

4. The case of the prosecution is that the victim was knowing the accused. He is friend of victims cousin and frequently visiting the house of victims uncle. The victim was residing with her uncle and grand parents. On 7th March, 2015, while the victim was returning home after attending examination, the accused had offered her lift on his motorcycle. He told her that he would drop her to Village, She sat on motorcycle. Accused took her to sugarcane field. He committed forceful sexual intercourse with her. She did not disclose incident to any one. After 8 to 10 days, the accused again visited house of victim. He touched her breast. The accused, thereafter again committed sexual intercourse with her in victims house. Since the victim missed her menstrual period, she was examined by doctor and it was noticed that she was pregnant of 22 weeks. FIR was registered. Sonography report revealed that victim was carrying pregnancy of 23 weeks on 28th July, 2015. She delivered child. The victim died on 23rd December, 2016.

5. Learned counsel for the applicant submitted that the applicant was on bail during the trial. The facility of bail has not been misused. However, after the conviction he is in custody. The applicant is in custody for three years four months. The conviction is primarily based on probabilities. There is no cogent evidence to support the prosecution case. There is contradiction in the statements recorded under Sections 161 and 164 of Cr.P.C. The last

menstrual period of victim was on 16th February, 2015. It cannot be held that pregnancy is due to incident dated 7th March, 2015. The trial Court has committed an error in calculating the period for arriving at the conclusion that the accused was responsible for the pregnancy of the victim. The medical examination does not permit extension of period for such calculation. There are several contradictions and omissions in the statement of witnesses. When the victim and accused were brought for blood samples for DNA test, the police did not carry DNA kits. They were again called on 2nd August, 2015. The requisition letters Exhibit Nos.78 and 79 issued by investigating officer for collection of blood sample, bears dated 1st August, 2015. The letter was acknowledged by Medical Officer on 2nd August, 2015. There is evidence of changing dates and irregularities regarding DNA report. The victim was not available for deposing before the trial Court. The evidence of witnesses in the nature of hearsay. The fine amount of Rs.2,00,000/- would be deposited within a period of eight weeks from the date of release.

6. Learned APP submitted that, non examination of victim during the trial would not be fatal to the case of the prosecution. The victim had passed away before recording evidence. There is sufficient evidence on record to justify the conviction. D.N.A. report supports the case of the prosecution.

The victim was minor at the time of incident. The case of prosecution cannot be discarded on the basis of calculation about period of pregnancy as contended by accused. The applicant has subjected victim to sexual assault. She was minor.

7. Learned Advocate for Respondent No.2 adopted the submission of learned APP. It is submitted that the victim has passed away during the pendency of trial. She could not depose before the Court. The evidence of Medical Officer and other witnesses supports the prosecution case. It is not disputed that the victim was minor at the time of incident. D.N.A. report proves the guilt of accused.

8. There is no dispute that the applicant was on bail during the trial. This Court by order dated 22nd August, 2016, had granted bail to the applicant/appellant. There is no adverse report that the applicant had misused the facility of bail.

9. The statement of victim was recorded on 29th July, 2015. FIR was registered under Section 376(1), 366(A) of IPC, Section 4 & 12 of POCSO Act. The age of victim stated as 15 years 7 months. The victim had alleged that the accused had subjected victim to sexual intercourse on 7th March, 2015. Thereafter, the accused outraged her modesty in her house. About one month prior to registration of FIR accused committed sexual intercourse with her in house. Due to fear of father, she did not disclose

incident to any one. It was revealed that she was 22 weeks pregnant. The accused was aged around 22 years. The applicant was granted bail by this Court by order dated 22nd August, 2016. The trial Court in Paragraph 77 of judgment has observed that, victim must have succumbed to the request of accused in state of infatuation. The victim could not be examined since she died on 23rd December, 2016. The reason for death of victim is not mentioned. The statement of victim was recorded under Section 164 of Cr.P.C. on 6th August, 2015. In the said statement, the victim has stated that, she was sexually assaulted by accused on 7th March, 2015. She was threatened. She shouted. 8 to 10 days thereafter, she was again sexually assaulted by accused in house. Thereafter accused again visited her house and committed sexual intercourse with victim under force. There is variation in both statements. PW-1 is father of victim. PW-2 is uncle of victim. PW-4 is sister of victim. PW-5 is medical officer. He examined victim. She was pregnant. PW-7 is medical officer. He is Radiologist. He ascertained age of victim. Her bony age was more than 16 years, 6 months but less than 18 years. PW-10 is medical officer. He obtained blood samples for DNA. According to him, victim was brought for blood sample. But DNA kit was not brought on 1st August, 2015. She was again brought on 2nd August, 2015. Accused was also brought for blood samples. The defence

examined DW-1. She is classmate of victim. She was with victim. One boy came at S.T. Stand. Victim went with him. He is not present in Court. The prosecution has relief on DNA report. The defence has urged that said report suffers from discrepancies.

10. The appeal is admitted. Applicant was on bail during trial. After conviction he is in custody. He is in jail for about three years.

11. Hence, I pass the following order :-

ORDER

- i. Interim Application No. 1554 of 2021 is allowed;
- ii. During the pendency of Criminal Appeal No.535 of 2021, the sentence of imprisonment imposed vide Judgment and order dated 27th September, 2019 passed by learned Special Judge under POCSO Act, in POCSO Special Case No.63 of 2015 is suspended and the applicant is directed to be released on bail on executing PR. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- iii. The applicant is permitted to furnish cash bail in the sum of Rs.25,000/- for a period of eight weeks in lieu of surety.
- iv. The fine amount of Rs.2,00,000/- shall be deposited in the trial Court within a period of eight weeks from the date of his release.

v. The applicant shall attend the trial Court once in six months on first Saturday of the month till the final disposal of the appeal;

vi. In the event, there are two consecutive defaults in attending the trial Court, the said fact may be brought to the notice of this Court and in such eventuality, the prosecution will be at liberty to prefer an application for cancellation of bail.

vii. The appeal be listed for compliance of depositing the fine amount after a period of eight weeks.

viii. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)