

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.463 OF 2019

Devidas s/o Balkrushna Sahare
Aged about 40 years,
Occupation – Private,
R/o. Mauza Itgaon,
Post and Tahsil Paoni, District Bhandara
(At present mauza Khapri Raja,
Tahsil Umrer, District Nagpur)
(Presently at Central Prison, Nagpur)

...APPELLANT

VERSUS

The State of Maharashtra,
through P.S.O., P.S. Kuhi,
District Nagpur

...RESPONDENT

Shri A.S. Band, Advocate for the appellant.
Shri M.K. Pathan, Additional Public Prosecutor for the
respondent/State.

CORAM : ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.
DATED : DECEMBER 02, 2022.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel for the parties.

2. The appellant in the present appeal is convicted for the offence punishable under Section 376(2)(f) and (n) of the Indian Penal

Code (hereinafter referred to as 'the IPC' for short) read with the offences defined under Sections 5(i)(l) and (n) punishable under Section 6 and offences under Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for short) and sentenced to suffer imprisonment for life, which shall mean imprisonment for the remainder of his natural life and shall also be liable to pay fine of Rs.10,000/- (Rs. Ten thousand), in default to suffer rigorous imprisonment for six months in Special Cri. (POCSO) Case No.122/2015 decided on 24/11/2017.

3. The facts necessary for the decision of the appeal are as follows :

A] The victim is the daughter of the accused. On 22/03/2015, she lodged oral report at police station Kuhi, Nagpur on an allegation that she is residing with her maternal aunt and her husband since the date of incident. Prior to that she was residing at Khapri near Pachgaon, Tahsil Umrer along with her father, step mother and her step siblings. She has not disclosed date of incident but alleged that on the day of incident, she was only in the house and her step mother and her children were out of station. In the evening she cooked food and after dinner her father went in the courtyard and she was lying on the bed. Her father-accused came inside, closed the door from inside, slept besides her and

subjected her for sexual assault. In the night at about 1.00 a.m. she went outside for natural call and again she came and slept inside the house. Again her father subjected her for sexual assault. At about 5.00 a.m. she went at the house of Vandana Gedam and informed the incident to her. Thereafter she approached to the police and lodged report.

4. On the basis of said report, police have registered the crime vide Crime No.26/2015 under Section 376 (2)(m)(I)(G), 506 of the IPC and under Sections 4 and 8 of the POCSO Act. After registration of the crime, the Investigating Officer has visited the alleged spot of incident and drawn the spot panchnama. The victim was referred for the medical examination. The accused was arrested and he was also referred for medical examination. The cloths of the victim as well as the cloths of the accused are seized. During the spot panchnama, the Investigating Officer has seized one coverlet and one piece of condom packet from the place of the incident. All the incriminating articles are forwarded to Chemical Analyzer and after completion of investigation the Investigating Officer has filed the charge-sheet against the accused.

5. Learned trial Court has framed charge vide Exhibit 7. The accused pleaded not guilty and claimed to be tried.

6. The prosecution mainly rests on the evidence of the victim- PW-1 and PW-2 - Dr. Hemant Namdeo Ghangale and PW-4 Dr. Madhuri Sham Deotale who examined the victim and PW-3 - Laxman Baliram Dhengale and PW-5-Subhash Govindrao Kale, Investigating Officers.

7. Besides oral evidence, Prosecution also relied upon various documents such as :

Oral report (Exhibit 13), First Information Report (Exhibit 14), Medical Certificates (Exhibit 22 and 23), Chemical Analyzer Reports (Exhibits 24 to 26), Letters to Medical Officer (Exhibits 29 and 30), Spot Panchnama (Exhibit 32), Seizure Memo regarding the articles seized during the spot panchnama (Exhibit 33), seizure memo regarding the cloths of the victim (Exhibit 34) and seizure memo regarding the cloths of the accused (Exhibit 35), arrest panchnama (Exhibit 36), seizure memo regarding the seizure of the samples (Exhibit 39) and requisition to Chemical Analyzer (Exhibit 41).

8. The implicit reliance is placed by the prosecution is on the evidence of the victim. She deposed vide Exhibit 12 that at the relevant time she was residing along with her father, step mother and her step siblings. On the day of incident, she was alone in the house as her step

mother and her children were out of station. Taking disadvantage that she is alone in the house, accused who is her father entered inside the house when she was lying on the bed and subjected her for sexual assault. As per her evidence, accused has repeated the act in the midnight also. Therefore, she approached to one Vandana Gedam and thereafter lodged the report. Said report is at Exhibit 13 and printed FIR is at Exhibit 14. As per her evidence, at the time of incident she was below 18 years of age as her birth date is 07/11/1998.

9. The accused has challenged the birth date of the victim girl. As per the contention of the defence, the birth date of the victim girl is 07/11/1996 and not 07/11/1998. During cross-examination PW-1 – victim stated that she is not aware whether her birth date is 07/11/1996. Subsequently, she stated that her date of birth is 07/11/1996. Admittedly, accused is facing charge under the provisions of POCSO Act. To substantiate the charge under the provisions of POCSO Act, the burden is on the prosecution to prove the age of the victim girl. Admittedly, the prosecution has not adduced any evidence to prove the age of the victim girl. The contention of the victim that her birth date is not 07/11/1996 but it is 07/11/1998. No documentary evidence is adduced by the prosecution. The evidence of Investigating Officer PW-3 – Laxman Baliram Dhengale is also silent regarding

whether he has collected any birth certificate or any document to prove the age of the victim girl. Evidence of PW-5, another Investigating Officer also silent regarding the age of the victim girl. Thus, neither the oral evidence nor the documentary evidence is on record to show that the birth date of the victim girl is not 07/11/1996 but it is 07/11/1998. Though the victim girl has claimed her birth date as 07/11/1998 but is it not corroborated by any documentary evidence.

10. How the age of the victims are to be determined is discussed by the Hon'ble Apex Court in the case of *Jarnail Singh Vs. State of Harayana 2013 ALL MR (Cri) 2946* that even though Rule 12 of Juvenile Justice Rules 2007 is strictly applicable only to determine the age of the child in conflict with law, the aforesaid statutory provision should be the basis for determining the age, even for a child who is victim of a crime. For, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is victim of crime. Therefore, it would be just and appropriate to apply Rule 12 of the 2007 Rules to determine the age of prosecutrix. The manner of determining age conclusively, has been expressed in Sub-rule 3 of Rule 12. Under the aforesaid provision, the age of the child is ascertain by adopting the first available basis, out of number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3),

an option is expressed in the preceding clause, it has over riding effect over an option expressed in a subsequent clause. In the scheme of Rule 12(3) matriculation (or equivalent) certificate of the concerned child is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisaged consideration of the date of birth entered, in the school 1st attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive and no other material is to be relied upon. Only in the absence of such entry Rule 12(3) postulates reliance on the birth certificate issued by Corporation, Municipal authority or Panchayat. Yet again, if such certificate is available then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child, it is only in the absence of any of the aforesaid, the Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

11. In the present case, admittedly the victim girl is illiterate as per her evidence. The statement of the accused is recorded under Section 313 of the Cr.P.C. But he denied that the birth date of the victim girl is 07/11/1998. Thus, the accused has also not admitted that the

birth date of the victim girl is 07/11/1998. Thus, the prosecution has not proved the birth date of the victim girl, and therefore, it is not proved that the victim girl was child within the definition of Section 2(d) of the POCSO Act.

12. Now, it has to be seen whether a prosecution has established penetrative sexual assault by father. PW-1 the survivor has deposed before the Court that the accused who is her father subjected her for sexual assault by taking disadvantage that she is alone in the house. Her evidence further discloses that earlier incident happened when she was lying on the bed after the dinner of her father and again in the midnight accused has repeated the said act. As per her evidence, she disclosed the said incident in the morning to one Vandana Gedam and thereafter she approached to the police station. She is cross-examined regarding the alleged incident. During her cross-examination she admitted that before her pregnancy she had physical relations with one boy from Shirsi. It is further elicited from her cross-examination that she is acquainted with that boy as initially she was residing at Shirsi. It further came on record that she was having five months pregnancy which was aborted.

13. Thus, her cross-examination is only to the extent that she had lodged false report against the accused who is her father. It is specifically

came on record that she had physical relations with one boy from Shirsi before her pregnancy.

14. To corroborate her version, prosecution has not examined said Vandana Gedam to whom she allegedly disclosed the said incident immediately. To corroborate her version, prosecution relied upon the evidence of the Investigating Officer who had drawn the spot panchnama about the spot of incident. Said spot panchnama is marked as Exhibit 32 on the basis of evidence adduced by PW-3. As per the evidence of PW-3, after registration of the crime, he visited the alleged spot of incident and drawn the spot panchnama. The spot was shown by the Survivor. From the spot, he seized one coverlet and one piece of condom packet by preparing seizure panchnama. The seizure memo is at Exhibit 33. While drawing the spot panchnama, he seized one blanket (Chaddar) from the spot of incident which is having blood stains. From the spot panchnama it reveals that the spot is situated in the residential locality. Several houses are situated there.

15. The prosecution has also adduced the evidence of Medical Officers PW-2 Dr. Hemant Ghangale and PW-4 Dr. Madhuri Deotale vide Exhibits 21 and 47 respectively. As per their evidence, on 22/03/2015, victim was referred to them for medical examination. She had narrated

the history that on 21/03/2015 at about 10.00 p.m. and in the intervening night of 21/03/2015 and 22/03/2015 at 1.00 a.m. her father subjected her for sexual assault. She also stated that there was similar history of sexual intercourse by her father 5 to 6 months back. On her examination they observed that genital anus and cavity showed abrasion of approximately 2 x 2mm over introitus at 7 O'clock position with redness over surrounding area of vagina, hymen ruptured and old healed, evidence of carunculae myritiformis. Redness over surrounding area of vagina which according to the Medical Officer is due to any type of recent trauma or coitus. Injury mentioned in column No.(VI)(e) is fresh and within 24 hours. The Survivor was pregnant of 18 to 20 weeks. Accordingly, certificate was issued which is at Exhibit 22. PW-4 admitted that hymen can be ruptured due to natural intercourse or by insertion of some object into vagina. It is further elicited that the victim may have conceived in the month of October 2014. PW-2 has also admitted that vaginal examination was done by PW-4 - Dr. Madhuri Deotale and he has not done so. The conceptual period was about 14 days prior to 18 to 20 weeks of pregnancy. Thus, it is elicited from the Medical Officer during the cross-examination that hymen can be ruptured by insertion of some object in vagina or due to natural intercourse. The evidence of Medical Officer shows that the injury is fresh and within 24 hours. As per the Medical Officer, the victim was

examined on 22/03/2015. The Medical Officer has mentioned the timing when she was examined and it shows that the victim was examined at about 8.30p.m. on 22/03/2015. Besides the medical evidence, prosecution also relied upon the Chemical Analyzer reports Exhibits 24 to 26. Exhibit 24 Chemical Analyzer report states about the examination of the cloths of the victim and cloths of the accused and the articles found at the time of spot panchnama. As per Chemical Analyzer report Exhibit 24, Exhibit 2 i.e. knicker was stained with blood of blood group 'B' and blood group of blood detected on Exhibit 8 i.e. chaddar cannot be determined. No blood is detected on the cloths of the accused. Exhibits 25 and 26 are in respect of the blood group of the victim and the accused. The blood group of the victim and the accused is of blood group 'B'. Another material evidence on which the prosecution relied upon is the scientific evidence of DNA report. Said DNA report is at exhibit 45(A). As per the said DNA report, the blood samples of the victim, of the accused and of fetus was sent to analysis. The DNA extracted from blood samples of accused Devidas, fetus and the blood samples of the victim by using the PCR technique. It is analysed by the Analyzer that out of 15 different genetic system analysed with PCR, putative father Devidas failed to match obligate paternal alleles present in Exhibit 1 fetus and Exhibit 3 cord blood in DNAn-178/15 at 5 STR Loci. Analyzer has also analysed 15 different genetic

systems and concluded that the victim matched obligate maternal alleles present in Exhibit 1 fetus and Exhibit 3 cord blood and opined that the accused Devidas is excluded to be the biological father of Exhibit 1 fetus and Exhibit 3 cord blood whereas victim is concluded to be the biological mother of Exhibit 1 fetus and Exhibit 3 cord blood.

16. Besides the oral evidence of the victim and the medical evidence and scientific evidence, prosecution relied upon the evidence of PW-3-Laxman Dhengale and PW-5-Subhash Kale who are the Investigating Officers. The sum and substance of the evidence of PW-3 is that the victim approached to the police station along with 3 women and lodged the report. He registered the offence on the basis of said report and carried out the investigation. He narrated about the investigation carried out by him. During his cross-examination he admitted that he has sent the accused to the Rural Hospital for medical examination at once by sending requisition letters Exhibits 37 and 37A. He denied the suggestions of the defence Counsel that he carried out the false investigation and submitted false charge-sheet against the accused.

17. Shri A.S. Band, learned Counsel for the appellant vehemently submitted that the material evidence DNA report exonerate the accused to be a father of the fetus is sufficient to show that the accused is falsely implicated in the alleged offence in the background that the victim girl

had physical relations with one boy. The victim girl specifically admitted that she had physical relations with one boy. The accused had explained why he is falsely implicated. He explained that he had seen his daughter roaming with one boy and he scolded her and warned her not to roam with such boy and told her to go and stay with such boy and therefore she falsely implicated him in this case. He submitted that the evidence of the victim does not inspire the confidence. He further submitted that though she stated that she had immediately disclosed the incident to one Vandana Gedam but said Vandana Gedam is not examined. Her evidence that she was subjected for sexual assault by the accused prior to 5 to 6 months also but she has not narrated the incident. The silence on the part of the victim girl who is grown up would speak for itself and the age of the victim girl is not proved by the prosecution.

18. Per contra, the Shri M.K. Pathan, learned Additional Public Prosecutor submitted that the evidence of the victim in itself is sufficient to convict the accused for the offences alleged against him. The Survivor is a helpless victim girl as accused has performed second marriage. There is no reason for the victim girl to implicate the accused falsely who is her father. He further submitted that by virtue of Section 29 of the POCSO Act, there is a presumption against the accused that he is guilty of the offence with which he is charged and in the present case, the accused

has not discharged the said onus except by placing on record his explanation during statement under Section 313 of the Cr.P.C.

19. After appreciation of the evidence, it is an admitted position that the victim girl is the daughter of the accused. The victim girl has admitted that she had physical relations with one boy. There is specific evidence that she conceived and the DNA report exonerated the accused to be a father of the said fetus. Victim girl has not disclosed the earlier incident to anybody though she is residing in the village. It is not the case that the victim was threatened or confined, and therefore, she could not disclose the said incident to anybody. On the contrary, her evidence shows that she had physical relations with one boy who is from the same village. While appreciating the evidence of the victim we may look for some assurance of her statement to satisfy that the evidence of the victim is cogent and reliable.

20. The Hon'ble Apex Court in the case of ***State of Punjab Vs. Gurmit Singh and ors.(1996) 2 SCC 384*** held that corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not requirement of law but a guidance of prudence under given circumstances. It is well settled that inferences

have to be drawn from a given set of facts and circumstances with realistic diversities and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty.

21. It is well settled that the sole testimony of the prosecutrix is sufficient to warrant conviction if it inspires the confidence. In the present case, the victim is a grown up girl testified about the sexual assault on her. It is not supported either by the Chemical Analyzer report or by DNA report. Even there is no evidence to show that she was subjected for sexual assault by the accused on earlier night. Her silence regarding the initial sexual assault also speaks for volume. Though she disclosed the said incident to one Vandana Gedam but she is not examined by the prosecution. Admittedly, medical evidence shows that she had sustained injury on her anus and hymen was found ruptured. She is also pregnant of 18 to 20 weeks. Said evidence is to be assessed and scrutinized in the light of her admission that she had physical relationship with one boy. The above said evidence is also to be scrutinized in the light of DNA report which has exonerated the accused to be a biological father of the said fetus. The evidence of the victim is not supported by the scientific evidence. There can be no doubt that there have been remarkable technological advancement in forensic

science and in scientific investigations. The DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. Modern DNA testing can provide powerful new evidence unlike anything known before DNA technology as a part of forensic science and scientific discipline not provide any guidance to investigation but also supplies the Court accurate information about the tending features of identification of criminals.

22. In *Mukesh and another Vs. State (NCT of Delhi) 2017 ALL MR (Cri) 2448*, Hon'ble Apex Court held the importance of DNA evidence. It was observed in paragraph No.216 and 217 :

“216. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a party of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

23. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must.

24. Thus, DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. Modern DNA testing can provide powerful new evidence unlike anything known before DNA technology as a part of forensic science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued investigation about the tending features of identification of criminals. The process of DNA profiling starts with DNA extracted from the sample taken from the suspects. Thus, it is helpful to inculcate as well as exculpate the suspects. In the present case, the evidence of the victim is not corroborated by the scientific evidence DNA.

25. Learned Additional Public Prosecutor vehemently submitted that there is a presumption under Section 29 of the POCSO Act. Said presumption would help the prosecution when legal and admissible evidence is adduced by the prosecution. The determinative question would be whether the presumption under Section 29 of the POCSO Act discharges the prosecution of proving its case beyond reasonable doubt.

26. We are constrained to hold that the prosecution cannot be discharged on proving its case by way of such admissible evidence. It cannot be said that the presumption under Section 29 of the POCSO Act

is conclusive presumption which cannot be overcome by any additional evidence or argument.

27. It is not sufficient to make an allegation but it is for the prosecution to establish the charge indicated upon the accused beyond reasonable doubt. It is well settled that the sole testimony of the prosecutrix is sufficient to warrant conviction if it inspires the confidence. The evidence of the victim if scrutinized in the light that she had physical relations with one boy, she is pregnant of 18 to 20 weeks. Her pregnancy was aborted and samples of fetus, samples of the victim and accused are analyzed through the DNA examination, the accused is exonerated as the father of the said fetus whereas victim was determined as mother of the said fetus. The silence of the victim regarding the allegation as she was subjected for sexual assault by the accused previously also and not disclosing it to anybody though she is having an opportunity. The conduct of the victim of not disclosing the fact to anybody creates the doubt about the veracity of the evidence of the victim.

28. After perusal of the judgment of the trial Court it reveals that the trial Court has observed that the age of the victim is proved by the prosecution on the basis of her oral evidence is erroneous. It cannot be

accepted in the absence of any documentary evidence, the trial Court has also discarded evidence of DNA report. The DNA report assumes importance in the light of the admission of the victim that she had relations with one boy and the explanation by the accused in the statement under Section 313 of the Cr.P.C. that the victim's relationship with boy was objected by the father, and therefore, he was implicated in the alleged offence. The explanation of the accused that he objected the behaviour of the victim appears to be probable. The learned trial Court has considered the fresh injury of abrasion was found on her genitals as per the medical evidence. But the possibility that the victim had physical relations with the boy whom she is having relationship cannot be ruled out and it gets the support from the DNA report which exonerates the accused to be biological father of the fetus. The trial Court has completely relied upon the oral evidence of the victim and the medical evidence. Said evidence assumes importance if there would not have any relations between the victim and the boy. The investigating officer ought to have carried out the investigation regarding the involvement of any third person in the alleged offence to ascertain who is the real culprit. But the Investigating Officer has not carried out the said investigation though he received the DNA report. Thus, the accused is entitled for benefit of doubt.

29. The observation of the learned trial Court that the evidence of victim is supported by the medical evidence is not acceptable. As the evidence of the victim is not inspiring the confidence and the prosecution has not proved the facts that it was the accused and accused only who had subjected the victim for sexual assault. The doubt is created in the case of the prosecution as the victim had admitted her relationship with one boy and the DNA report exonerated the accused. Therefore, the accused is entitled for benefit of doubt as the prosecution has failed to prove the charge against the accused beyond reasonable doubt. In the result, appeal deserves to be allowed. Hence, we proceed to pass the following order :

- (i) The criminal appeal is allowed.
- (ii) The judgment and order dated 24/11/2017 passed by learned Sessions Judge, Nagpur in Special Criminal (POCSO) Case No.122/2015 convicting and sentencing the appellant to suffer imprisonment for life for offences punishable under Section 376(2)(f) and (n) of the Indian Penal Code read with offences defined under Sections 5(i),(l) and (n) punishable under Section 6 and offences punishable under Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 is hereby quashed and set aside.

(iii) The appellant is acquitted of offences for which he was convicted and sentenced.

(iv) The appellant be set at liberty forthwith, if he is not required in any other offences by the police.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)

**Divya*