

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.743 OF 2021

Shri Vikas Shantaram Shinde]
Age: 28 years, Occup: Labourer,]
R/o. Kurtade, Shindewadi, Taluka,]
District Ratnagiri, Maharashtra]
(Presently at Nagpur Central Prison)].. Appellant
(Original Accused)

v/s.

1. The State of Maharashtra]
(Through Ratnagiri Gramin Police]
Station)]
2. Smt. Priyanka Prakash Shinde]
Age 40 years, Occup: Agriculturist]
R/o. Kurtade, Shindewadi, Taluka]
District Ratnagiri, Maharashtra.].. Respondents.

Mr. Amit Mane, for the Appellant.

Mr. Suraj S. Hulke, APP for Respondent No.1-State.

Ms. Grishma Lad, for Respondent No.2.

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CORAM: VINAY JOSHI, J.
DATED : 8th MARCH, 2022.

ORAL JUDGMENT:-

Challenge in this appeal is to the judgment and order of conviction dated 9th October, 2019 passed in Special Case No.4 of 2018 whereby the Appellant was held guilty for the offence under Sections 376(2)(i)(j)(n) and 506 of Indian Penal Code (IPC) and under Sections 4 and 6 of the Protection of Children From Sexual Offences Act, 2012 (POCSO Act). The Trial Court has imposed sentence to suffer Rigorous Imprisonment for 10 years

and to pay fine of Rs.20,000/- with default clause, for the offence punishable under Section 6 of the POCSO Act. No separate punishment was awarded for the offence of rape by virtue of Section 42 of the POCSO Act. For the offence punishable under Section 506 of the IPC, accused was sentenced to suffer Rigorous Imprisonment for 1 year along with fine of Rs.5,000. The Trial Court directed that both the sentences shall run concurrently.

2 The accused was in jail during the trial as well as during pendency of this appeal.

3 The prosecution case can be stated in brief that the victim- girl aged 13 years 8 months, was a school going intellectually disabled child of informant lady. The victim-girl missed her menstrual cycle somewhere in the month of June, 2017. After few months i.e. on 10th November, 2017, informant-mother took her to the hospital for said purpose. During examination, it was diagnosed that victim was pregnant. On enquiry, victim-girl disclosed about the incident of forcible sexual intercourse committed by accused on several occasions. Immediately victim's mother lodged report to the police on the very day i.e. on 10th November, 2017. On the basis of said report, police registered crime and carried investigation. During course of investigation, panchanama regarding place of occurrence was drawn. Clothes of the victim were seized. Accused was arrested. Birth certificate of victim was collected. Samples were extracted for DNA profile. During mean time, the victim delivered a male child on 10th March, 2018. Again samples of new born baby were

extracted for DNA testing. After completing the usual formalities of investigation, final report was came to be filed.

4 In order to establish the guilt, prosecution has examined as many as 15 witnesses. Prosecution also banks upon several documents. On the basis of oral as well as documentary evidence, the Court below held that victim was a '*child*' within the meaning of Section 2 (d) of the POCSO Act, and the prosecution has proved the offence of aggravated form of penetrative sexual assault. The Trial Court has passed the aforesaid sentences for the proved offences.

5 Heard learned Counsel Shri Mane, for the Appellant as well as Mr. Shukle, learned APP for the State and Ms. Lad, learned Counsel for Respondent No.2-victim. Perused entire record as well as reported judgments cited on behalf of Appellant/Accused.

6 Since the accused is charged under the provisions of POCSO Act, it is incumbent on the prosecution to establish that the victim was a child as defined under Section 2(d) of the POCSO Act. The defence has not challenged the age of victim meaning thereby the aspect of minority of victim. It has come in the evidence of prosecution witnesses that victim was 13 years and 8 months of age at the time of occurrence. The prosecution has examined PW-12 – Smt. Minakshi M. Mohite on the point of birth certificate. The prosecution has tendered on record birth certificate issued by competent authority, showing that victim's date of birth was 27th July, 2004. There is no challenge to the said piece of evidence, therefore, I have no hesitation to hold that victim was

below 18 years of age at the relevant time.

7 It takes me to consider the evidence on core issue. Police report has been lodged by victim's mother (PW-1) on 10th November, 2017. It is her case that victim was her daughter amongst three other. Victim was mentally retarded and was studying in 8th standard at the relevant time. She stated that victim has missed her menstruation cycle, therefore she took her to the hospital on which learnt that victim was carrying pregnancy of 5 months. On enquiry, the victim-girl disclosed that accused used to visit her house in the afternoon and by removing garments, used to repeatedly commit sexual intercourse. On learning the things, she lodged report.

8 It is profitable to directly go to the crucial evidence of minor victim. The Trial Court has recorded the evidence of minor-victim by following the mandate of Section 33 of the POCSO Act. The victim's evidence was recorded in question and answer form. During her evidence, victim disclosed that accused who is her neighbour, used to visit her house. Accused removed garments of both and slept over her. Such things were happened on 5 to 6 occasion. She has narrated in detail that the accused used to arrive at her house in the afternoon, bolting the door and used to raise the voice of TV set and did the things. Victim was cross examined at length but nothing emerged to discard her testimony.

9 After lodging the report, victim-girl was medically examined by PW-6 – Dr. Leena M. Kumbhare, attached to Civil Hospital, Ratnagiri. It has come in her evidence that, on 11th

November, 2017 she has examined the victim-girl. On examination, she found that hymen was ruptured and victim was pregnant of 21 weeks. She has prepared medico legal examination report (Exh. 68) to that effect.

10 It is the prosecution case that samples were collected and DNA profile was matched. Prosecution has examined PW-8 – Dr. Rajashree G. Dhavale who has extracted blood samples in DNA kit. It is her evident that on 16th November, 2017, victim-girl was brought to her, on which she has extracted blood samples in DNA Kit, packed it, sealed it and along with DNA form, handed over to the police. She deposed that on 10th March, 2018, victim delivered a baby boy, therefore, she has collected DNA samples of new born baby and after sealing, handed over to the police. Prosecution has examined PW-9 – Dr. Vikas M. Kumare who has obtained blood samples of accused in DNA kit. Prosecution has examined police personnel who have carried DNA samples to the chemical analyzer.

11 Pertinent to note that though scientific evidence is admissible under Section 293 of the Criminal Procedure Code, prosecution has endeavoured to examine PW-14 Sujata P. Jadhav, who was Assistant Chemical Analyzer. It is the evident of PW-14 – Sujata Jadhav that she has studied M.Sc. in Bio Chemistry. She was working as Assistant Chemical Analyzer in Pune Laboratory. She has prepared DNA profile of accused, victim as well as new born baby. She found that they were matched with each other. She stated that accused and victim are concluded to be biological parents of the new born baby of the victim. Accordingly, DNA

report has produced on record which fully corroborates the testimony of the victim.

12 Learned Counsel appearing for the Appellant/ Accused would submit that unless the samples were properly obtained, it is not safe to rely on DNA report. In this regard, he relied on the decision of the Supreme Court in case of ***Ganesh Laxman Madne v/s. State of Maharashtra (MANU/MH/0805/2019)***. In said case, this Court by relying on the decision of Supreme Court, observed that though scientific evidence about DNA report is of conclusive nature, however, samples, if not properly obtained or sealed, it is not safe to rely. In case at hand, the Medical Officer who has extracted DNA samples, has categorically deposed about the mode and manner of extracting, packing and sealing of the samples. Moreover, both carriers were examined to ensure that samples were kept intact and properly delivered. The evidence of Investigating Officer has also supported the proper seizures. Therefore, there is no substance in the contention that DNA report, cannot be relied.

13 Learned Counsel appearing for accused has submitted that the victim-girl has not specifically stated about the incident of sexual intercourse. He would submit that there is absence of primary evidence of victim about sexual intercourse. He contended that in absence of substantive evidence of victim, the circumstantial evidence like medical examination report and DNA report would not assist. It requires to once again go through the evidence of victim. At the inception, it is to be noted that victim

was intellectually challenged girl. PW-3 - Dr. Shashwat V. Shere who is MD in psychological medicine, has examined the victim. It is his evidence that the victim was referred for assessment of I.Q. test. He found that mental age of victim was 7 years and I. Q. 53. He opined that, it was the case of mild mental retardation, having 50% disability. Keeping in mind such mental incapacity of victim, her evidence has to be assessed. Though in specific words, the victim has not stated about sexual intercourse, however, in other words, she stated that accused has removed her under garments, his own garments and slept over her. She also stated that she got a child from accused. The said evidence in unequivocal term suggests about incident of sexual intercourse. Besides that, there is a scientific evidence disclosing that accused was biological father of new born baby of victim. Having regard to said aspect, there is no substance in the contention that victim has not stated the incident in specific terms. On the other hand, victim's evidence is quite, natural, reliable and trust-worthy which conveys the act of sexual assault.

14 The learned Counsel appearing for the accused has argued that the material incriminating circumstances are not put to the accused during his statement under Section 313 of the Cr. P. C. which has caused prejudice to the accused. The learned Counsel appearing for accused by relying on the decision of the Supreme Court in the case of *Asraf Ali v/s. State of Assam (MANU/SC/7839/2008)* contend that, absence of putting material circumstances to the accused, vitiates the trial. There can be no dispute about said proposition of law. In the light of the said

submission, statement of accused recorded in term of Section 313 of Cr. P. C., has re-visited. The Trial Court has formulated in all 40 questions in a bid to put all incriminating material to the accused to seek his explanation. Perusal of the said statement, reveals that the material circumstances like victim's mental status, her age, pregnancy, removal of clothes, repeated sexual intercourse were specifically put to the accused. Apparently, the material which has formed the basis for conviction, has been put to the accused. Hence, the submission in this regard carries no merit.

15 Learned Counsel appearing for Appellant further submitted that the chain of events has not put to the accused in statement under Section 313 of Cr. P. C. He would submit that, as to how the samples were extracted for DNA profile, how that were carried for analysis and the fact of delivery of victim has not been put to accused in sequence. In fact, the chain of events is a matter of appreciation. Principally, the material circumstances are brought to the notice of accused during the statement, therefore, no prejudice has caused to the accused at all.

16 On re-examination of entire material, it emerges that the victim was minor at the time of occurrence. The evidence of victim was specific about sexual assault. Victim's mother has supported her evidence of material aspect. Moreover, medical examination report coupled with DNA report strongly supports the victim's evidence. Though, delay in lodgment of FIR is criticized, however, having regard to the peculiar facts, satisfactory explanation is offered by the prosecution on the point of delay.

Pertinent to note that, victim was intellectually challenged girl. As and when her mother noticed that victim has missed her menstruation cycle, she immediately took her to the Doctor. No sooner victim's mother learnt about the pregnancy, immediately she enquired with the victim and, thereafter, lodged the report. The prosecution evidence is cogent, reliable and trust-worthy. The Trial Court has properly analyzed the evidence adduced by prosecution. The finding of guilt can not be faulted with.

17 In view of the above, Appeal carries no merits. Hence, deserves to be dismissed and, accordingly, stands dismissed. Fees of appointed counsel be paid as per rules.

(VINAY JOSHI,J.)