

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.263 OF 2018

Akshay Chandrakant Dagade
Aged about 23 years,
Occupation :- Agriculture,
R/o. Phulenagar, Wai,
Tal. Wai, District : Satara.
At present detained at Kalamba
Central Prison, Kolhapur

.... Appellant

versus

1. State of Maharashtra
Through Bhuij Police Station,
Tal. Wai, District : Satara.
Vide C.R. No.49/2015.

2. XYZ

.... Respondents

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- Mr. Vaibhav R. Gaikwad, Advocate for Appellant.
- Smt. M. R. Tidke, APP for the State/Respondent.
- Mr. Hitesh Muttha (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 15th DECEMBER, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 10/01/2018 passed by Additional Sessions Judge, Satara,

in Special (Child) Case No.70 of 2015. The Appellant is convicted and sentenced for the offence punishable u/s 3 r/w 4 and section 5(j)(ii),(l) r/w 6 of the Protection of Children from Sexual Offences Act, 2012. He was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to suffer rigorous imprisonment for one year. The amount of fine was directed to be paid to the victim girl as compensation. The Appellant was granted set off for the period he had spent in jail during trial. Paragraph No.42 of the impugned judgment also mentions that the ingredients of section 376(ii)(f),(i),(j),(n) and section 506 of the Indian Penal Code were proved beyond reasonable doubt. However, the operative part does not record any specific conviction or sentence in respect of these sections.

2. Heard Mr. Vaibhav R. Gaikwad, learned counsel for the Appellant, Mr. Hitesh Muttha, learned counsel for Respondent No.2 and Smt. M. R. Tidke, learned APP for the State.

3. The prosecution case is that the Appellant was related to the victim. His father was the cousin of the victim's mother. The victim was residing in a different village. She had gone to her maternal uncle's village, in the summer vacation of 2015. The Appellant was resident of that village. It is the prosecution case that on 2-4 occasions, he established physical relations with the victim against her will in his own house. Her date of birth was 05/12/2001 and the incident had taken place in April and May 2015. Thus, she was below 14 years. The victim became pregnant and on 16/10/2015 she was taken to the doctor for Sonography. At that time it was revealed that she was pregnant. Her mother discussed this matter with her family members and ultimately the FIR was lodged on 19/10/2015 vide C.R.No.149/2015 at Bhujinj Police Station, Satara. The Appellant was arrested in the same night. The investigation was carried out. The victim and the Appellant were sent for medical examination. Their blood samples were drawn for the purpose of DNA testing. The statement of various witnesses were recorded. The victim delivered her child on 24/01/2016. Even

his blood sample was collected for DNA testing. The reports were collected. DNA report showed that the Appellant was the biological father of the child delivered by the victim. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions. The defence of the Appellant was of total denial.

4. During trial, the prosecution examined 11 witnesses; including the victim, her mother, Pancha, Medical Officers, carrier of the sample and the Investigating Officer. Learned Trial Judge relied on the evidence of the victim and the DNA report, as well as the other evidence led by the prosecution and held that the prosecution had proved its case beyond reasonable doubt.

5. The victim was examined as P.W.4. She has deposed that she was born on 05/12/2001. She was residing with her parents and brother in her village in District Satara. At the relevant time she was studying in 7th standard. In the summer

vacation after the final examination was over in the month of April, she went to her maternal uncle's village. The uncle and his wife used to go out for grazing their sheep. The Appellant was her relative. He came to the victim's uncle's house and told her to accompany her to his house. He was residing nearby. Since he was a relative, the victim went there. At that time there was no one in his house. He closed the door from inside and established physical relations with her against her will. He threatened the victim. In the month of May this was repeated on three occasions. He went back to her village around the time when her school was to reopen. Because of the threats given by the Appellant she had not informed anybody about this incident. In the month of October, she was having pain in her stomach. Therefore, her mother took her to the hospital of Dr. Swati Shah (examined as P.W.3) on 16/10/2015. On examination, the doctor told them that she was pregnant for six months. The victim's mother enquired with her. At that time, the victim told her about the incident. They came back to the village of victim's maternal uncle. After 2-3 days, i.e. on 19/10/2015, she gave

complaint at Bhuij police station. The FIR is produced on record at Ex.56. On the next day the victim showed the spot of incident. On that day ,she was sent for medical examination at Civil Hospital, Satara. Her statement was recorded u/s 164 of Cr.PC. in the Court at Wai on 30/10/2015, which in on record at Ex.57. On 24/01/2016, she delivered a male child. That child was with her.

6. In the cross-examination, she admitted that her other maternal uncle was in the police department. She did not know the financial position of the Appellant. She denied the suggestion that since the Appellant was a relative, they decided to lodge the case against the Appellant, so that he would marry her. She accepted that the Appellant's father transferred the land in her name and it was signed by her mother as her guardian. She denied the suggestion that on transfer of the land they had decided to withdraw the case. Her evidence is corroborated by her FIR at Ex.6 as well as by her statement recorded u/s 164 of Cr.PC. which is produced at Ex.57.

7. P.W.1 was the victim's mother. She has deposed about the case which completely corroborates the version of P.W.4. P.W.1 has spoken about the victim being taken to a doctor on 16/10/2015 revealing her pregnancy. She has deposed about the enquiries she made with the victim and the FIR which was lodged on 19/10/2015. She has also deposed about the delivery of a male child.

She was cross-examined mainly on the situation of the Appellant's house. She admitted that her brother was in the police department who used to help her in difficulties. She further deposed that the victim was born in Bhuinj. She admitted that when the victim was taken to doctor on 16/10/2015, that time P.W.1 had told the doctor that the victim's age was 18 years. She admitted that she had remained present in the Sub-Registrar's office for transfer of land which she was to get from the Appellant. Her statement was also recorded u/s 164 of Cr.P.C. which is produced on record at Ex.29. That statement also corroborates her deposition.

8. P.W.2 Vijay Javahar Nawale was the Pancha for Spot Panchanama, which is produced on record at Ex.40 and also for seizure of clothes of accused. That Panchanama is produced on record at Ex.42. Nothing much reveals from these two Panchanamas.

9. P.W.3 Dr. Swati Ravindra Shah was the first Doctor to whom P.W.1 had consulted. This witness had conducted Sonography on the victim revealing her pregnancy. That time the victim was pregnant for 26 weeks and 4 days. The victim herself had told that her age was 14 years, but on the consent form, P.W.1 i.e. mother of the victim had given age of the victim as 18 years.

She was cross-examined mainly about her compliance with the statutory requirements of conducting Sonography.

10. P.W.5 Dr. Jayeshkumar Bhikanrao Birari had conducted the medical examination of the Appellant on 21/10/2015. He

found that the Appellant was capable of performing sexual intercourse. The Appellant's blood sample was taken for DNA testing. Other samples of blood, semen were also taken.

In the cross-examination, he was asked about the letter sent by the police which was received by him. He was cross-examined about the care which he had taken while drawing the sample. Apart from this cross-examination, there were suggestions that no such samples were taken and the procedure for DNA testing was not done in presence of Panchas. These suggestions were denied. He could not tell the name of the Constable to whom the samples were given.

11. P.W.6 Dr. Sheetal Jayant Sawant had examined the victim on 20/12/2015. The victim was found to be pregnant for 24 to 28 weeks. The victim had given history involving the Appellant. This witness had received request letter from the police for taking blood sample of the victim for DNA testing. Accordingly, she had taken samples in two groups in the kit

provided for that purpose. Initially DNA kit was not available and therefore she had directed the police to get those kits. She has deposed that the kits were received on 22/10/2015 and then she had taken the blood sample. The sample was kept in an ice back in a Thermos.

In the cross-examination, she accepted that she had not made a written request to the police for providing DNA sample kit. Apart from that, only suggestions were given to her regarding her deposition which she had denied.

12. P.W.7 Police Constable Pramod Tukaram Jadhav was a carrier who had carried the sample to the Forensic Science Laboratory, at Pune. He has deposed that he had taken sample and the letter on 21/10/2015. The letter was bearing signature of two police officers More and Pawar. That letter is produced on record at Ex.78. He has specifically deposed that he had taken the sample to the FSL on 21/10/2015.

13. P.W.9 PSI Gajanan Kalba More, was the Investigating Officer. He has deposed that on 19/10/2015 the victim, her mother and her maternal uncle had approached Bhuinj police station for lodging the FIR. The victim's statement was recorded in presence of a social worker. It was taken down by a woman police constable. Then, the FIR was lodged vide C.R.No.149/2015 at Bhuinj police station. He searched for the Appellant. He was arrested at 10.30 p.m. The Village Development Officer at Bhuinj was requested to furnish birth certificate of the victim, which he had furnished and it was produced on record at Ex.89. On that birth certificate, the date of birth was mentioned as 05/12/2001. During investigation Spot Panchanama was conducted. On 21/10/2015, he requested the Civil Hospital, Satara to furnish the kits for taking blood sample for DNA testing. On 21/10/2015 he sent the blood sample for DNA testing. He filed the charge-sheet.

14. P.W.8 API Narayan Vinayakrao Pawar, was the second Investigating Officer. He recorded the statement of the P.W.7 PC

Pramod Jadhav on 22/10/2015. Pramod Jadhav had deposited the DNA sample.

15. P.W.10 PSI Rekha Goroba Dudhbhate had requested for blood sample kit for DNA testing of the child of the victim. The samples were sent to the FSL, Pune on 06/09/2016.
16. P.W.11 Dr. Sharda Shivaji Bhaskar had taken the blood of the child for DNA testing. She had drawn sample on 05/09/2016.
17. The DNA report was produced on record at Ex.73/2 which specifically mentions that the Appellant and the victim were concluded to be the biological parents of the male child of the victim. The birth certificate is produced on record at Ex.89. It was issued by the Village Development Officer, Bhuinj. As mentioned earlier it shows that the victim's date of birth was 05/12/2001. It was registered on 10/12/2001. Apart from that, the school record was also produced at Ex.101. It also shows that her date of birth was 05/12/2001.

This is the evidence led by the prosecution.

18. Learned counsel for the Appellant submitted that the prosecution case is not believable. There was no immediate disclosure on the part of the victim about the incident. There is inordinate delay in lodging the FIR. The alleged incident had taken place in April and May 2015 and the FIR was lodged on 19/10/2015. This delay is not explained. Apart from that, even as per the prosecution case, the mother came to know about the pregnancy on 16/10/2015 and yet the FIR was lodged on 19/10/2015. Even this delay has remained unexplained. This shows that there was deliberation and hence there is deliberate false implication of the Appellant. He submitted that the DNA report in this case is not reliable because there is discrepancy in the date on which the samples were collected. P.W.6 Dr. Sheetal Sawant has deposed that the blood sample of the victim was collected on 22/10/2015, whereas the carrier P.W.7 says that it was deposited with FSL on 21/10/2015. Therefore, learned counsel submitted that these dates are different and therefore sufficient doubt is created about the DNA report. He further

submitted that the victim's mother had accepted a piece of land through registered sale deed from the Appellant's father. This also shows that the victim's family is not honest and there is a possibility of false implication.

19. Learned APP as well as the Respondent No.2 opposed these submissions. According to them, the evidence of victim herself is sufficient to convict the Appellant. Her evidence is sufficiently corroborated by the medical evidence and in particular by the DNA report. They submitted that the discrepancy in the date of collecting the sample as deposed by the P.W.6, does not go to the root of the matter. The entire evidence shows that the samples were in fact collected on 21/10/2022 and were sent immediately on that date itself under a covering letter. They submitted that learned trial Judge gave due consideration to all these aspects. According to learned counsel for the Respondents, even the date of birth of the victim is conclusively proved.

20. I have considered these submissions. As far as the age of the victim is concerned, the prosecution has produced two documents i.e. Ex.89 which was the birth certificate furnished by Village Development Officer at Bhuinj and secondly the school record which is produced at Ex.101. Both these documents show that the victim's date of birth is 05/12/2001. These documents have remained unchallenged. There is hardly any cross-examination in respect of these documents. There is no reason to doubt the prosecution case in respect of genuineness of these two documents. Hence, it can safely be held that the prosecution has proved that the victim's date of birth was 05/12/2001 and therefore, in the month of April and May the victim was a minor, below 14 years of age.

21. As far as the victim's version is concerned, she has given sufficiently clear answers and her evidence does not suffer from any infirmity. The act was repeated on 3 to 4 occasions. The defence that it was a case of consent was not taken by the Appellant. In any case, the consent of the victim is immaterial in

this case, because she was a minor. Even otherwise, she has deposed that the act was committed against her will and she was threatened by the Appellant. Therefore, ingredients of the offence for which he is convicted, are made out.

22. Her deposition is supported by the DNA report, which is produced at Ex.73/2. The report is specific and it mentions that the victim and the Appellant were conclusively proved to be the parents of the child, delivered by the victim. Though, learned counsel for Appellant tried to raise some doubt about the date on which the victim's blood sample was taken based on the deposition of Dr. Sawant (P.W.6); these submissions cannot be accepted. The other Medical Officer P.W.5 Dr. Birari had taken sample of the blood of the Appellant on 21/10/2015. Importantly, the covering letter at Ex.78 addressed to the Director of Forensic Science Laboratory, mentions the date as 21/10/2015. It is signed by the police officers and significantly it shows the acknowledgment of Senior Clerk of Regional Forensic Science Laboratory, Ganeshkhind, Pune, which

mentions that the letter and the sample were received on 21/10/2015. Therefore, there is hardly any doubt that the samples were collected and sent by the police on 21/10/2015 and that they were received by the FSL on that very day. Therefore there was no occasion for the police to tamper with the evidence. The date mentioned in this covering letter clarifies the situation and therefore it can safely be held that the samples of the blood of both, the victim and the Appellant, were collected on 21/10/2015 and sent to FSL on that very day.

23. The sale deed which was executed by the father in favour of the victim and which was signed by the victim's mother as guardian; only shows an attempt on the part of the Appellant's family to see to it that the witness helped the Appellant and no grievance was made by them before the Court. Such conduct does not help the Appellant's case at all.

24. Considering all this discussion, it is clear that the prosecution has proved its case beyond reasonable doubt.

Learned Judge has considered these aspects properly. Therefore, I do not see any reason to interfere with the impugned judgment and order. Consequently, the Appeal is dismissed.

(SARANG V. KOTWAL, J.)