

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

CRIMINAL APPEAL NO.560 OF 2018

Shri Dilip s/o Sudam Karale
age 55 years, Occu. Labourer &
Agriculturist, R/o Tokewadi Shivar,
Agadgaon, Taluka Nagar,
District Ahmednagar, Maharashtra
(Arrested on 14/1/2017
At present lodged in Jail)

... APPELLANT
(Orig. Accused)

VERSUS

1. The State of Maharashtra,
at the instance of
Nagar Taluka Police Station,
Taluka Nagar, Dist. Ahmednagar
(Copy to be served on the office
of Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)
2. X
Age 47 years, Occu. Agriculturist
R/o Hadola Vasti, Agadgaon,
Taluka Nagar, Dist. Ahmednagar
PIN – 414 001 (M.S.)

... RESPONDENTS

.....
Shri A.D. Ostwal, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent No.1 – State
Shri Amit Savale, Advocate for respondent No.2
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 12th January, 2022

Date of pronouncing judgment : 27th January, 2022

J U D G M E N T :

This appeal is directed against the judgment and order dated 14/6/2018, passed by Additional Sessions Judge, Ahmednagar in Special Case No.137/2017, convicting the appellant for the offence punishable under Section 376(2)(I) of the Indian Penal Code and sentencing him to rigorous imprisonment for a period of ten years and to pay a fine of Rs.60,000/-. In default of payment of fine, the appellant is directed to undergo simple imprisonment for a period of one year.

2. The facts giving rise to the present appeal are as follows :-

P.W.1 "X" informant has a 23 year old daughter, by name "Y" (prosecutrix). She is deaf, dumb and mentally challenged as well. Both the informant and her husband used to be away from home for work during day time. The prosecutrix used to be alone at home. Sister-in-law of the informant would reside in the neighbourhood. Co-sister of the informant noticed some physical change with the prosecutrix. The informant, therefore, took the prosecutrix to a Primary Health Centre, Deogaon for medical screening. The

prosecutrix was found to be pregnant of five and half months. The informant, therefore, realised that someone took advantage of the mental condition of the prosecutrix and committed rape of her. The informant, therefore, lodged First Information Report (F.I.R. - Exh.11) against an unknown person. A crime vide C.R. No.222/2016, therefore, came to be registered with Nagar Taluka Police Station. The informant thereafter gave a supplementary statement, suspecting the appellant to be responsible to the pregnancy of the prosecutrix. The Police Station Officer, therefore, summoned the appellant. The appellant, in turn, suspected involvement of the father of the prosecutrix and her cousin as well. The Police Station Officer, therefore, decided to go for D.N.A. test. He produced the appellant and both the other suspects before the Medical Officer Dr. Ashwini Sonawane (P.W.8). Their blood samples were obtained. Meanwhile, the prosecutrix delivered a baby girl. Blood samples of both the baby and prosecutrix were also obtained for D.N.A. test. The blood samples were delivered to an expert at Forensic Science Laboratory, Kalina, Mumbai. The D.N.A. report concluded the appellant to be the biological father of the baby of the prosecutrix. The appellant was, therefore, arrested. He gave a disclosure statement, pointing out a place whereat he had sexual intercourse with

the prosecutrix. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing the charge sheet.

3. Since the prosecutrix was found to have belonged to a Scheduled Caste, relevant provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act) were also invoked. Learned Additional Sessions Judge framed the charge (Exh.3). The appellant pleaded not guilty. His defence is of false implication on account of having made complaint against the father of the prosecutrix.

4. To establish the charge, prosecution examined 11 witnesses and produced in evidence various documents. The trial Court, on appreciation of the evidence, convicted the appellant and sentenced to suffer imprisonment as stated hereinabove. The appellant, was, however, acquitted of the charge under Section 3(2)(v) of the Atrocities Act and Section 7(1)(d) of Protection of Civil Rights Act. The State has not preferred appeal against the said acquittal.

5. Heard. Learned counsel for the appellant would submit that, there is an inordinate delay in lodging of the F.I.R. The informant is an interested witness. The prosecutrix is an adult lady. She was not examined as a witness. There is no evidence to indicate the prosecutrix to have been mentally retarded to such an extent to be unable to give oral evidence. The panch witness to the disclosure statement did not stand by the prosecution. The medical officer who certified the prosecutrix to be mentally retarded, has categorically admitted her to have not been affected by severe or profound mental retardation. Learned counsel would further submit that, without examination of an expert the D.N.A. report came to be admitted in evidence. The appellant has thus suffered in his defence and lost an opportunity to cross-examine the expert. The procedure of taking blood samples for D.N.A. examination was not fullproof. There has been tampering with the blood samples. Before obtaining the appellant's blood sample, his consent was not obtained. The same affects the right to privacy. The D.N.A. report brought into existence this way, therefore, ought not to have been read in evidence. It is not known as to why for little over three weeks the D.N.A. kits were kept long at the police station. As such, it is a case based on

circumstantial evidence and that is only on the D.N.A. report without there being substantive evidence of the prosecutrix, attributing the appellant with the alleged sexual intercourse. The benefit of doubt should have, therefore, been extended to the appellant. It was for the prosecution to prove its case. Suspicion, howsoever strong, cannot take place of proof. The learned counsel, therefore, urged for allowing the appeal. He would, in the alternative, submit that the appellant is little over 56 years of age. He has 3 daughters and a son and old parents to look after. He, therefore, urged for reduction in quantum of sentence.

6. The learned A.P.P. would, on the other hand, submit that, the F.I.R. was lodged against unknown person. It was lodged soon after the prosecutrix was found to have been pregnant. The delay, if any, in lodging the F.I.R. is, therefore, inconsequential. It was the appellant himself who had suspected involvement of the father and cousin of the prosecutrix. Blood samples of the trio were, therefore, obtained for D.N.A. test. The appellant, without any demur, submitted himself for taking his blood sample. The medical officer who took the blood samples, has categorically given the evidence as to how the blood samples were obtained. The

same indicates there was no procedural lapse. No sooner the blood samples were obtained, those were sent to the Forensic Science Laboratory, Kalina, Mumbai the same day. The reports indicate that the seals were intact. The D.N.A. report is a conclusive proof. The same nails the appellant in the offence in question. According to learned A.P.P., no interference with the impugned judgment and order is thus warranted. He, therefore, urged for dismissal of the appeal.

7. Considered the submissions advanced. Perused the evidence in the case. Gone through the authorities relied on. Let us appreciate the evidence in the case.

8. P.W.1 informant is a rustic woman. The prosecutrix is her daughter. It is in the evidence of P.W.1 that the prosecutrix is deaf, dumb and mentally challenged as well. Both the informant and her husband used to be away from home during day time to earn their living. The prosecutrix used to be alone at home. Some change in the physical appearance of the prosecutrix was noticed. She was, therefore, medically screened. The medical examination report disclosed the prosecutrix was pregnant of little over five months. It was Tarabai, co-wife of P.W.1, who had

noticed the change in the physical appearance of the prosecutrix. In view of this court, non-examination of Tarabai is of no consequence. It is further in her evidence that, she, therefore, lodged F.I.R. Exh.11 against an unknown person. True, the F.I.R. may be said to have been lodged late. The fact is, however, that, it has been lodged against an unknown person. Delay in lodging of an F.I.R. is of no consequence since the appellant did not have a reason to say it to have been lodged with a concocted version. It is only after registration of the F.I.R. the informant gave a supplementary statement suspecting the involvement of the appellant. As such, the evidence of P.W.1 informant undoubtedly establishes that her daughter (prosecutrix) is deaf and dumb. She conceived, and on maturity, delivered a baby girl. The evidence of P.W.1 further states that, her house is on way to the field of the appellant. The appellant used to pass by the informant's house. the appellant would greet the prosecutrix by waving his hand and signs as well. This is a reason why the prosecutrix suspected the appellant's involvement. So far as up to this, evidence of P.W.1, there is nothing to name the appellant in the offence in question. There is also nothing to suggest the P.W.1 to have any reason to falsely suspect the appellant's involvement in the offence in question.

9. On the question of mental retardness of the prosecutrix, P.W.1 has specifically stated so. It was even suggested in the cross-examination of P.W.1 that the prosecutrix would talk with her by signs. P.W.5 Dr. Ashok Kumar was a Psychiatrist. At the relevant time, he was serving in Civil Hospital, Ahmednagar. It is in his evidence that, the prosecutrix was referred for medical examination on 16/8/2016. He clinically examined her to find her to be incapable to give consent for sexual intercourse. The medical case record of the prosecutrix was placed on record vide Exh.30. P.W.5 Dr. Ashok Kumar although admitted that the prosecutrix was not completely mentally retarded, he denied suggestion that a person with moderate mental retardation could distinguish between good and bad things. The doctor has categorically denied that the prosecutrix was in the senses to protect her own interest i.e. to distinguish between good and bad things. P.W.5 Dr. Ashok Kumar being an expert, and there being no contra evidence, it has to be safely concluded that the prosecutrix was a mentally challenged person and, therefore, incapable to give consent for sexual intercourse. When the prosecutrix had conceived and delivered a baby girl, it has to be assumed that someone

took advantage of her mental status and had sexual intercourse with her. Such act does amount to an offence of rape. The question is, whether the appellant is the author of the crime in question.

10. P.W.1 had suspected the involvement of the appellant herein. The appellant was, therefore, summoned by the concerned police station. The appellant suspected involvement of the father of the prosecutrix and her cousin as well. The investigating officer, therefore, decided to go for a D.N.A. test since in the meanwhile the prosecutrix has delivered a baby girl.

11. P.W.6 Prashant, investigating officer, testified that, he had been to Mumbai to fetch six kits for taking necessary samples for D.N.A. examination. He, therefore, wrote a letter to Forensic Science Laboratory, Kalina. Office copy of the letter is placed at Exh.42. His evidence indicates that, he accordingly brought six kits. True, those kits were kept in the police station for little over three weeks before those came to be used. P.W.6 Prashant has, however not been subjected to any question in this regard to point out that the kits had not been kept in the required temperature and,

therefore, the kits were not fit for being used. The evidence of P.W.6 Prashant further indicates that on 17/10/2016, the appellant and two other suspects were produced before P.W.8 Dr. Ashwini for obtaining their blood samples for D.N.A. test.

12. P.W.7 Haribhau testified to have had taken the trio to Civil Hospital, Ahmednagar on 17/10/2016 for obtaining their blood samples. It is true that, the blood sample of the appellant was taken at the instance of the police. The learned counsel for the appellant, therefore, appears to be justified in contending that pressure was exerted on the appellant to submit for medical examination and to give blood sample. According to learned counsel, that no one can be compelled to give a blood sample as the same would amount to compelling a person to be a witness against himself. It is also true that, Section 53-A of the Code of Criminal Procedure could not be invoked since the appellant was not under arrest. The entire cross-examination of all the prosecution witnesses and even the appellant's examination under Section 313 of the Code of Criminal Procedure, however, indicate that the appellant, without any demur, appeared before the concerned medical officer and gave his blood sample.

13. P.W.8 Dr. Ashwini was categorical to state to have had taken blood samples of the trio one after another. It is in her evidence that, she took blood samples in three different syringes in the sample kits. After taking the blood samples, the kits were labeled with the names of the respective persons with mentioning dates thereon. It is further in her evidence that, after taking blood sample of one of the three, the procedure for sealing and labeling was first completed and then only the blood sample of second one was obtained and so on. It is in her evidence that, Wax Seal was applied on each kit and then handed over to the carrier (P.W.7). She had prepared the case papers of the trio whose blood samples were obtained. The case papers have been placed on record at Exhs.47 to 49. It is true that, in the cross-examination, P.W.8 Dr. Ashwini has admitted that after collecting the blood sample, the work of labeling and sealing was done by sister. She was, however, categorical to state that, sealing and labeling was done in her presence and supervision. It is true that, the appellant had moved the trial Court, asking for production of CCTV footage of the place whereat his blood sample was obtained. According to learned counsel for the appellant, there was possibility of the samples having been tampered with. The appellant suspected swapping of the

labels affixed on the sample kits. It appears that, production of CCTV footage was asked for very late. The concerned Civil Surgeon had expressed his inability to produce the CCTV footage since it was not available. It is also true that, along with each kit two blank consent forms are supplied. The consent form is to be filled up in respect of the person whose blood sample has to be obtained. The consent form is required to bear signature of the concerned incumbent. The sample of the blood has to be obtained in the presence of two witnesses. In the case in hand, the consent form of the appellant herein is not forthcoming. However, the evidence of P.W.8 Dr. Ashwini undoubtedly indicates that she obtained the blood samples of appellant and two others one after other. On obtaining sample of one of them, the sealing and labeling was completed first. The Court has no reason to doubt the evidence of P.W.8 Dr. Ashwini.

14. It is true, 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.

15. It is reiterated that, the evidence of P.W.8 Dr. Ashwini proves the procedure of taking blood sample was flawless. Soon after taking the samples of the blood, the kits were handed over to P.W.7, who in turn delivered the same at Forensic Science Laboratory, Kalina the same day. Office copy of the covering/ forwarding letter is at Exh.46. The letter bears acknowledgment receipt dated 18/10/2016. It records

that, three sealed plastic containers were received. The same indicates that, the seals were intact. The investigating officer had no occasion to first take the kits to the police station, keep them there for a while and then transmit them to Forensic Science Laboratory, Kalina. P.W.7 Haribhau, Police Head Constable has categorically testified that it was he who had produced the appellant and two others before P.W.8 Dr. Ashwini for obtaining their blood samples. It was he in whose presence the blood samples were obtained, labeled and sealed. It was he who carried those samples immediately and delivered them to Forensic Science Laboratory at Kalina. It is only after obtaining the blood samples of the appellant and two others, the prosecutrix delivered a baby girl on 31/10/2016.

16. Then there is evidence of P.W.11 Dr. Vijay. It is in his evidence that he had received a request (Exh.53) for blood sample of the prosecutrix and her new born for D.N.A. test. He, therefore, obtained blood samples of both of them in D.N.A. kits after filling necessary form. Those forms have been placed on record. It is in his evidence that the D.N.A. kits were kept in a cold box. He handed them over to P.W.7 Haribhau. The evidence of P.W.7 Haribhau is to the effect

that he carried those blood samples to Forensic Science Laboratory, Kalina and delivered them on 2/11/2016. The office copy of the forwarding letter with acknowledgment receipt thereof are at Exhs.53 and 55.

17. The D.N.A. report (Exh.14) has been admitted in evidence through the oral evidence of the investigating officer and the doctor as well. The report states that the plastic containers were received in sealed condition. The seals were intact and as per the copy sent. The same were about the other two blood samples of the prosecutrix and the new born. True, the report indicates that the analysis started on 18/10/2016 and was completed on 11/1/2017. The learned counsel for the appellant would submit, what kind of analysis was done during the period of about three months. He meant to say that the samples might have been tampered with. According to him, the D.N.A. report should not be read in evidence without there being evidence of an expert who did the analysis and gave his report.

18. 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.”

19. In view of the aforesaid observations of the Apex Court, the reliance on the judgment of the Gujarat High Court in case of **Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Anr.** reported in **2009 Cri.L.J. 2888** is of no avail for the appellant herein.

20. The D.N.A. report (Exh.14) records the result of analysis as under :

(1) The DNA extracted from blood sample of ex1 Ku. Mangal Anna Bhingardive, ex2 B/o Ku. Mangal Anna Bhingardive was typed at 15 STR LOCI and gender specific Amelogenin locus using PCR Amplification technique.

(2) The DNA extracted from blood samples of ex1 Anna Vishwanath Bhingardive, ex2 Dilip Sudam Karale & ex3 Akash Vijay Thombe in F.S.L.M.L. Case No.DNA-1909/16 was typed at

15 STR LOCI and gender specific Amelogenin locus using PCR Amplification technique.

Interpretation :

(1) For all the 15 different genetic systems analyzed with the PCR, putative father Dilip Sudam Karale in F.S.L.M.L. Case No.DNA-1909/16 **matched** the obligate paternal alleles present in the child B/o Ku. Mangal Anna Bhingardive at all STR loci; similarly mother Ku. Mangal Anna Bhingardive **matched** the obligate maternal alleles present in child B/o Ku. Mangal Anna Bhingardive at all STR loci.

(2) Out of 15 different genetic systems analyzed with the PCR, putative father Anna Vishwanath Bhingardive in F.S.L.M.L. Case No.DNA-1909/16 **did not match** the obligate paternal alleles present in the child B/o Ku. Mangal Anna Bhingardive at 10 STR loci.

(3) out of 15 different genetic systems analyzed with the PCR, putative father Akash Vijay Thombe in F.S.L.M.L. Case No.DNA-1909/16 **did not match** the obligate paternal alleles present in the child B/o Ku. Mangal Anna Bhingardive at 10 STR loci.

21. Section 293 of the Code of Criminal Procedure reads thus :

“293. Reports of certain Government scientific experts.—

(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 Controller 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;

(g) any other Government Scientific Expert specified, by notification, by the Central Government for this purpose.”

undoubtedly indicates that, examination of an expert in proof of his report is not a statutory requirement. The appellant had every opportunity to seek witness summons for appearance of the expert who analysed the samples of D.N.A. report and to cross-examine him on the aspect of the matter. The Apex Court, in case of **Rajiv Singh Vs. State of Bihar**, [(2015) 16 SCC 369], observed :

“Though in terms of Section 293 of the Code of Criminal Procedure the report being one from the Government Scientific Expert, the same could have been per-se, used as evidence in the trial by the trial Court in its discretion.”

23. The facts in Rajiv Singh’s case (supra) undoubtedly indicate that it was the prosecution who had voluntarily offered the witness to prove the express report. The facts further indicate that, instead of analyzing the sample at the Government Laboratory, the work was assigned to private laboratory. The witness has admitted that, he has no requisite expertise in discipline of D.N.A. test. On the facts and circumstances of the case, the D.N.A. report was not acted upon.

24. As such, the analysis of the evidence referred to

hereinabove would undoubtedly indicate that blood samples of the appellant and two others were obtained one after another. The same day the blood samples were delivered at Forensic Science Laboratory, Kalina in sealed condition. Thereafter the blood samples of the prosecutrix and the new born were obtained and similarly delivered at Forensic Science Laboratory. The expert at Forensic Science Laboratory, Kalina analysed the blood samples and gave his report (Exh.14), concluding the appellant to be the biological father of the baby delivered by the prosecutrix. The same was not possible unless the appellant had a sexual intercourse with the prosecutrix, who was unable to give consent therefor. As such, the evidence on record undoubtedly nail the appellant with the offence in question. The trial Court has passed a well reasoned order. This Court has no reason to take a different view on reappraisal of the evidence. The appeal, therefore, fails.

25. The submission made by learned counsel for the appellant that it was post commission of the offence in question, Section 376 of the Indian Penal Code was amended providing minimum sentence of imprisonment of ten years is not correct. When the offence was committed, the minimum

sentence prescribed for the offence with which the appellant was charged with, was not less than ten years imprisonment. This Court is, therefore, unable to concede to the request of the learned counsel for the appellant to reduce the sentence of imprisonment to the period of seven years in view of the peculiar facts and circumstances of the case.

26. In the result, the Criminal Appeal is dismissed.

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

fmp/-