

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

CRIMINAL APPEAL NO. 1481 OF 2018

Shailesh Ashok Mane

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

**WITH
CRIMINAL APPEAL NO. 165 OF 2022**

Parmeshwar Shivaji Narke

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. S. G. Rajput a/w. Shusham Kalbere a/w. Chaitali Rajput a/w. Gayatri Mane a/w. Nikita Kulkarni for Appellant in Criminal Appeal No.1481 of 2018.

Mr. Satyavrat Joshi for Appellant in Criminal Appeal No.165 of 2022.

Mr. S. R. Agarkar, APP for State/Respondent in both Appeals.

CORAM : SARANG V. KOTWAL, J.

DATE : 6th OCTOBER 2022

JUDGMENT :

1. Both these appeals are decided by this common Judgment because they arise out of the same trial. For the sake of convenience, both the Appellants are referred to by their status as

accused before the trial Court.

2. The Appellant Parmeshwar Shivaji Narke was the accused No.1 and Appellant Shailesh Ashok Mane was the accused No.2 in Special Child Case No.67 of 2015 before learned Adhoc District Judge-1 and Additional Sessions Judge, Baramati. By his Judgment and order dated 20/10/2018 passed in Special Child Case No.67 of 2015 both the appellants were convicted for commission of offence punishable U/s.376-D of I.P.C. Both of them were sentenced to suffer R.I. for 20 years each and to pay a fine of Rs.10,000/- each and in default of payment of fine to suffer R.I. for 2 years each.

Both the Appellants were also convicted for commission of offence punishable U/s.4 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act'). Each of them was sentenced to suffer R.I. for 7 years and to pay a fine of Rs.1000/- and in default of payment of fine to suffer R.I. for 3 months.

Both substantive sentences were directed to run concurrently. Both of them were given set of U/s.428 of Cr.p.c.

3. Heard Shri. Rajput, learned counsel for the Appellant in Criminal Appeal No.1481 of 2018, Shri. Satyavrat Joshi, learned counsel for the Appellant in Criminal Appeal No.165 of 2022 and Shri. Agarkar, learned APP for the State in both Appeals.

4. The prosecution case is that, on the date of incident the victim was about 17 years 10 months of age. Her date of birth was 19/07/1997. The incident took place on 18/05/2015. The victim was working with a caterer. The accused called her telephonically on some pretext. Both of them then took her to a secluded field and committed rape one after other. Thereafter, the victim told this incident to her mother when she returned home late in the night. They decided to lodge F.I.R. First they went to Yavat police station, but they were directed to go to Lonikand police station. Subsequently, the F.I.R. was actually registered at Yerwada police station vide C.R.No.137 of 2015. The investigation was carried out. The victim was sent for medical examination. Her clothes were seized. Different articles and clothes were sent for chemical analysis. The accused No.1 was arrested on 20/05/2015 and the accused No.2 was arrested on 21/05/2015. Their blood was

collected for DNA Analysis. The investigation was carried out. The statements of various witnesses were recorded. The spot panchanama was recorded. The DNA report shows that the blood samples of the accused matched with the DNA sample of her vaginal swab. The charge-sheet was filed and the case was committed to the Special Court.

5. During trial, the prosecution examined 14 witnesses including the victim, Medical Officers, panchas, police officers and the in-charge Head Master of the school where the victim was studying. The defence of the accused was of total denial. At the conclusion of the trial, both the accused were convicted and sentenced as mentioned earlier.

6. To prove the age of the victim, the prosecution examined PW-14 Dada More who was the in-charge Head Master of the school at Pune where the victim had studied. He had brought the original general register before the trial Court. The victim had left the school on 31/05/2015. According to their register, her date of birth was 19/07/1997. A copy of the original register was produced on record at Exhibit 82.

In the cross-examination, he deposed that their school was managed by PMC, Pune. In answer to a specific question, he deposed that their school had mentioned the date of birth of the victim as per the record received from the earlier school. This particular answer was given to a specific question put to this witness in the cross-examination. Apart from that, there was no cross-examination challenging the date of birth of the victim.

7. The victim herself was examined as PW-4. Her evidence is more important. She has deposed as follows:

The incident took place on 18/05/2015 between 3.00p.m. to 4.00p.m. near Shikrapur, Taluka Shirur, District Pune. Those days she was working with one Caterer. She received a telephonic call from an unknown person. He offered her a job. He told her that, he had already arranged services of 9 girls and he required one more girl for the job. He told her that the job would get over between 4.00p.m. to 5.00p.m. She accepted the job. That person called PW-4 to Wagholi. She went there. Two persons came near the bus stop on a motorcycle. She verified that those were the

same persons who had called her. One of them asked her to sit on the motorcycle. They went ahead on the same motorcycle. They stopped near a sugarcane juice centre at Bhima Koregaon. One of those had consumed alcohol. She was told that the marriage was arranged at Shikrapur and they were to go there. After that, she was taken near one field near the bank of a river. The person who had consumed the liquor forcibly took her to the field. The other initially made a show of helping her, but he also took her forcibly to the same field. Thereafter, both of them committed rape on her one after the other against her wish. She was threatened not to disclose that incident to anybody. At the spot, her *chappal* was left as it was damaged. They bought her another *chappal*. They tried to give her food, but she refused. She was given Rs.100/- as bus fare and dropped her at Shikrapur bus stop. The person who had consumed liquor brought another person showing his willingness to drop her to her house, but she refused. After that, she returned home at around midnight. She was frightened. She did not disclose the incident to her mother immediately, but told her mother about the incident on the next day. Her mother lodged the

complaint with Yerwada police station. The police there did not take down their complaint. Then her mother lodged the complaint with Shastri Nagar police chowky. After that, the police recorded her statement. It was treated as an F.I.R. It is produced on record at Exhibit 25. She identified her own clothes and the clothes of accused which they had worn at the time of incident. She also identified the accused in the Court.

In the cross-examination, she deposed that she used to work under a Caterer's contractor. She admitted that, she had not produced any documentary evidence regarding her mobile phone before the police. She had disclosed the number from which she had received that unknown call. She had reached Wagholi bus stop by sharing an auto rickshaw and then a taxi. She stated that, there are police stations of Yerwada, Lonikand and Talegaon Dabhade. There is also an outpost at Shikrapur. Her mother was a labourer. Their income was very less. Her police statement did not contain the fact that an unknown person had told her that he had arranged for 9 girls and was short of one girl. Her police statement also mentioned that two persons took her in the field by pulling her by

force and there was no reference to her *chappal* in her police statement. She denied the suggestion that, she had gone for picnic with her boy friend and had returned late in the night, that she had maintained physical relations with her boy friend and out of fear she told her false story to her mother.

Her F.I.R. which is produced at Exhibit 25 substantially narrates the same incident. In her F.I.R. she had given description of both these persons. It is mentioned in her F.I.R. that, she was called to help in the marriage ceremony and for that job she was promised her fees and travelling expenses. The F.I.R. was lodged at Yerwada police station on 19/05/2015 at 11.45p.m.

8. The next important witness is PW-10 Dr. Pruthviraj Pawar who had medically examined the victim on 20/05/2015. She was brought to Sassoon General Hospital by a police constable attached to Lonikand police station. She had narrated the history. On examination he did not find evidence of any external injuries over body surface. The hymenal edges were old and healed and there was no bleeding. There was no evidence of peri-hymenal or

periurethral inflammation. After that, he collected samples from the victim and sealed the same and handed over to the police. The history and clinical examination was suggestive of multiple acts of penetrative sexual vaginal intercourse.

In the cross-examination, he could not give definite opinion about the injuries in respect of her hymen. The medical certificate is produced on record at Exhibit 43. The medical history recorded in the medical papers was that, she was called at Wagholi on 18/05/2015 and two persons committed sexual assault without her consent.

9. PW-1 was brother of the accused No.2. He had turned hostile. The prosecution wanted to examine him to show that, he had given his mobile phone to the accused No.2 and it was used by him for calling PW-4. But no call record was produced on record and, therefore, his evidence is not of any value.

10. PW-2 was the relative of accused No.2 and PW-3 was a friend of both the accused. They were examined to show that both accused had brought the victim to the village. But PW-2 and 3 also

did not support the prosecution. Their contrary statements from their police statements were proved through the evidence of the investigating officer. PW-1, PW-2 and PW-3's contrary statements from their police statements are produced on record at Exhibit 53 to 56. Those portions at the most show that, at around 12.30p.m. the victim was with the accused. Since these witnesses have turned hostile, the prosecution cannot really take help of their evidence. But in any case, the evidence of PW-4 shows that the accused and the victim were together around that time.

11. Similarly, PW-7 Mahendra Gajare was a shopkeeper. The prosecution wanted to show that, after the incident the accused bought a new pair of Chappal for the victim. But he had also turned hostile. Neither the prosecution, nor the accused can take advantage of his evidence.

12. PW-5 Vilas Kumbhar was a pancha for spot panchanama. He turned hostile; but the spot panchanama is produced on record at Exhibit 29. The spot panchanama shows that, a damaged footwear, a small hook and a stone with dried liquid were

recovered from the spot. All the articles were seized and sealed.

13. PW-6 Sandip Dorge was a pancha for seizure of clothes of the accused and also seizure of motorcycle at the instance of accused No.1.

14. PW-8 Saurabh Jain and PW-9 Sushant Divekar were panchas for seizure of clothes of the victim. However, they turned hostile and did not support the prosecution case. This panchanama is proved through the evidence of the investigating officer. It is produced on record at Exhibit 39. This panchanama is important because clothes of the victim is an important piece of evidence in this case. That panchanama was carried out at around 12.05a.m. on 20/05/2015. Under that panchanama, one *salvar*, one *kurta*, one brassier, one nicker and one stole were seized and sealed. Those articles were sent for chemical analysis.

15. PW-11 Seema Dhakne, API was attached to Yerwada police station. On 19/05/2015, she had taken down victim's complaint. Since the incident had taken place within the jurisdiction of Lonikand police station, she forwarded the offence

to Lonikand police station. Her forwarding letter is produced on record at Exhibit 46. It is mentioned that the offence was registered vide C.R.No.00 of 2015 at Yerwada police station and then it was forwarded to Lonikand police station. She has specifically deposed that the F.I.R. which was given by the victim is already produced on the record of the trial Court at Exhibit 25.

16. PW-12 Chandrakant Jadhav, P.I. was attached to Lonikand police station. He along with victim went to the spot of incident. There he realized that it was within the jurisdiction of Yawat police station and therefore, he forwarded the offence to Yawat police station. His forwarding letter is produced on record at Exhibit 48.

17. PW-13 Ajay Gorad, API, was the investigating officer. He has deposed about the investigation carried out in this case. The F.I.R. was registered at Yawat police station vide C.R.No.137 of 2015. He seized the clothes of the victim under panchanama. That panchanama is produced on record at Exhibit 39. Then he went to the spot of incident and seized the articles from there. The spot

panchanama was recorded. The victim was sent for medical examination to Sassoon Hospital. He recorded the statements of different witnesses. He proved the contrary versions from the police statements of the hostile witnesses in this case. He arrested the accused and referred them to medical examination. He seized their clothes and sent them for chemical analysis. The C.A. reports are produced on record at Exhibit 62 to 73. The main C.A. report regarding DNA analysis is at Exhibit 73 which mentioned that, Semen stain cuttings from nicker and vaginal swab of the victim matched with the male haplotypes obtained from blood of accused No.1 Parmeshwar Narke and blood of accused No.2 Shailesh Mane. The Semen stain cuttings from stole of the victim matched with the male haplotypes obtained from blood of accused No.2 Shailesh Mane. There was hardly any cross-examination of PW-13 except giving suggestions. The distance between Yawat police station and the spot of incident was 17 Kms.

This, in short, is the evidence led by the prosecution. Learned Sessions Judge believed the evidence of the prosecution on all material aspects. The defence of the accused, as mentioned

earlier, was of total denial. No specific defence was taken by them.

18. Both learned counsel for both accused made following submissions:

The complaint lodged by mother of the victim with Shastri Nagar police chowdy is not produced on record, therefore, the first narration of the incident is not before the court and there is scope to believe that a false story is concocted.

The victim's mother is not examined. She was an important witness because she was the first person who had narrated the incident to the police.

The date of birth of the victim is not proved by the prosecution.

19. Shri. Rajput, relied on the Judgment of the Hon'ble Supreme Court in the case of *Jarnail Singh Vs. State of Haryana*¹, wherein, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 was considered. That Rule provides the procedure to be followed in determination of Age.

¹ Criminal Appeal No.1209 of 2010 decided on 01/07/2013.

20. Both learned counsel submitted that, there was absolutely no injuries either external or even to private parts of the victim and, therefore, a false story of forcible sexual intercourse is concocted. There are major contradictions in her evidence. The motorcycle is not identified. Even the accused are not identified properly because there was no test identification parade. The identification in the Court after so many months cannot be believable. The police did not produce call data record and, therefore, adverse inference should be drawn because the case was started with the phone calls made by the accused to the victim. The evidence of victim cannot be termed as evidence of sterling nature. Considering the punishment of 20 years, her evidence needs to be appreciated very cautiously. There was delay in registration of F.I.R. The panchas for seizure of clothes of the victim have turned hostile, therefore, seizure of clothes of the victim becomes doubtful; consequently DNA reports based on her clothes cannot form the basis for conviction.

21. Learned APP, on the other hand, submitted that the prosecution has proved every single ingredient of the offence

beyond reasonable doubt. There is absolutely no reason to doubt the version of the victim. Her evidence is sufficiently corroborated with the DNA report. No further evidence was necessary to prove the case against the accused.

22. I have considered these submissions. As far as date of birth of the victim is concerned, the In-charge Head Master of her school has produced the school record at Exhibit 82. Her date of birth is shown as 19/07/1997. The record was kept in ordinary course by the witness; as he has answered in the cross-examination that the date of birth of the victim was mentioned as per the record received from the earlier school. There is no challenge to this evidence and there is no reason to doubt this evidence. It is not the case of the defence that this record is incorrect or is manipulated. That entry was made in the register of that school as Entry No.6187. Besides this, the prosecution had produced the School Leaving Certificate on record. It was produced through an application vide Exhibit 74 on behalf of the prosecution for taking the School Leaving Certificate on record; to which, on behalf of the accused an endorsement was given that the accused had no

objection for taking that certificate on record. Thus, accused have accepted the school leaving certificate of the victim which mentions her date of birth as 19/07/1997. Thus, accused have accepted that date of birth of the victim was 19/07/1997. The date of offence is 18/05/2015. Thus, on that date, the victim was below 18 years of age. Therefore, in any case, her consent will be immaterial for proving the offence. In this case, the victim has categorically deposed that the offence was not committed with her consent, but it was committed forcibly against her will. From this evidence, the prosecution has sufficiently proved beyond reasonable doubt that, on the date of incident the victim was below 18 years of age.

23. As far as victim's own version through her deposition is concerned, I see absolutely no reason to doubt the truthfulness of her case. She has described the incident in detail. The accused were not known to her and they called her on the pretext of giving her a job which was related to her work. She went to the village Wagholi unsuspecting the ill-intention of the accused and thereafter she fell prey to their ill-intentions and act. The victim

was overpowered by two accused and she was helpless to resist. The spot of incident described by her is also proved not only through her own evidence and spot panchanama, but also through the C.A. report at Exhibit 71. This report shows that a hook found at the spot matched with the brassier seized by the police from the victim based on spectro chemical composition analysis. The hook was found at the spot where the incident had taken place. Similarly, the footwear which was found at the spot was found to have characteristics and spectro chemical composition of the earth at the spot. The same material was found on the stole of the victim. The stole was seized from the victim which shows that the victim was at the spot and her footwear remained there which matched with the earth on her stole which was with her till it was seized by the police. All these factors show that the incident had taken place at that particular spot shown by the victim and it is a strong corroborative piece of evidence. The decisive evidence in favour of the prosecution is in the form of DNA report at Exhibit 73. As mentioned earlier, the DNA report shows that vaginal swab of the victim matched with the DNA samples of both accused.

Similarly, semen stains matched with the DNA sample of accused No.2. There is absolutely no reason to doubt this DNA report. The defence has not been able to cast any shadow of doubt on this particular piece of evidence. Considering this strong evidence, absence of test identification parade or identification of the accused in the Court after many months loses their significance and importance. There cannot be a strong circumstance than this not only regarding identity of the accused but also regarding their participation in the offence. Based on this evidence, the prosecution has proved its case beyond reasonable doubt. There is also no force in the submission that the initial statement describing the incident is not brought on record. The police officer attached to Yerwada police station has admitted that Exhibit 25 is the statement given by the victim herself; it was given immediately on the next day and there was no delay for concocting a false story. In any case, based on the above discussion, it is quite clear that the offence was committed by no one else but by these two accused who faced the trial.

24. As far as, sentencing part is concerned, the trial Court

has imposed minimum sentence for the offence punishable U/s.376-D of IPC, as well as, under section 4 of POCSO Act. There is no scope to reduce it further. In this view of the matter, I do not find any merit in these appeals.

25. Both the Appeal are accordingly dismissed.

(SARANG V. KOTWAL, J.)