

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

CRIMINAL APPEAL NO. 686 OF 2018

Dnyaba @ Dnyaneshwar s/o Gyanuji
Tajne, Aged about 58 years,
Occupation : Labour, Resident of
Belkhed, Taluka Risod,
District Washim.

APPELLANT
(IN JAIL)

// V E R S U S //

The State of Maharashtra,
Through Police Station Officer,
Police Station Shirpur,
Taluka Malegaon,
District Washim.

RESPONDENT

Smt. S.P. Deshpande, Advocate (Appointed) for the Appellant.
Shri T.A. Mirza, A.P.P. for Respondent - State.

CORAM: V. M. DESHPANDE AND

G. A. SANAP, JJ.

DATED : 19/01/2022.

JUDGMENT : (PER G. A. SANAP, J.)

1. In this appeal challenge is to the judgment and order dated 28.12.2017, passed by the learned Additional Sessions Judge, Washim in Special Child Case No.72/2016, whereby the learned Judge has convicted the appellant for the offence punishable under Section 376[2][f], [n] of the Indian

Penal Code and for the offence punishable under Section 5 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POSCO Act'), and sentenced him to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default of payment of fine, he is ordered to suffer rigorous imprisonment for 6 months. No separate sentence is awarded under Section 6 of the POSCO Act.

2. The facts leading to the appeal are as follows.

The name of victim is masked to conceal her identity. The victim is the informant. The appellant is the father of the victim. It is the case of the prosecution that on the date of commission of offence, the victim was below 18 years of age. The victim used to reside with the appellant, her mother and other siblings at village Belkhed, Taluq Risod, District Washim. The family is doing labour work, which is the source of their livelihood. In the month of December, 2015 mother of the victim by name Jyoti had gone to the house of her maternal uncle at Mumbai for medical treatment.

She was in Mumbai for 15 days. In the absence of mother, the victim, the appellant and her grand-mother used to reside together at village Belkhed. It is further case of prosecution that one night, the appellant, while the victim was sleeping inside the room, came in the said room from the courtyard, where he was sleeping with his mother. The appellant removed the clothes on the person of the victim. The victim requested the accused not to indulge in the illegal act. The victim told the accused that she would complain about the same to her mother. Appellant told her not to disclose anything to her mother. The appellant pressed her breast and committed sexual intercourse with her. The victim on account of threat of appellant did not disclose the incident to any body.

3. In the course of time her M.C. stopped. Jyoti, mother of the victim took her to the hospital of Dr. Shelke Madam at Washim. On examination, the doctor informed that the victim had conceived. The mother of the victim, therefore, took her to women's hospital at Akola for treatment and

admitted her there on 22.06.2016. The father established sexual relations with the victim and the victim conceived. On the date of her admission at Women's Hospital at Akola on 22.06.2016, the victim was carrying pregnancy of 5-6 months. This fact was revealed during the course of examination by the doctor. The Medical Officer conveyed the information to Ramdaspath Police Station, Akola. On receipt of the information, P.W.No.12 P.S.I. Anita Ingle went to the Lady Harding Hospital, at Akola. She recorded statement of the victim girl.

4. The statement of the victim girl recorded by P.W.No.12 was forwarded by her to the jurisdictional police station namely Shirpur Police Station, Taluq Risod, District Washim. It was received by Shirpur Police Station on 28.06.2016. On the basis of the said statement, P.I. Harish Gawali (P.W.16) registered the crime against the appellant bearing No.97/2016 for the offences punishable under Sections 376 [2][f] of the Indian Penal Code and Section 6 of

the POCSO Act. P.W.15 – A.P.I. Khandare conducted the investigation. He arrested the appellant. He forwarded the appellant and victim for medical examination. He drew the spot panchanama. He collected blood samples. He forwarded the blood samples to the C.A. as well as for D.N.A. analysis. He recorded the statements of the witnesses and collected the evidence in respect of age of the victim. On completion of the investigation he filed charge sheet.

5. The victim girl was admitted at Vatsalya Mahila Vasatigruha, Nashik. On 09.08.2016, the victim delivered a dead male child at Civil Hospital, Nashik. The investigating officer collected the blood and bone samples of the dead male child and forwarded the same to DNA analysis to RFSL Nagpur. In due course, he received the report, which confirmed that the appellant and the victim are concluded to be the biological parents of the male child, born to the victim.

6. The learned Additional Sessions Judge framed the charge against the appellant/accused for the above offences.

The appellant / accused pleaded not guilty to the charge. It is the defence of the appellant that the victim had sexual affair with one person. He had caught the victim and said person red handed, and therefore, to take revenge a false report was lodged against him. In order to bring home the guilt against the appellant, the prosecution examined 16 witnesses. The prosecution relied upon the documentary evidence. In defence, the appellant examined Nandabai. On consideration and analysis of the evidence, the learned Additional Sessions Judge held the charge against the appellant proved. The learned Additional Sessions Judge convicted the appellant and sentenced him as above. Being aggrieved by this order, the appellant is before this Court in appeal.

7. We have heard learned Advocate Smt. Deshpande, (appointed) for the appellant and the learned A.P.P. Shri Mirza, for the State. We have perused the record and proceedings.

8. Smt. S. P. Deshpande, learned Advocate for the appellant submitted that the evidence of the victim girl is not credible and as such, is not sufficient to prove the charge against the appellant. The evidence is full of omissions and inconsistencies on material part of the case of the prosecution. There is no other independent evidence to corroborate the oral evidence of the victim girl. In the submission of learned Advocate for the appellant in view of shaky evidence of the victim girl, the learned Additional Sessions Judge should not have accepted the said evidence, without corroboration from independent source. The learned Advocate submitted that the prosecution has not adduced sufficient evidence to prove that on the date of alleged incident, the victim girl was below 18 years of age. The learned Advocate took us through the record and pointed out that the DNA reports at Exhs.65 and 66 were produced after recording statement of the appellant under Section 313 of the Code of Criminal Procedure at the stage of argument. The learned Advocate submitted that therefore, the DNA reports cannot be used as evidence against the appellant.

The learned Advocate submitted that the defence of the appellant that he has been falsely implicated in this case by victim because he had caught her red-handed while indulging in sexual intercourse with another person is probable.

9. Shri T. A. Mirza, learned Additional Public Prosecutor submitted that the appellant being father of the victim girl was in a position of dominance and authority. The learned Additional Public Prosecutor submitted that considering the relation between the appellant and the victim girl, the possibility of victim girl falsely implicating her father, cannot be accepted in this case. In the submission of the learned Additional Public Prosecutor, the possibility of false implication of the appellant in this case as sought to be made out, has been completely ruled out by oral and documentary evidence. The learned Additional Public Prosecutor took us through the evidence of victim girl and submitted that the evidence of the victim girl despite being subject to searching cross-examination, has not been shaken at all. The learned

Additional Public Prosecutor submitted that the prosecution on the basis of oral and documentary evidence has proved that on the date of incident, victim girl was below 18 years of age. The learned Additional Public Prosecutor submitted that when the offence of rape came to light, the victim girl was carrying 5 - 6 months pregnancy. The learned Additional Public Prosecutor submitted that on the basis of the medical evidence and the DNA reports, it has been conclusively proved that the appellant and the victim girl are concluded to be biological parents of male child born to the victim girl. The learned Additional Public Prosecutor took us through the Judgment and order passed by the learned Additional Sessions Judge and submitted that the learned Judge has recorded sound reasons in support of his finding against the appellant.

10. In order to appreciate the rival submissions, we have minutely perused the oral and documentary evidence. At the outset, it is necessary to mention that the witnesses who were privy to the incident directly or indirectly have not

supported the case of the prosecution. The mother of the victim PW-3 - Jyoti was privy to the real state of affairs. However, she did not fully support the case of the prosecution. She was declared hostile. However, perusal of her cross-examination conducted on behalf of the learned Additional Public Prosecutor would show that on certain material aspects, she has supported the case of the prosecution. It is further pertinent to mention at the outset that the appellant is the father of the victim girl. Being father, he was supposed to know the birth date of the victim girl. In the cross-examination conducted on behalf of the appellant by the learned Advocate, specific suggestion with regard to the actual birth date of the victim girl was not put to her. It was expected on the part of the appellant being father of victim girl to point out the actual birth date of the victim girl inasmuch as the prosecution has come before this Court with a case that the birth date of the victim girl is 15/09/1998. As far as this aspect is concerned, it would require due consideration after appreciating the evidence of the victim girl and other documentary evidence.

11. Before we proceed to appreciate the evidence of the victim girl (PW-2) Vanita, it would be necessary to note that (PW-3) Jyoti mother of the victim girl has admitted that at the time of lodging of the report, the victim girl was carrying 5 months pregnancy. She has admitted that she took her to Doctor at Washim and from Washim, she took her to the Lady Harding Hospital, Akola. It is undisputed that when the victim girl was taken to Government Hospital at Akola, the Medical Officer declared that the victim girl was carrying 5 - 6 months pregnancy. The Medical Officer on being informed that the victim girl was unmarried, reported the matter to the Police. On this aspect, the evidence of mother is consistent. At this stage, it would be necessary to see additional statement filed in writing by the appellant at the time of recording of his statement under Section 313 of the Code of Criminal Procedure. In this statement, he has stated that at the time of lodging of the report, the victim girl was carrying 4 - 5 months pregnancy. He has stated that the victim girl had affair with

one person and from the said person, victim girl had conceived. His statement would clearly indicate that PW-3 - mother of the victim girl and the appellant - father of the victim girl have consistently stated that at the time of lodging of the report, the victim girl was carrying 4 - 5 months pregnancy. The evidence of Jyoti as well as the stand of the appellant in his written statement about the father of the child of victim girl is silent. It is pertinent to mention that if the child was begotten by some third person, then Jyoti - mother of the victim girl and the appellant were expected to make enquiry with the victim girl and immediately lodge a report against the said third person. In our view, the above facts would assume great significance while appreciating the evidence of the victim girl.

12. The unfortunate victim girl has narrated the plight. She has been made to suffer due to beastly and barbaric act of her own father. It is pertinent to mention that in her evidence, she has narrated the incident with great vividity. The

other witnesses related to the appellant tried to save him. The victim girl till the end did not deviate from her original version of the incident. She has deposed that at the time of the incident of rape on her by the appellant, her mother had gone to Mumbai. Her siblings and she were sleeping together in the house. The appellant and her grand-mother were sleeping in the courtyard. She has stated that in the night, the appellant gave call to her and asked her to give him water to drink. She has deposed that she opened the door and gave water to the appellant. The appellant threw away water on the door and came inside and shut down the door. The accused threatened her not to raise shout, else he would kill her. The appellant removed her clothes and pressed her breast. She has stated that the appellant forcibly committed sexual intercourse with her. On the next day as well, the appellant forcibly committed sexual intercourse with her. He had threatened her to kill, if she disclosed the incident to anybody including her mother. Her M.C. was stopped in January, 2016. She disclosed it to her mother. Her mother took her to Doctor at Washim. She has

deposed that Doctor at Washim on examination informed that she had conceived pregnancy. She further deposed that her mother took her to hospital at Akola. In the said hospital on examination, the doctor opined that she was carrying 6 months pregnancy. She disclosed the incident to the doctor. The doctor called the police. The police recorded her statement. It is at Exh.18. She has further deposed that on 09/08/2016, she delivered a male child. After sometime, child died. She has deposed that her birth date is 15/09/1998. This is a substance of her evidence in examination-in-chief.

13. The victim girl has been cross-examined. In the cross-examination, attempt has been made to falsify her version. In cross-examination, it was suggested to her that she had sexual relations with third person and she was caught red-handed by her father. She has falsely implicated the appellant in this case. The victim girl has denied the suggestions. Certain facts brought on record in the cross-examination, needs to be mentioned. Smt.Jyoti is the first wife of the appellant.

Smt.Shobha was the second wife, who died before the incident. Vinod and Rajnandan are brothers of the victim girl. There are four children to the appellant from Smt.Shobha. On the date of incident, the appellant was father of 7 children. This fact would indicate that despite having two wives, the appellant did not feel satisfied and ultimately he ravaged the victim girl to satisfy his beastly lust. An attempt has been made in the cross-examination to indicate that the victim girl was above 18 years old. Perusal of the cross-examination would show that the suggestion was put to her that her date of birth is not 15/09/1998 and at the time of incident, her age was 19 - 20 years. The victim girl has denied the suggestion. Perusal of the cross-examination would show that the actual birth date of the victim girl which must be known to the appellant being father was not even suggested to the victim girl in the cross-examination. Minute perusal of the cross-examination would show that the victim girl after having undergone the unimaginable sufferings and trauma did not deviate a inch from the core and crux of her evidence in examination-in-

chief. The answers given to material questions by her in the cross-examination are consistent. Certain facts brought on record in the cross-examination about the commission of offence by the appellant and the knowledge of the same to the mother of the victim girl and reaction of the mother thereafter, indicate that the victim girl has not even made a slightest attempt to hide anything from Court. Perusal of the cross-examination would show that the mother of the victim girl initially made an attempt to see that this incident is buried by aborting the child. However, there was no response and co-operation from the appellant. The beastly act and sin committed by the appellant came to fore when the victim girl was taken to the Lady Harding Hospital at Akola. The evidence of the victim girl on the incident of rape on her by the appellant cannot be discarded and disbelieved. No material has been elicited in the cross-examination to discard and disbelieve her evidence. The conduct of the appellant is not consistent with his defence. If the victim girl had conceived from third person, the appellant would have been the first

person to take cognizance of the same and reported the matter to the police. The appellant would not have made wait for six months to lodge report of such a serious incident.

14. In this context, it is necessary to mention that the appellant was in position of dominance and authority being father of the victim girl. He misused his parental position. He extended threat to the victim girl not to disclose the offence of rape on her by him. This incident of rape would have gone unnoticed, if the victim girl had not conceived. The statement of the appellant recorded under Section 313 of the Code of Criminal Procedure would assume importance in the above context. The question No.4 in his examination under Section 313 of the Code of Criminal Procedure pertains to the birth date of the victim girl. He was specifically asked to explain about the birth date of the victim girl being 15/09/1998. He has answered that he does not know it. He has not denied that 15/09/1998 is not birth date of the victim. He has not specifically mentioned in the additional written statement filed

by him about the birth date of the victim girl. He has categorically admitted that at the time of lodging of the report, the victim girl was carrying 5 - 6 months pregnancy. He was specifically asked about the School Leaving Certificate of the victim girl at Exh.55. He has stated that he does not know about it.

15. On the basis of the evidence of PW-2 victim girl, it has been proved that the appellant repeatedly committed sexual intercourse with her and she was conceived from the appellant. The appellant extended threat to kill her, if she dared to disclose the incident to anybody. We do not see any reason to discard and disbelieve this evidence. The evidence is natural. The bravery and courage shown by the victim girl to testify against the appellant, who is her father is appreciable. The remaining family members did not support the case of the prosecution. It may be noted that the victim girl would have been required to spend sleepless nights and restless moments before testified against her own father. The remaining

members did not support the case of the prosecution to save the appellant from the tentacles of law. The evidence of the victim girl on the point of forcible intercourse with her by the appellant and on the point of her age being below 18 years is concrete, credible and as such deserves acceptance.

16. The victim girl has stated that the appellant begotten four children from Shobhabai. The victim girl has two real brothers and four step brothers. It is pertinent to mention that the victim girl is the only female child born to the appellant. The appellant in order to satisfy his lust, despite marrying with two wives and having seven children, kept an evil eye on his only daughter.

17. There is other corroborative evidence to accept the evidence of the victim girl on the point of sexual intercourse with her and she gave birth to a male child. PW-14 - Dr. Kanchan Barde medically examined the victim girl. She has stated that on 24/06/2016, she conducted Sonography test of the prosecutrix. She has categorically deposed that the

examination indicated that the victim girl was carrying 5 - 6 months pregnancy. Ext. 44 is the Medical Certificate issued by PW-14 - Dr. Kanchan Barde. The oral evidence of PW-14 has been corroborated by the contemporaneous documentary evidence. We do not see any reason to discard and disbelieve the evidence of PW-14 being an independent witness. Similarly, there is no material in her cross-examination to discard her evidence.

18. PW-8 - Manjula Bhoje is serving at Civil Hospital, Nashik. The victim girl after medical examination, was taken to Civil Hospital, Nashik and kept at Vatsalya Mahila Vastigruha, Nashik. On 09/08/2016, PW-8 had been to Vatsalya Mahila Vastigruha, Nashik because the victim girl had stomach pain. PW-8 has deposed that she was therefore taken to Civil Hospital, Nashik, where she delivered a male child. The child died after sometime. The Inquest Panchanama on the body of the child was conducted in her presence. It is at Exh.31. PW-7 - Vijaya Pathak is serving as a Nurse attached to

Vatsalya Mahila Vastigruha, Nashik. She has deposed that the victim girl was admitted in their Vastigruha. She was pregnant. She has deposed that on 09/08/2016, the victim girl delivered a male child at Civil Hospital, Nashik. The dead body of the male child was sent for post mortem. The dead body of the male child was buried. She has further deposed that on the same day, on the request of the police, the dead body was exhumed and handed over to the hospital for post-mortem. The evidence of these two witnesses corroborate the version of the victim girl that on account of her pregnancy, she was taken to Vatsalya Mahila Vastigruha, Nashik. Their evidence further proves that the victim girl delivered a male child at Civil Hospital, Nashik.

19. PW-6 - Dr. Shrikant Karwate had examined the appellant. He collected his blood sample. On examination of the appellant, he found that the appellant was capable to do sexual intercourse. There is no serious challenge to this part of evidence of PW-6.

20. PW-15 - Shri Kamlesh Khandare (API) conducted the investigation. During the course of investigation, he had deputed PW-10 - Shri Padmakar Ingale (Police Constable) to carry the samples to Regional Forensic Science Laboratory, Nagpur for DNA test. PW-10 - Shri Padmakar Ingale has deposed that on 02/07/2016, he had deposited two blood samples for DNA test at Regional Forensic Science Laboratory, Nagpur. His oral evidence has been supported by Exh.36. PW-15 - Shri Kamlesh Khandare has deposed that during the course of investigation, the samples collected were sent for DNA analysis. The independent oral and documentary evidence adduced by the prosecution corroborates the evidence of the victim girl on the material point that at the time of report, she was carrying 5 - 6 months pregnancy and she delivered a male child at Civil Hospital, Nashik. We have already observed that in view of this positive evidence, it was necessary for the accused to make his defence probable. There is no iota of material to accept the defence of the appellant.

21. Perusal of the Judgment of the Trial Court would show that the Trial Judge has relied upon the document at Exh.55 which is a School Leaving Certificate of the victim girl. This document was proved by PW-15 - Investigating Officer. No independent witness from the school was examined. Similarly, no primary evidence to prove the contents of Exh.55 was produced. In our view, this evidence is required to be kept out of consideration. In the earlier part of the Judgment, we have observed that there is no serious challenge to the evidence of the victim girl with regard to the date of birth stated by her. Similarly, the appellant in his 313 statement has claimed ignorance about it. The appellant has not stated the actual birth date of the victim girl. The appellant being father of the victim girl was supposed to know the actual birth date of the victim girl and therefore, he was expected to suggest the same to the victim girl in her cross-examination. It is necessary to mention at this stage that as per the provisions of Section 313 Sub-section (4), the answers given by the accused may be taken into consideration in the enquiry or trial.

In our view, in view of the positive statement made by the victim girl about her birth date, the appellant was required either to deny it categorically and state the actual birth date of the victim girl. He has simply stated that he does not know about it. The appellant has not denied this fact in his Section 313 statement. In view of this position, the evidence of the victim girl on the point of rape on her by the appellant as well as her age being below 18 years has been proved. The evidence of the victim girl has been corroborated by other evidence on these two material aspects.

22. We may now deal with the DNA reports at Exhs.65 and 66. Exh.65 is the Control DNA profile from blood samples of the victim girl and the appellant. The initial part of Exh.66 is the examination report of femur and sternum of the male child born to the victim girl. The second part is DNA analysis and parentage test result. The DNA expert has opined that the appellant and the victim girl are concluded to be the biological parents of femur of male child born to the

victim girl. It is pertinent to mention that the DNA report can be admitted in evidence without examining the DNA expert by invoking the provisions of Section 293 of the Code of Criminal Procedure. However, before undertaking the exercise of exhibiting the document like DNA report by invoking the provisions of Section 293 of the Code of Criminal Procedure, there must be a specific order by the Court. In this case, in order to ascertain the real factual position, we have minutely perused the record. We are at loss when confronted with such casual and careless approach displayed by the learned Additional Sessions Judge. The document at Exhs.65 and 66 were admitted and given exhibit marks after recording 313 statement of the accused. In Section 313 examination of the appellant, the evidence in the form of DNA report was not put to the appellant so as to enable the appellant to offer his explanation about the same. There is no specific order in the record to indicate under what circumstances and on whose application, DNA reports were exhibited after recording 313 statement of the appellant. There is no record to indicate that

either the appellant or his Advocate admitted the DNA reports or consented for giving exhibit mark to these documents. We may state that such exercise undertaken by the learned Trial Judge in respect of such an important piece of evidence in a trial of such magnitude is not a good omen for the system. We sincerely feel that such approach cannot subserve the purpose of justice. It certainly causes prejudice and miscarriage of justice. The height in the matter is that the learned Additional Sessions Judge made use of DNA reports against the appellant to convict him in this case. In our opinion, law does not permit to make use of such evidence against the appellant.

23. It is pertinent to mention that we have had an option to either record 313 statement of the appellant afresh or send it to the Trial Court for recording the same. However, on going through the evidence of the victim girl and other corroborative evidence, we found that the same is sufficient to accept the case of the prosecution. Therefore, this exercise was not undertaken. Be that as it may, the fact remains that the

DNA reports need to be kept out of consideration.

24. On minute perusal and analysis of the evidence, we are satisfied that the evidence is sufficient to prove the charge against the appellant. There is no doubt about the credibility of the evidence of the prosecution witnesses. The prosecution has proved the guilt of the appellant beyond reasonable doubt. In the teeth of the concrete and cogent evidence, the submissions advanced on behalf of the appellant cannot be accepted. In our view, there is no substance in the appeal. The appeal, therefore, deserves to be dismissed. Hence, the following order :-

ORDER

The appeal is dismissed.

(G. A. SANAP, J.)

(V. M. DESHPANDE, J.)

Dhuria / Choulwar

VITHAL
MAROTRAO
CHOULWAR

Digitally signed by VITHAL
MAROTRAO CHOULWAR
Date: 2022.02.26 15:05:21
+0530