the appellant had frequent sexual intercourse with her on the days when her mother and sister were out of the house, in July 2015 the cycle stopped. She deposed that it is at this stage that she informed her mother and her mother took her to the doctor for examination. Initially, the position was ignored for some days but because the cycle did not commence the Medical Officer advised Sonography, and this revealed the victim was pregnant for 7 months. Finally, the victim gave birth to a female child on 02-03-2016. She deposed that her blood sample and blood sample of the child was extracted by the Medical Officer. She identified the appellant who was even otherwise familiar to her during the trial and stated that he is the same person who committed sexual intercourse with her and whom she used to call her father. She also deposed that the time of the last incident of sexual intercourse by the appellant, when they were staying at Plot No.10 Bapu Nagar, Nagpur.

15. In the cross-examination, there was no dent whatsoever in the clear and cogent testimony of PW-2. There was no challenge to the age. There was no challenge to the deposition about the collection of

blood samples and DNA samples or in any case, there is no serious challenge to the same except for a solitary suggestion. The case which the appellant sought to put forward in his written statement under Section 313 of Cr.P.C. was not put to the victim (PW-2). Therefore, on the clear, cogent, and unshaken testimony of the victim (PW-2), the conviction of the appellant is required to be sustained.

16. Although no corroboration was necessary for the conviction of the appellant, we find that there is more than ample corroboration on record for sustaining the conviction of the appellant in the present case. The victim's mother (PW-4) has deposed in the matter and her deposition supports the version deposed by the victim (PW-2). Similarly, the prosecution examined one Jaiprakash Mishra (PW-3) who deposed that the appellant was residing along with the victim's mother and her two daughters including the victim at Bapu Nagar, Zingabai Takli, Nagpur, during the relevant period.

17. Most importantly, there is corroboration in the form of medical/forensic evidence. Several witnesses have been examined by the prosecution to establish the integrity of the process by which the blood samples and the DNA samples were collected. In cross-examination, no dent has been made to the testimony of these witnesses and there is no case made out to doubt the integrity of this

process. The prosecution examined Amulya Pande (PW-7), Assistant Chemical Analyzer R.F.S.L., Amravati, who tested the DNA sample and submitted her expert opinion on the same.

18. Amulya Pande (PW-7) has deposed to the entire process commencing from the receipt of the sample and the tests conducted by her. Ultimately, Amulya Pande (PW-7) deposed to the following conclusions-

"6] I have extracted the D.N.A. profiles from the blood samples provided in D.N.A. kit of Chandrashekhar Tabhane, victim xxxxxx and baby of victim and compared the D.N.A. profiles obtained from the blood of Chandrashekhar Tabhane, victim xxxxxx and baby of victim by adopting P.C.R. amplification method. During my comparison of profiling I found that Chandrashekhar Tabhane matched the obligate paternal alleles present in baby of victim xxxxxx at all 15 S.T.R. Loci so also the xxxxxx Gaikawad also matched the obligate maternal alleles present in baby of victim xxxxxx. Therefore, in my opinion, Chandrashekhar Tabhane and victim xxxxxx are concluded to be the biological parents of baby of victim xxxxxx.

7] After obtain the D.N.A. profiles from the blood sample of Chandrashekhar Tabhane, I have given it M.L. Case No.DNA/147/16, the report now shown to me is the same. It bears my signature. Its consents are true and correct. It is at Exh.60.

8] After obtaining the D.N.A. profiles from the blood sample of victim xxxxxx, I have given it M.L. Case No.DNA/152/2016, the report now shown to me is the same. It bears my signature. Its contents are true and correct. It is at Exh.61. After reaching to my opinion, I have prepared the D.N.A. now shown to me is the same. It bears my signature. Its contents are true and correct. It is at Exh.62."

19. Thus, Amulya Pande (PW-7) has very clearly deposed that the appellant and the victim are concluded to be the biological parents of the child born to the victim (PW-2). Again to this examination, no dent has been made. This important evidence according to us, more than corroborates the clear and cogent testimony of the victim (PW-2).

20. The appellant in response to the questions posed to him under Section 313 of the Cr.P.C. simply denied the prosecution version as false. He also submitted a very detailed written statement in which he suggested that at the relevant time the victim (PW-2) had stayed at her maternal uncle's place and therefore the possibility of some other person being the father of the child cannot be ruled out. The appellant tried to reason how the depositions of the victim or her mother were not trustworthy. The appellant also tried to suggest that on one of the occasions even he had gone to the Doctor with the victim and her mother and how only at a belated stage the allegations were leveled against him.

21. Even though the version suggested by the appellant in his written statement under Section 313 of Cr.P.C. was never put to any of the prosecution witnesses in the case of the trial, We have considered the same in the interests of justice. According to us, even after considering such a version, there is no case made out to disbelieve the

testimony of the victim (PW-2) girl. There is no suggestion as to why the victim (PW-2) should make such serious allegations against the appellant. Besides and most importantly while something can always be said about the oral testimony, scientific evidence particularly in the form of DNA evidence cannot ordinarily be discounted or discarded in a case of this nature. In this case, the DNA evidence establishes that the appellant and the victim (PW-2) are the biological parents of the child born to the victim girl. This answers the appellant's case that some other person might be the father of such a child. Therefore, even after considering the defense raised by the appellant in his statement under Section 313 of Cr.PC. we think that there is no case made out to reverse the conviction recorded by the designated Court in this matter.

22. In **Mukesh and others vs State (NCT of Delhi) and others**, reported in **(2007) 6 SCC I**, the Hon'ble Supreme Court held that -

"DNA technology accurately identifies criminals. DNA profiling is now a statutory scheme under Section 53-A CrPC. and such profiling is a must in case of examination of rape victims. DNA report deserves to be accepted unless it is absolutely dented. if the sampling is proper and if there is no evidence of tampering of samples, DNA Test report is to be accepted. DNA analysis is hundred percent accurate and at present a predominant forensic technique for identifying criminals."

23. Having regard the evidence of the DNA sampling, we think that the prosecution has succeeded in establishing the guilt of the accused beyond any reasonable doubt.

24. According to us, there is no delay in lodging the FIR having regard to the sensitivity of the case, the nature of the offense, and the relationship between the victim and the appellant, (the appellant was the stepfather of the minor victim). The minor victim has deposed about the threats given by the appellant and about the sexual assaults perpetrated by the appellant upon her. It is only after the victim missed her periods, was examined by the doctor, was found to be pregnant and after she disclosed the facts to her mother, the FIR was lodged. This according to us, is a credible and natural reason for the so-called delay in lodging of the FIR. Based on such alleged delay, there is no case made out to suspect the prosecution version in this matter.

25. In **Deepak vs State of Haryana** reported in (2015) 4 SCC 762 and in **State of Punjab** (supra), the Hon'ble Supreme Court has explained that threats against rape victims constitute sufficient explanation for the delay in lodging the FIR. Besides the Hon'ble Supreme Court has held that *in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in*

lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family.

26. In the facts of the present case, the delay, if at all has been quite properly explained by the prosecution and therefore, there is no case to interfere in the impugned judgment and order.

27. From the perusal of the impugned judgment and order, we find that the learned designated Court has considered the evidence on record in its correct perspective. The learned Designated Court has adverted to the material evidence on record and after applying the correct legal principles convicted and sentenced the appellant. Therefore, there is no case made out to interfere with the impugned judgment in this case.

28. On the aspect of sentencing, we have considered the contentions of Mrs. Paul, learned Counsel for the appellant. This is a case where the appellant has committed a penetrative sexual assault on the minor victim who was his stepdaughter. As a result, the minor victim became pregnant and even delivered a female child. Having regard to such circumstances which have been established by the prosecution beyond a reasonable doubt, we do not think that there is a good ground to interfere with the sentence imposed on the appellant. As a result, we dismiss this appeal without any order for costs.

29. Although we have dismissed this appeal after disagreeing with the submissions of Mrs. Paul, learned Counsel appointed under the Legal Aid Scheme to appear on behalf of the appellant, we must say that Mrs. Paul, learned Counsel has rendered good and effective service to the cause of the appellant by arguing this case after good preparation. We, therefore, thank her efforts and quantify fees payable to her at Rs. 5000/-.

30. In this case we noticed that the name of the minor victim and her details have not been masked. Therefore, we direct that this be done so that the identity of the minor victim is not accessible without

the leave of the Court. Registry to ensure that this exercise is complete at the earliest.

(Pushpa V. Ganediwala, J.)

(M.S. Sonak, J.)

Deshmukh