

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

CRIMINAL APPEAL NO.401 OF 2018

Sandeep Sahadev Varli

.... Appellant

Versus

Union Territory of Daman & Diu
and another

....Respondents

.....

Mr.Adithya R. Iyer, Advocate a/w. Advait Helekar, Jayesh Bhosle i/
b. Ashish S. Chavan, for the Appellant.

Mr. Harsh Dedhia, Advocate i/b. H.S. Venegavkar, for Respondent
No.1.

Smt. Megha Bajoria, Advocate (appointed) for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 11th NOVEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 30.1.2018 passed by the Sessions Judge, Daman in Sessions Case No.30/2016. The appellant was convicted for commission of offence punishable under Section 376(2)(i) of the Indian Penal Code along with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and was sentenced to suffer RI for ten years and to pay fine of Rs.4,000/- and in default to suffer RI

for six months. The appellant was also convicted for commission of the offence punishable under Section 506(II) of IPC and was sentenced to suffer RI for two years and to pay fine of Rs.1,000/- and in default to suffer RI for two months. Both the sentences were directed to run concurrently. The appellant was given set off under Section 428 of Cr.P.C. The appellant was acquitted from the charges of commission of offences punishable under Sections 323 and 452 of IPC.

2. Heard Shri Adithya Iyer, learned counsel for the appellant, Shri Harsh Dedhia, learned counsel for the respondent No.1 and Smt. Megha Bajoria, learned appointed counsel for the respondent No.2.

3. The prosecution case, in brief, is that the victim girl was about 12 to 13 years of age at the time of the incident. Her date of birth was 17.11.2002. It is her case that since May, 2015 and for a few weeks more she had physical relations against her wish with the appellant. He got friendly with her and then forcibly established physical relations. She became pregnant but due to

fear she could not tell that to anybody else. She was in her seventh month of pregnancy. Her family got suspicious and she was taken to a doctor, who confirmed her pregnancy. Thereafter the appellant was called by the victim's family, but, he denied having anything to do with the victim or her pregnancy. After that FIR was lodged on 7.7.2016 at Coastal police station vide C.R. No.25/2016. The appellant was arrested on 8.7.2016. His blood sample for DNA analysis was drawn on 12.7.2016. The victim gave birth to a male child in September, 2016. Thereafter blood samples of the victim and her child were drawn. They were sent for DNA profiling to experts at Forensic Science Laboratory for comparing the blood samples. Report was sent back showing that the appellant was the biological father of the child of the victim. The investigation was carried out and the charge-sheet was filed.

4. The case was conducted before the Special Judge at Daman. During trial, the prosecution examined ten witnesses including the victim, her father, her grand-mother, her aunt, a pancha, Medical officers, an expert from the Forensic Science

Laboratory and the investigating officer. The defence of the appellant was of total denial. He also submitted his written say in continuation of his examination under Section 313 of Cr.P.C. According to him, the father of the child was somebody else. He was implicated falsely to save the real father of the child. In the written say, he submitted that he was not biological father of the child of the victim. She was having love affair with other boy who belonged to a wealthy family. One Bachubhai was Sarpanch of their village and one Naginbhai who was a Civil Supply Inspector; were having cordial relations with the victim's family. They were holding grudge against him. Even the victim's family and the appellant's family were on inimical terms. The victim's family wanted to save the wealthy boy's family from defamation and with the help of Naginbhai and Bachubhai, the appellant was falsely implicated. He has further stated in his say that everyone in the town was aware about the victim's pregnancy. It was further his case that the victim was just one year younger to her elder sister. She was admitted to school by showing her wrong age because she was over-aged.

5. The learned Judge believed the prosecution evidence and, in particular, relying on the victim's evidence as well as the DNA report, convicted the appellant as mentioned earlier.

6. The victim herself was examined as PW-2 as the main witness by the prosecution. She has deposed that her date of birth was 17.11.2002. She was studying in the ninth standard. She was knowing the appellant. He was residing near her house. In the month of May, 2015 the appellant told her that he wanted to talk with her. On 10.5.2015, there was some marriage in their village. The victim attended that marriage. That day, the appellant took her in one dilapidated house in one Wadi. She has further deposed that the appellant had forcible sex with her. She then went to her house. After 2-3 weeks, he called her and again repeated the act in another Wadi. She has stated that the appellant did this many times. She felt giddiness in her school. Then her parents came to know about it. Her aunt (PW-8) took her to a hospital at Vapi. The doctor confirmed her pregnancy. On returning home, she made a phone call to the appellant. On the next day, the appellant came to

her house and started discussing with her parents and grandmother. In the meantime, the appellant's mother came there and pushed her. They told the victim and her family that they could do whatever they wished to do. Then the victim and her family went to the police station and lodged the FIR. On 10.9.2016 she delivered a baby boy. On that day, her blood sample was taken.

In the cross-examination, some questions were put to her to bring out omissions from her statement. One of the omissions was that she had not mentioned in her police statement that the intercourse was forcible. She could not assign a reason why it was not so mentioned in her statement. There was omission in her police statement about her deposing that after 2-3 weeks again the appellant called her in another Wadi and repeated the act. She could not explain why this fact was not mentioned in her police statement. She deposed that from 10.5.2015 till 6.7.2016 she did not make any complaint against the appellant for those instances. She knew Naginbhai and Bachubhai from her village. Bachubhai was her uncle's friend. According to her, the relations between the

appellant's parents with Naginbhai and Bachubhai were cordial but subsequently they became strained. She denied the suggestion that she named the appellant at the behest of Naginbhai and Bachubhai. She identified the appellant in the Court.

7. PW-1 Dr. Lina Patel was the Medical Officer who had collected the blood sample of the appellant on 12.7.2016. She was working as Medical Officer at Government Hospital at Marwad. After collecting the blood sample it was sealed. She filled the identification form for DNA profiling. Photo copy of the form was placed on record. The form was marked as 'Article-A'. The requisition letter for collection of blood was produced on record at Exhibit-10.

In the cross-examination, she answered that she did not remember the policeman who had brought the appellant for sample collection. She did not recollect who had typed 'Article-A'. The witnesses were brought by the police. The photograph on 'Article-A' was affixed by the police. She had collected the blood sample, form was filled-up, then it was signed and sealed and then was handed

over to the police. The blood was collected in EDTA bulb. The sample was sealed in her presence by her staff. The EDTA bulb contained preservative powder which prevents the blood from clotting. She has deposed that the signatures of the appellant and the witnesses were taken by the police in her presence. The policeman who had come for the sample collection was having the name plate on his uniform written as “Kinjal Patel”. ‘Article-A’ mentions that the sample of the appellant was collected in EDTA bulb for DNA test in connection with C.R. No.25/2016 of Coastal police station, District-Daman, which was collected for DNA analysis and was sealed under her own seal. It also mentions that it was signed on 12.7.2016 at 2.15 p.m.. The witnesses were Satish Mithal Halpati and Vijay Manilal Patel. It also bears signature of the appellant and the photographer.

8. PW-3 Dr. Shailesh Arlekar was a Senior Gynecologist at Government Hospital, Daman. On 10.9.2016, he received a request letter sent by the Coastal police station for taking blood samples of the victim as well as of the newly born child. He then collected the

samples for DNA on 12.9.2016. They were taken in EDTA bulbs. They were sealed in presence of two panchas. Identification form of the victim and the child were filled up and sent to FSL with the DNA samples through police. The photographs of the victim and the child were affixed on those forms. Signature of the victim was obtained on those forms. Those forms are produced on record as 'Articles B & C'.

In the cross-examination, he deposed that the victim delivered the child on 10.9.2016. The EDTA bulbs came with rubber cap seal. The cap of that bulb cannot be removed. The blood is to be injected through the cap in the bulb. The stamp of his hospital was affixed on EDTA bulb. The staff put seal of their hospital on the bulbs. One sample of the blood for each was taken. Each blood sample was kept in ice cooled box. The paper box in which the bulb was kept was sealed with wax.

9. PW-4 Dr. Bhagubhai Patel had carried out sonography of the victim on 6.7.2016 and it was found that she was pregnant for 29 weeks and five days.

10. PW-5 was father of the victim. He has deposed that the victim was born on 17.11.2002. After he came to know about her pregnancy, he made enquiries with her. That time, she told him that she had friendship with the appellant and that the appellant had committed rape on her and had threatened her not to disclose it to anyone. The appellant was called to his house. After some time, the appellant's parents came there. The appellant's mother pushed the victim. The appellant denied that he was responsible for the pregnancy. After his refusal, PW-5 then went to the police station and lodged the FIR. The FIR is produced on record at Exhibit-23.

In the cross-examination, he admitted that in the past the victim and the appellant both had told him that they had no relations with each other. There was omission in his FIR that he had made enquiries with the victim and there was no mention of the word 'rape' in his FIR.

11. PW-8 was the aunt of the victim and PW-9 was the grand-mother of the victim. Their evidence is on the similar lines.

12. PW-6 Uttam Halpati was a pancha witness. He was pancha for spot panchnama of the spot. The act was committed near the bank of creek in one hut. The spot panchnama was produced at Exhibit-25.

In the cross-examination, he deposed that he had signed at about 5 to 6 times.

This witness's signature appears on Articles B & C which are the forms for collecting blood samples of the victim and her child. However, he has not deposed about signing on those forms in the hospital. His evidence is not very reliable. In the cross-examination, he deposed that he signed in the police station on some papers at 5 to 6 places.

13. PW-7 was the Head of the School where the victim was studying at the time of incident. She brought the original admission register maintained by her school. There was entry No.151 related to the victim. As per that entry, her date of birth was 17.11.2002. A true copy of the extract of the admission register relating to the entry was produced on record at Exhibit-30.

In the cross-examination, she admitted that such entry was taken based on the information gathered from the other school where the victim was studying, which was a Government primary school. She further deposed that they used to take leaving certificate from earlier school and keep that in their records. She admitted that there was no mention in that school leaving certificate as to on what basis the date of birth was mentioned therein. She could not tell whether the entry regarding date of birth of the victim was taken in the register on the basis of the birth certificate or based on declaration by her parents.

14. PW-10 PSI Brendan Azevedo had conducted the investigation. He has deposed about lodging of the FIR. He has produced photo-copy of the school leaving certificate of the victim which was produced on record at 'Article E'. The school leaving certificate was pertaining to the Government Secondary School when the victim had left the school on 3.5.2016. He arrested the appellant on 8.7.2016. He prepared panchnama of house of the appellant and surrounding area. He deposed that he kept the sealed

blood sample in muddemal room on 12.7.2016 in respect of blood of the appellant. On 13.7.2016, it was forwarded to FSL Surat through PC Mangela. The blood samples of the victim and the child were also sent to FSL Surat.

In the cross-examination, he was specifically asked about the original 'Article E' i.e. school leaving certificate. He had not produced the original school leaving certificate. He proved all the omissions from the FIR and statements of the witnesses which were asked in the cross-examination of those witnesses respectively. The most important document in this case i.e. the DNA report is produced by this witness at Exhibit-44. There is a clear conclusion in that report thus :

“From the above observations, it is concluded that STR profiles of Mr. Sandeep Sahadev Varli is consistent as biological father of the child of the victim.”

15. PW-11 was the Scientific Officer working with FSL Surat. He has deposed that the DNA Test was carried out as per

their procedure and the report at Exhibit-44 was prepared. He has reiterated in his deposition about the appellant being biological father of the victim's child.

In the cross-examination, he has deposed that he did not find any seal on the caps of EDTA bulbs. They had returned all the three envelopes to the concerned police station.

16. Learned counsel for the appellant submitted that the defence of the appellant was of total denial. He was falsely implicated because of the family rivalry and also because the appellant's family had dispute with Bachubhai and Naginbhai who were the influential persons in the village.

17. Learned counsel for the appellant mainly emphasized in his submissions that the samples were not kept properly in the police station and there was a strong possibility of tampering with the samples. He submitted that there was clear overwriting in Exhibit-40 wherein the date 11.7.2016 was changed to 12.7.2016. He submitted that even the muddemal register entry shows that the date of deposit of blood sample of the appellant as 11.7.2016

whereas even as per the prosecution case and the evidence of PW-1, the blood sample of the appellant was collected on 12.7.2016. He submitted that the carrier who carried the sample from the hospital to the police station and then from the police station to FSL Lab, Surat is not examined to establish that there was no possibility of tampering and therefore adverse inference needs to be drawn.

18. He further submitted that as per the evidence of PW-2, the incident has taken place in May, 2015 and few weeks thereafter, but, these dates do not match with the period of her pregnancy.

19. He further submitted that the prosecution has failed to prove that the victim was below 18 years of age. Nobody from her first school i.e. her Primary School was examined. The school record which is produced on record is based on the information given to the first school and, therefore, from the first school someone should have been examined to establish beyond doubt that the victim was born on 17.11.2002 and that at the time of incident she was a minor. However, learned counsel for the appellant submitted that it was not defence of the appellant that it

was a case of consent.

20. Learned counsel for respondent Nos.1 & 2 both submitted that evidence of the victim and her family members is reliable, cogent and consistent. The DNA report in this case is very crucial and it establishes the prosecution case beyond reasonable doubt. The statement of the appellant recorded under Section 313 of Cr.P.C. and the written statement given by him indicates that the appellant was aware as to who was the father of the child of the victim according to the appellant. In that case, it would have been natural for him to have named that person either before the investigating agency or before the Court. The appellant has not named him and, therefore, it remains only an attempt to implicate somebody else to save himself.

21. They submitted that discrepancy in the date of 11.7.2016 and 12.7.2016 is only minor and does not go to the root of the matter. PW-1 is an independent witness and, therefore, her evidence is more important than minor discrepancy regarding the dates. They further submitted that PW-6 is an unreliable witness

and his evidence does not destroy the evidence of the medical officers.

22. I have considered these submissions. As far as the age of the victim is concerned, the prosecution has produced on record the school record of the victim. There is no reason to disbelieve the evidence of PW-7. She has produced the school record maintained in the ordinary course of the business. It was kept since a few years earlier before the date of incident. Therefore, it cannot be said that this record is created to implicate the appellant in this particular case.

23. Learned counsel for the appellant has criticized production of a photo-copy of the school leaving certificate by the investigating officer. However, since the Head of the school herself was examined by the prosecution and since she had produced entry from the register, there is no reason to disbelieve the evidence regarding the age of the victim. These entries show that the victim was around 12 to 13 years of age at the time of incident which had taken place from May, 2015 onwards.

24. As far as the evidence of the victim herself is concerned, her evidence is quite clear. She has deposed with clarity and her evidence appears to be completely truthful. There was no reason for her to implicate the appellant falsely. Her evidence is supported by the circumstances and in particular by the DNA report. Her version is also supported by her family members i.e. her father, grand-mother and aunt. All of them were consistent. The victim has deposed about the incidents when the appellant had physical relations with her against her wish from May, 2015 onwards. After her pregnancy was discovered, whatever transpired was deposed by all these witnesses and they are consistent in their depositions. Considering the tender age of the victim it was also understandable that she could not and did not disclose to anybody about these incidents before her pregnancy was found out.

25. The most clinching evidence in this case is the DNA report. There is absolutely no reason to disbelieve the Medical Officer's evidence; and the expert's evidence given by PW-11 in particular. The DNA report is clear and it mentions that the

appellant was the biological father of the child of the victim. In that case, the submission that the period of offence does not match with the pregnancy does not stand in the way of the prosecution case because the fact that the victim had delivered a child cannot be disputed. Similarly, the DNA report establishes that the appellant was the father of the victim's child.

26. I am unable to accept the submissions of learned counsel for the appellant that the samples of the blood collected from the appellant were tampered. This submissions is mainly based on the muddemal article register which show that the sample was deposited in the police station on 11.7.2016 and not on 12.7.2016 when actually the blood was drawn. The evidence of PW-1 in that respect is important. Her deposition as well as her documents show that the blood sample was drawn on 12.7.2016 at 2.15 p.m. and, therefore, some error in the date mentioned in the muddemal register will not wipe out the evidence of PW-1.

It is also not believable that the investigating agency would go to such an extent to substitute the blood sample of the

appellant and instead put the blood of some third person who is supposed to be the real culprit. No such foundation either in the form of suggestion or in the form of any other evidence is put on record by the defence. No specific suggestion to that effect is given even to the investigating officer. Drawing a sample for DNA profiling was a specialised procedure required to be conducted by the Medical Officers. In any case, there is no reason to disbelieve the Medical officers. There is absolutely no evidence or circumstance to even indicate that the sample which had reached the FSL Surat for DNA test was not that of the appellant.

27. Thus, taking deep and detailed view of these aspects, I am of the firm opinion that the prosecution has successfully proved its case beyond reasonable doubt. There is no reason to interfere with the impugned judgment and order. Hence, I do not find merit in the appeal. The appeal is accordingly dismissed.

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(SARANG V. KOTWAL, J.)

Deshmane (PS)