

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

CRIMINAL APPEAL NO. 119 OF 2018

Kaushik Kashiram Halpati

..Appellant

Versus

1. The State of Maharashtra
2. Union Territory of Daman
3. XYZ

..Respondents

Mr. Shashikant D. Chandak a/w. Kanchan S. Chandak (appointed Advocate) for Appellant.

Mr. P. H. Gaikwad, APP for State/Respondent No.1.

Mr. H. S. Venegavkar, SPP a/w. Aayush Kedia for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 30th SEPTEMBER 2022**

JUDGMENT :

1. The appellant has challenged the Judgment and order dated 19/04/2017 in Sessions Case No.19 of 2015 passed by learned Special Judge, Daman. The appellant was convicted for commission of offence punishable under Section 376(2)(i) of I.P.C. and he was sentenced to suffer R.I. for Twenty years and to pay a fine of Rs.3,000/- and in default of payment of fine to suffer R.I.

for One year. He was convicted for commission of offence punishable under Section 6 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') and he was sentenced to suffer R.I. for Twenty years and to pay a fine of Rs.3,000/- and in default of payment of fine to suffer R.I. for One year.

Both the sentences were directed to run concurrently. He was granted set off U/s.428 of Cr.p.c. for the period he spent in custody as an under trial prisoner.

He was acquitted from the Charges of commission of offence punishable U/s.506(II) of I.P.C.

Out of the fine amount, Rs.5000/- were directed to be paid to the victim as compensation.

2. Heard Shri. Shashikant Chandak, learned Advocate appointed for the Appellant, Shri. Gaikwad, learned APP for the State/Respondent No.1 and Shri. Venegavkar, learned SPP a/w. Shri. Ashutosh Kedia, learned Advocate for the Respondent No.2.

3. The prosecution case is that, some months prior to 24/09/2015 the Appellant who was staying in the neighbourhood committed rape on the victim. As a result she became pregnant.

Her mother discovered about her pregnancy and the F.I.R. was lodged on 24/09/2015 vide C.R.No.24 of 2015 at Coastal police station, Moti Daman. The investigation was carried out. The Appellant was arrested on 25/09/2015. The spot panchanama was conducted. The statements of the witnesses were recorded. The victim, as well as, the Appellant were sent for medical examination. Their blood samples were retained for DNA analysis. On 25/01/2016 the victim gave birth to a baby boy. His blood samples were also taken and sent for D.N.A. analysis. The DNA report showed that the Appellant was the biological father of that baby boy. On conclusion of the investigation the charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined Ten witnesses including the victim, her mother, Medical Officers, pancha for spot panchanama, Expert Analystist regarding DNA analysis and the Investigating Officer. The defence of the Appellant was of denial. He also mentioned that her uncle had threatened to implicate him in a false case and at his instance he was implicated. At the conclusion of the trial, learned trial Judge believed the prosecution

evidence and convicted and sentenced the Appellant as mentioned earlier.

5. PW-1 was the victim herself. She has deposed that, she was residing with her parents. She has stated that the Appellant was her uncle. He committed rape on her in his house. He resided in the neighbourhood. According to her, he was her father's brother. The Appellant used to send her to bring tobacco from a shop. When she used to return with tobacco, he used to have physical relations with her. It happened 5 to 6 times. Subsequently, her Aunt took her to a Government hospital where it was found that the victim was pregnant. Then the report was lodged with the police station. Her statement was also recorded before a Magistrate. She delivered a child. The victim's date of birth was 09/04/2003.

In the cross-examination, she has stated that her father used to go to high-seas in connection with his job for about 8 to 10 months at a stretch. The Appellant resided with his wife. Her elder uncle stayed near their house. The victim was put a suggestion

that the Appellant's mother was suspected of practicing black magic. The victim's elder uncle had quarreled with the Appellant's mother and out of that there was enmity. She was also suggested that, she was friendly with her cousin who was her paternal Aunt's son. She could not tell the dates and months when the incidents took place. She used to shout at that time. But she volunteered that, when the neighbours had gone to attend their jobs these incidents took place. Even the Appellant's brother used to be away from the house as he was addicted to liquor. She further voluntarily deposed that the Appellant had threatened her and, therefore, she could not narrate these incidents to her mother. When her mother came to know about her pregnancy, she scolded her as to why she had not told her about it earlier. She denied the suggestion that, she had relations with her cousin and that she was tutored to depose against the Appellant.

6. PW-2 was mother of the victim. She has deposed that the victim was in the 5th standard in the year 2015. On 24/09/2015, the victim was crying, therefore, PW-2 called her elder sister in law. The victim was taken to a hospital. It was revealed that she

was pregnant. Then the victim told her that the Appellant was responsible for the same. The incidents had taken place on 3 to 4 occasions. PW-2 then went to the police station and lodged the report. Her F.I.R. was taken on record at Exhibit 11. It was registered on 24/09/2015 at 8.45p.m.

In the cross-examination, she admitted that the Appellant was not the real brother of her husband. The Appellant was not her relative. She admitted that, in their community sexual relations were allowed before marriage and some times after delivery of the child marriages were performed. For about 3 to 4 months she did not disclose the pregnancy of the victim to anybody else. At the time of lodging of F.I.R. her husband was on the high-seas. He went there during festival of *Raksha-bandhan* in 2015 and returned in January 2016. The elder brother of her husband had lodged a complaint against the appellant's mother. She admitted that, her sister in law's son used to visit their house regularly. He was having good relations with the victim. Whenever they were in financial difficulty her husband's elder brother used to help them. The defence wanted to suggest that the F.I.R. was

lodged and the case was registered at the behest of this elder brother in law of PW-2. The F.I.R. which is produced on record at Exhibit 11 substantially corroborates version of PW-2, as well as, of PW-1.

7. PW-3 Dr. Shailesh Arlekar was attached to Government Hospital, Daman. On 24/09/2015, he examined the victim who was 26 weeks into her pregnancy. He did not find any recent injuries. He deposed that, on 25/01/2016 the victim delivered a child.

8. PW-4 Jyotiben Dhodi was working with Group Gram Panchayat Magarwada. She brought the original Gram Panchayat record and proved the birth certificate of the victim showing her date of birth as 09/04/2003. The Birth certificate is produced on record at Exhibit 19.

9. PW-5 Dr. Siddharth Rathod had examined the appellant on 25/09/2015. He had collected his blood samples for DNA purposes. On medical examination he did not find anything to suggest that the appellant was not capable of performing sexual

act. The blood samples of the appellant were sent to F.S.L. for DNA test along with this witness' letter which is produced on record at Exhibit 23.

He was cross-examined regarding standard operating procedure for collecting blood. He deposed that, after taking blood from the Appellant's hand it was put in three tubes which were packed and were sent to the office for further process.

10. PW-6 Dr. Nirankar Singh attached to Daman Government Hospital had collected the blood sample of the victim for DNA analysis. It was sent to chemical analysis under forwarding letter at Exhibit 26.

In the cross-examination, he deposed that, he did not know who packed those tubes. He did not have any knowledge of standard operating procedure for collecting blood.

11. PW-7 Rajesh Halpati was a pancha for spot panchanama. A bed-sheet was seized from the house of the Appellant. However, there is no further connection of this bed-sheet with this case and, therefore, his evidence is not material.

12. PW-8 Dr. Patel had carried out sonography of the victim before the F.I.R. was lodged. Even his evidence is not in dispute that the victim was pregnant at that time.

13. PW-10 Bharatsingh Purohit, P. I. was the investigating officer. He had conducted the investigation after registration of F.I.R. He had conducted the spot panchanama. He had arrested the Appellant. He had caused taking of samples, sending them to FSL and had collected the reports. He had filed the charge-sheet.

14. PW-9 Mithesh Trivedi is an important witness. He was an expert in conducting DNA analysis. He has deposed that, on 06/11/2015 their office received blood samples of the Appellant and that of the victim. On 15/02/2016 their office received the blood samples of the baby. The DNA profile report was prepared on 21/04/2016. It was produced on record at Exhibit 41. The clear opinion mentioned in the report was that the Appellant was the biological father of the baby boy.

In the cross-examination, there was hardly anything of any significance. He stated that, he himself had not received blood

samples but those were received by another official from his office. The blood samples were brought in a cold box like icebox. There was no time limit for examination of samples, if the samples were kept in cold storage. He denied the suggestion that, no icebox was used for keeping samples in this case. The DNA report produced by him at Exhibit 41 supports his case.

15. Learned counsel for the Appellant submitted that, the prosecution has not proved its case beyond reasonable doubt. The victim has not given minimum necessary details about the dates of incidents etc. The victim had not made a grievance to her mother which shows her conduct was unnatural. The Appellant was implicated falsely because of enmity between the Appellant's mother and the victim's elder uncle. He submitted that the prosecution has not proved that sufficient care was taken for collecting and sending samples and, therefore, DNA report was not beyond doubt.

16. Learned counsel for the Respondent No.2 and learned APP, on the other hand, supported the prosecution evidence

emphasising that certain facts viz. victim's age, her pregnancy and delivery of a child cannot be disputed. Therefore, based on the DNA report, it is proved beyond reasonable doubt that the Appellant was the biological father of that child.

17. I have considered these submissions. As rightly submitted by learned counsel for the Respondent No.2, the age of the victim cannot be disputed. The Birth certificate is produced on record through the evidence of PW-4. She had brought contemporaneous Gram Panchayat's record showing victim's date of birth as 09/04/2003. The F.I.R. was lodged in September 2015; by that time she was already pregnant. Therefore, at the time of lodging of F.I.R. the victim was 12 years 5 months old and, therefore, at the time of incidents she was below 12 years of age. However, since the specific dates of incidents are not mentioned, there is possibility that the incidents had taken place when she was above 12 years. But that will not make any difference because it was still an aggravated form of 'penetrative sexual assault' as defined U/s.3 r/w. 5(l) of POCSO Act; which would be punishable U/s.6 of the Act, because the incidents had taken place more than

once. Similarly, the ingredients of Section 376(2)(i) of IPC are also made out in this particular case based on the clinching evidence in the form of DNA report. It cannot be disputed that the victim was pregnant in September 2015 when the F.I.R. was lodged and she, in fact, delivered a baby boy on 25/01/2016. The only question which needs to be decided as to whether the Appellant was responsible for her pregnancy. In this context, the DNA report and the evidence of PW-9 is clinching. It clearly shows that the Appellant was the biological father. There is no force in the submission that the samples were not preserved properly or were not sent properly. The DNA report shows clear readings of different STR distribution values. The samples were not unsuitable for examination and clear results were obtained from the analysis. The defence cannot argue that the DNA report was manipulated. Therefore, the prosecution has proved beyond reasonable doubt that the Appellant is responsible for this offence. The consent of the victim is immaterial in this case considering her age. Therefore, the prosecution has successfully proved its case beyond reasonable doubt.

18. The next question which needs serious consideration is about quantum of sentence. Section 6 of POCSO then in the year 2015 provided minimum sentence of 10 years which could extend to imprisonment for life. Learned trial Judge had considered the submissions in respect of sentence to be imposed on the appellant and had sentenced him to suffer R.I. for 20 years as mentioned earlier. In this case, learned counsel for the Appellant has submitted that, there are certain mitigating circumstances. He submitted that, just prior to the incident the appellant had got married. He is continuously in custody since September 2015. More than 7 years have passed. There is no special reason as to why minimum sentence could not be awarded to him.

19. On the other hand, learned counsel for the Respondent No.2 submitted that, learned trial Judge has given proper reasoning.

20. I have given more serious consideration to this question of sentence. Undoubtedly, considering the age of the victim and subsequent event of giving birth to her child makes the offence

very serious. As submitted by learned counsel for the Appellant, the child is in a shelter home. No family member is looking after him. Therefore, I am inclined to pass some order which would give some financial help to the child who was born to the victim. At the same time, compensation awarded to the victim by the trial court is also on lower side. Therefore, I am inclined to enhance the compensation amount, so that it would give some financial help to the victim, as well as, to the child who, as of today is in a shelter home. To that extent, the substantive sentence of the Appellant can be reduced and the fine amount can be enhanced.

21. Hence, the following order:

ORDER

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant U/s.376(2)(i) of I.P.C. and under Section 6 of POCSO Act is maintained. However, the sentence imposed on him is altered. Since both these sections provided for the same minimum and maximum

punishment, the sentence can be awarded under either of these heads as provided U/s.42 of POCSO Act.

- iii) For commission of offence punishable U/s.376(2) (i) of I.P.C. the Appellant is sentenced to suffer R.I. for 17 years. In addition, the Appellant is directed to pay fine of Rs.80,000/- (Rupees Eighty Thousand only) and in default of payment of fine, the Appellant is directed to suffer further R.I. for three years.
- iv) In view of the sentence imposed U/s.376(2)(i) of I.P.C., no separate sentence is imposed U/s.6 of POCSO Act.
- v) The Appellant shall be given set off U/s.428 of Cr.p.c. for the period which he has undergone in custody as an under trial prisoner.
- vi) If the fine amount is paid, Rs.30000/- shall be given to the victim-PW-1 by way of compensation.

Rs.50000/- shall be kept in Fixed Deposit, to be renewed from time to time, in the name of the child who is born to the victim in this case on 25/01/2016. The child shall be entitled to get that amount with interest once he attained the age of 18 years.

vii) It is clarified that the Appellant is granted period of six months from today to deposit the fine amount before the trial court.

viii) The trial Court shall take steps in disbursing the compensation amount to the victim and keeping it in Fixed Deposit and then disbursing to the victim's son, as directed by earlier part of the order.

ix) While disbursing the amount of compensation, identity and privacy of the said child be protected. Care should be taken not to disclose the facts of this case, directly or indirectly, to the child.

- x) The Appeal is disposed of in the aforesaid terms.
- xi) A copy of this order be sent to the Appellant through the jail authorities.
- xii) With these directions the Appeal is disposed of.

(SARANG V. KOTWAL, J.)