

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

CRIMINAL APPEAL NO.739 OF 2018

Omkar s/o Uttreshwar Dhage
Age 22 years, Occu. Nil,
R/o Lohata (East), Tq. Kallam,
District Osmanabad

... APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station Officer
Police Station, Shiradhon,
Tq. Kallam, District Osmanabad

(Copy to be served on P.P. of
High Court of Judicature of
Bombay, Bench at Aurangabad)

2. X
Age 18 years, Occu. Nil,
R/o Lohata (East), Tq. Kallam,
District Osmanabad

... RESPONDENTS

.....
Shri S.J. Salunke, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent – State
Shri S.A. Wakure, Advocate for respondent No.2.
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 2nd February, 2022

Date of pronouncing judgment : 3rd February, 2022

JUDGMENT :

This is an appeal against the conviction. The
appellant has been convicted for the offence punishable under

Section 376(2)(f), (i), (n) of the Indian Penal Code and Section 4 and 6 of the protection of Children from Sexual Offences Act, 2012 and, therefore, sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.25,000/-, in default to suffer rigorous imprisonment for six months. The appellant is also convicted for the offence punishable under Section 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/-, in default to suffer rigorous imprisonment for one month.

2. The facts are unusual. The appellant is the real brother of the victim (prosecutrix), a 17 year old girl at the relevant time. It is the case of the prosecution that, the appellant had put the prosecutrix in fear of her life and sexually exploited her many a times. As a result, the prosecutrix conceived and delivered a child. The prosecutrix, therefore, lodged the First Information Report (F.I.R.) - Exh.8 on 8/3/2017 with Loni Kalbhor Police Station, District Pune. Since the offence took place within the limits of Shiradhon Police Station, the crime came to be transferred to it for investigation. It appears that, the prosecutrix delivered a child in Sassoon Hospital, Pune. Blood samples of the

prosecutrix and the new born were obtained at Sassoon Hospital itself.

3. The investigation took place. The prosecutrix gave a supplementary statement, exonerating the appellant herein and putting a blame on one Gajanan Gaikwad (since acquitted). On arrest of both the appellant and Gajanan, their blood samples were obtained for D.N.A. profiling. The blood samples were analysed at Forensic Science Laboratory, Pune. The D.N.A. reports ruled out involvement of Gajanan. The D.N.A. report concludes the appellant to be the biological father of the new born of the prosecutrix. Both appellant and Gajanan were proceeded against by filing the charge sheet.

4. The learned Additional Sessions Judge framed the charge (Exh.3) against both the appellant and Gajanan. Both of them pleaded not guilty. Their defence is of false implication.

5. To establish the charge, the prosecution examined in all four witnesses and placed on record certain documentary evidence. On appreciation of the evidence in the case, learned Additional Sessions Judge acquitted

Gajanan. The appellant came to be convicted as stated above.

6. Learned counsel for the appellant would submit that, there is no substantive evidence pointing towards the involvement of the appellant. The prosecutrix and her parents did not state anything incriminating against the appellant. The doctors who did obtain the blood samples of the prosecutrix, appellant and the new born for D.N.A. profiling, have not been examined. The carrier who carried the blood samples to Forensic Science Laboratory has also not been examined. As such, although the D.N.A. report is against the appellant herein, the same ought not to have been relied on by the trial Court as there was no substantive evidence against the appellant. According to the learned counsel, the prosecutrix gave incriminating evidence against the acquitted accused – Gajanan. According to learned counsel, the appellant was just 21 years of age at the relevant time. He has been behind the bars close to five years. The prosecutrix has got married and is happy at her marital place. She has filed on record her affidavit, urging for the appellant's release. The learned counsel representing the prosecutrix reiterated the same.

7. The learned A.P.P. would, on the other hand, submit that, the D.N.A. report is conclusive proof of paternity. The prosecutrix stated in her examination-in-chief that the averments in the F.I.R. were true and correct. The blood sample of the appellant was obtained in the presence of investigating officer. The same was immediately dispatched to Forensic Science Laboratory. According to learned counsel, the evidence on record undoubtedly establishes guilt of the appellant and, therefore, there is no warrant for interference with the impugned order of conviction and sentence.

8. Considered the submissions advanced. Perused the evidence in the case. Also gone through the affidavit submitted by the prosecutrix.

9. The appellant is sought to be connected with the offence in question only on the basis of D.N.A. report. The appellant and the prosecutrix are the siblings. Admittedly, the prosecutrix was around 17 years of age at the relevant time. She conceived and delivered a baby. Delivery took place at Sassoon Hospital, Pune. The F.I.R. was, therefore, lodged at Loni Kalbhor Police Station, District Pune. The F.I.R. Exh.8

although implicates the appellant herein in the offence in question, the prosecutrix, in her substantive evidence before the Court, did not state anything incriminating against the appellant. In her examination-in-chief, she attributed the alleged offence to Gajanan (since acquitted). True, the F.I.R. was referred to her in her evidence. She stated that, it bears her signature, and the contents therein are true and correct. This cannot be said to be a substantive piece of evidence. It needs no mention that the F.I.R. can be used for corroboration or contradiction of the evidence of the author thereof before the Court. Admittedly, statement under Section 164 of the Code of Criminal Procedure was also recorded of the prosecutrix, wherein she gave a clean chit to the appellant.

10. The parents of the prosecutrix also did not utter anything incriminating against their son, the appellant. What they have stated is that, they were informed by the prosecutrix about the appellant to have sexual intercourse with her. The evidence of both these witnesses is hear-say and, therefore, inadmissible.

11. The only evidence that implicates the appellant is the D.N.A. report (Exh.15). The report concludes the

prosecutrix and the appellant to be biological parents of the new born.

12. The Apex Court, in case of **Mukesh and another Vs. State (NCT of Delhi) and others [(2017) 6 SCC 1]**, has observed :-

“457. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes, etc. recovered from the accused or from the witnesses. DNA testing on samples, such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA fingerprinting makes it possible to obtain conclusive results.”

13. All evidence needs to be packed and sealed properly in separate envelopes. The responsibility for this lies with the examining doctor. All blood samples must be refrigerated until handed over to next in chain of custody. The hospital has the responsibility of properly preserving samples till handed over to police. (Commentary on Medical Jurisprudence and Toxicology – by Modi). It is also true, admissibility of expert opinion is conditioned upon the

inviolability of forensic sample which necessitates infallible procedural management to avoid tampering, manipulation and mishandling of samples. The procedural protocol must invoke evidence dynamics to annul scope of any influence to modify, obscure, relocate or obliterate physical evidence, regardless of bona fide or malicious intent. In forensic world, selection, collection, packaging, labeling storage, preservation, transport and maintenance of chain of custody are vital steps for handling physical samples with utmost care and expertise aiming to avoid risk of contamination, destruction, loss or potential fiddle. (Article on Management of DNA Sample in Rape Incidents, by G.K. Goswami and Siddhartha Goswami – (2018) 7 SCC J-4.

14. In the case in hand, the blood samples of the prosecutrix and her new born were obtained in Sassoon Hospital. The Medical Officer who obtained their blood samples has not been examined. No police officer from Loni Kalbhor Police Station has been examined to show that the blood samples were preserved as required and were dispatched in sealed condition to the Forensic Science Laboratory. Same is the case about obtaining the blood samples of the appellant herein. True, P.W.4 Subhash Mane,

investigating officer testified that the appellant's blood sample was obtained in his presence. The doctor who obtained the same has not been examined. Although the D.N.A. report has to be admitted in evidence without examination of an expert (analyser), in view of Section 293 of the the Code of Criminal Procedure, there is no evidence about observing the protocol of D.N.A. sampling. It is reiterated that there is no substantive evidence of the prosecutrix to implicate the appellant in the offence in question. On the contrary, she gave him clean chit. She has even placed on record her affidavit stating to have been married and living at her matrimonial home. The appellant was around 21 years of age at the relevant time. He has been in jail for close to five years. In the peculiar facts and circumstances of the case, this Court is of the view that the evidence of the prosecution fell short to prove the guilt of the appellant beyond reasonable doubt.

15. In the result, the appeal succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is allowed.

(ii) The impugned order of conviction and sentence, dated 11/9/2017, passed by learned Special Judge, Osmanabad in Special (POCSO) Case No.26/2017 is quashed and set aside.

(iii) The appellant is acquitted of the offences under Sections 376(2)(f), (i), (n) and 506 of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act. The appellant be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be returned to the appellant.

**(R. G. AVACHAT)
JUDGE**

fmp/-