

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.254 OF 2018
WITH
CRIMINAL APPLICATION NO.3770 OF 2022

Dnyandeo Bhujang Dahiphale,
No.C-17218,
Yerwada Central Prison, Pune.

... Appellant

... **Versus** ...

- 1 The State of Maharashtra
- 2 X.Y.Z.

... Respondents

...

Mr. G.V. Wani, Advocate for appellant

Mr. A.M. Phule, APP for respondent No.1

Mr. Govind A. Kulkarni, Advocate (appointed) for respondent No.2

...

**CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.**

DATE : 02nd AUGUST, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

- 1 Present appeal has been filed by the original accused challenging his conviction in Sessions Case No.69/2015 by learned Special Judge, under

POCSO Act, Ahmednagar on 24.02.2016, whereby he has been held guilty of committing offence punishable under Section 376(2)(f)(i) of the Indian Penal Code, 1860 and under Section 5(j)(ii), 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for short, hereinafter referred to as “the POCSO Act”). The criminal application has been filed for suspension of sentence, however, taking into consideration the facts of the case and the fact that the appellant is in custody since the date of his arrest i.e. 12.12.2014, the appeal itself was taken up for final hearing with the consent of the learned Advocates representing all the parties.

2 The appellant is stated to be the accused involved in one of the most heinous crimes of committing rape on his daughter. Before proceeding to consider the facts in the case, we would like to say that we are aware about the provisions of Section 228-A of the Indian Penal Code and ratio laid down in **Sangita Yeshwantrao Tanpure vs. State of Maharashtra and others** [2021 All M.R. Cri. 1131], **Sajjan Hirachand Gusinge vs. State of Maharashtra and another** [2023(2) Bom.C.R.(Cri.) 282], **State of Punjab vs. Ramdev Singh**, [(2004) 1 SCC 421], **Nipun Saxena and another vs. Union of India and others** [(2019), 2 SCC, 703] and so many other pronouncements on the same point that the identity of the rape victim should not be disclosed. So also there is specific provision in the POCSO Act i.e. Section 33(7) of the

said Act which cast duty on the Courts that the identity of the victim should not be disclosed, however, there are certain cases in which ultimately somewhere the said identity gets disclosed from the point of view of relationship. This is one of the said cases. Unless that relationship is taken note of in writing in the Judgment, there cannot be better appreciation of the evidence. Therefore, we have taken utmost care of not disclosing the identity of the victim girl here, but when it came to the relationship with the accused, we have made reference of the same.

3 The prosecution has come with a case that First Information came to be lodged on 03.12.2014 on the basis of the report lodged by PW 2 – the grandmother of the victim (mother's mother), when the victim was admitted in Civil Hospital, Ahmednagar after she had delivered baby on 02.12.2014. In the First Information Report it was contended that till 01.12.2014 the victim had not disclosed the fact to anyone and just prior to 01.12.2014 the victim had come to her grandmother's place. The mother of the victim (daughter of informant PW 2) had expired in the year 2011 itself. The victim was residing with her father i.e. accused and sister at different place than the place where PW 2 was residing. The victim was taken to hospital on 01.12.2014 when she made complaint that her legs were paining. At that time it was disclosed to PW 2 that the victim is pregnant and may

deliver the child at any moment. The grandmother had not noticed the pregnancy of the victim as she has disclosed in the First Information Report that the victim had the habit of putting loose clothes. The victim delivered the child at 4.00 p.m. on 02.12.2014. A female child was born to her and thereafter the grandfather asked the victim as to how the thing has happened, then, at that time she disclosed that how she was supposed to take the name of her father. The father has sexually exploited her. Thereafter, the victim and the child were taken to Civil Hospital, Ahmednagar and actually the delivery was in Civil Hospital, Pathardi. Thereafter, the First Information Report came to be lodged.

4 During the course of the investigation the statement of the victim under Section 161 of the Code of Criminal Procedure came to be recorded. The hospital documents were collected. The evidence in respect of her birth date was collected. Accused came to be arrested. He was got medically examined. Samples for DNA testing were taken and panchnama of the spot was got executed. Statements of other witnesses were recorded. After the conclusion of the investigation charge sheet was filed before the learned Special Judge, under the POCSO Act, as the victim was then 15 years old.

5 When the accused was produced from the jail, charge was

framed by the learned trial Judge at Exh.4. Thereafter prosecution has examined in all 08 witnesses to bring home the guilt of the accused, when the accused pleaded not guilty. After considering the evidence on record and hearing both sides, the learned Special Judge sentenced the accused to suffer imprisonment for life for his entire remaining life and imposed fine of Rs.5,000/-, in default of payment of fine he was directed to undergo simple imprisonment for six months, for the offence punishable under Section 376(2)(f)(i) of the Indian Penal Code. Thereafter, he has been further convicted for the offence punishable under Section 5(j)(ii), 5(n) of the POCSO Act punishable under Section 6 of the said Act and was sentenced to suffer imprisonment for life for his entire remaining life and pay fine of Rs.5,000/-, in default to suffer simple imprisonment for six months. Both the sentences were directed to run concurrently. Set off was granted and out of the fine amount, amount of Rs.8,000/- was granted to the victim as compensation. Apart from the said compensation the case was referred to the Legal Services Authority, Ahmednagar to decide the quantum of compensation under Section 357-A of the Code of Criminal Procedure.

6 Initially when the appeal came to be filed, the appellant was represented by Advocate Mr. A.B. Gaikwad, who came to be appointed through Legal Aid Committee. Thereafter, learned Advocate Mr. G.V. Wani

has obtained the consent and represented the appellant. Thereafter, when the matter was on board on 06.03.2023, it was noticed that as the compensation has been awarded, the victim is a necessary party in view of **Emperor vs. Chunilal Bhagwanji [AIR (29) 1942 Bombay 205(1)]** and, therefore, that amendment was directed to be made. The notice was served on the victim, but she failed to appear and, therefore, Advocate Mr. Govind A. Kulkarni was appointed to represent the cause of the victim by order dated 24.07.2023.

7 Heard learned Advocate Mr. G.V. Wani for the appellant, learned APP Mr. A.M. Phule for respondent No.1 and learned appointed Advocate Mr. Govind A. Kulkarni for respondent No.2.

8 It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. Unfortunately the daughter has levelled serious charges against the father, but the learned trial Judge failed to consider the statement of the accused under Section 313 of the Code of Criminal Procedure and the defence taken. In his statement under Section 313 of the Code of Criminal Procedure it has been clearly stated by the accused that the parents-in-law of the accused had intention to grab the agricultural land i.e. 03 acres of land in the name of the

accused and, therefore, he has been involved in a false case. The victim was under pressure because of one Subhash Karad. The trial Judge failed to consider that the First Information Report is a belated. It is stated by the prosecution witnesses that the pregnancy of the victim was noted or came to light on 01.12.2014 when she was allegedly 07 months pregnant and on the next day she has delivered the child. At no point of time the victim had ever made complaint against the father to anybody. In the testimony of the victim it has come on record that she was residing with the accused as well as her sister after the death of her mother, so also, her grandmother (father's mother) was also residing with them. Therefore, the victim could have told about the incident to the grandmother. It appears that the victim was carrying out her day to day activities till the seven months of pregnancy. Further, the date of birth of the victim cannot be said to have been proved properly in this case. Therefore, the learned trial Judge ought to have acquitted the accused. Merely because the DNA test concluded that the victim and the accused are the parents of the child, the father ought not to have been convicted. The manner in which the evidence of the victim has been recorded is also required to be seen. The Advocate of the accused was not allowed to sit in front of the victim, but was allowed to sit behind the curtain and, therefore, when the accused has been implicated, the appeal deserves to be allowed.

9 Per contra, the learned APP as well as learned appointed Advocate for respondent No.2 have strongly opposed the appeal. It has been stated that the procedure that has been adopted while recording the testimony of the child witness is perfectly correct. It has been observed that the victim was not comfortable when she was giving evidence and, therefore, shifting of the place i.e. from Court hall to the chamber of the Judge cannot be doubted. It has been stated that even the learned APP and the Advocate for the accused were allowed to sit behind the curtain and the victim was then made comfortable. She has specifically stated that the father has ravished her. It appears that the victim had no idea about the pregnancy and it has stated that when she came to know about the pregnancy after 2-3 months i.e. as she has missed her monthly cycle, she had discussed it with her sister and the sister told her that if there are no periods for two months, there is nothing serious. And thereafter the victim had told the sister falsely that her monthly cycle had started after 2-3 months. The victim had delivered the child and then the samples were taken by PW 6 Dr. Vijay Sabale and the DNA report Exh.63 concludes that the mother of the said baby born to the victim is the victim and the accused is the biological father. This proves that the accused had committed sexual assault on his own daughter. Her date of birth has been proved her school record. Medical Officer under whose supervision the delivery was conducted has been examined. The baby was premature

and, therefore, the victim, who was minor, along with baby was sent to Civil Hospital, Ahmednagar. Therefore, the evidence that was led by the prosecution was beyond reasonable doubt and, therefore, there is no merit in the appeal. The appellant has been rightly convicted.

10 At the outset, in the other cases under POCSO Act the question would be – as to whether the prosecution has proved that the victim is child as defined under Section 2(1)(d) of the POCSO Act. However, in this case the accused himself is the father and, therefore, he cannot challenge the date of birth of his daughter. Further, in the cross of PW 1 – victim and PW 2 – the grandmother there is nothing which would suggest that the victim was more than 18 years of age when the alleged incident took place. Yet, the prosecution has examined PW 4 Babasaheb Dahifale, who was serving as Headmaster with the school where the victim had taken education. As per the school leaving certificate, her date of birth was 04.08.1999. The witness has produced the admission register, application forwarded to the institution, where the victim was kept after her delivery, the school leaving certificate, all are at Exhs.30 to 32 respectively. In his cross-examination he has stated that the birth certificate was not produced in the school. No doubt, in view of the recent ruling in **P Yuvaprakash vs. State represented by Inspector of Police** [Criminal Appeal No.1898 of 2023 decided by Hon'ble Supreme Court on

18.07.2023], unless there would be birth certificate or some other documents supporting the fact of birth on a particular day produced at the time of admission in the school, the admission register or the other documents from the school will not have evidentiary value. Entries in the admission register have been proved, but it has no basis. Even if relying upon the said decision, wherein the date of birth certificate from the school will have to be preferred to the birth certificate given by a Corporation or by a Municipal authority or by a Panchayat; yet, as there is no challenge to the same, it could not have been challenged by the father himself. There is ample evidence on record to show that when the incident took place the victim was aged between 15-16 years. Therefore, she was 'child' as defined under Section 2(1)(d) of the POCSO Act.

11 The victim PW 1 has deposed that her mother expired in 2011 and after that she and her sister were residing with father. Her brother was residing with PW 2 – grandmother and these two places are different i.e. two different villages. She was studying in 9th standard, at that time. She used to travel by bus from her residence to the school. Her sister was also studying in the same school. Father was agriculturist. She has stated that the grandmother i.e. father's mother was also residing with them. On the day of incident the grandmother had gone to her elder cousin uncle, who was

residing nearby to their house. It is to be noted that thereafter the victim became hesitant and it appears that by that time her evidence is being recorded from the witness box. Thereafter the Presiding Officer, who was the lady Judicial Officer, in order to make the victim comfortable has taken the measures and all those measures have been reduced into writing. The provisions have been mentioned as to how the recording of evidence should be made in POCSO cases. Section 33 of the POCSO Act makes it mandatory that the Special Court should create a child-friendly atmosphere and, therefore, it appears that ultimately the Presiding Officer decided to record the evidence in her chamber. The victim was then in the custody of an institution and the victim had come along with an employee of the said institution. Even at the time of her examination-in-chief precaution has been taken that apart from the lady Presiding Officer there would be lady Clerk attached to the Court and then after the victim was taken into the chamber, curtain was put and then APP as well as the Advocate representing the accused were asked to stand behind the curtain, so that they can hear the deposition of the victim. The victim was made comfortable and it appears that the learned Advocate who was representing the accused had no objection for the said arrangement. Now, the accused cannot make any capital of the said procedure. The recording has been done in camera. Except denial there is nothing in the cross. Therefore, the testimony of the

victim has almost gone unchallenged on record.

12 PW 2 – grandmother has supported her First Information Report and in the cross-examination she has admitted that after death of her daughter she used to look-after her children. The victim used to attend school from her residence to another village where the school was situated. Except denial then there is nothing. Of course, the grandmother has come in picture at a very late stage. It was not suggested to the victim, as to why she had not attempted to make any complaint about the father's behaviour with the grandmother, who was residing with them i.e. father's mother. It was also not suggested either to PW 1 or PW 2 that in those seven months the victim had ever come to PW 2's place. If there was no opportunity to interact with each other face to face, the victim might not have felt it comfortable to tell it to the grandmother on telephone. Further, it appears that the victim herself was not aware about what has happened to her and it appears to be her general talks with her sister as to what happens if the girl does not get her monthly cycle for 2-3 months. Though the witness was available for cross-examination, questions have not been asked about her silence for seven months and, therefore, it cannot be said that there is delay in lodging the First Information Report. The First Information Report has been lodged by PW 2 immediately on the next day or on the same day when she received the

information from PW 1 that the said act was done by the accused.

13 The testimony of PW 1 and PW 2 stood corroborated by PW 3 Dr. Pandit Shirsath. He has stated that the victim was brought by grandmother around 4.00 p.m. on 02.12.2014 and the victim was in labour pains at that time. The child was delivered by her around 4.30 p.m. and it was normal delivery but premature. He then says that the newly born child and the mother i.e. PW 1 were referred to Civil Hospital, Ahmednagar. On the same day he informed police about the incident. He has produced the case papers. Again except denial there is nothing. There was no necessity for him to go into the aspect as to who is the father of the child. Suffice was to say that he came to know that the girl is unmarried and, therefore, he made the communication to police. The case papers would show that history was taken at 5.20 p.m. on 02.12.2014, wherein also it was told that sexual contact occurred only once. She was sleeping with the younger sister and father. Father came near her and had sexual intercourse at home. The same story has been given by the victim in her examination-in-chief.

14 PW 6 Dr. Vijay Sabale is the Medical Officer attached to Civil Hospital, Ahmednagar, who had taken the samples for DNA testing on 16.12.2014. He has produced the supporting documents to show the said

fact. The forwarding letter has been produced, thereby the forensic laboratory acknowledged the receipt of sample. The DNA report is at Exh.63. The said DNA report shows that the accused and the victim are concluded to be the biological parents of the baby born to the victim. Therefore, the evidence adduced by the prosecution proves the accused as the culprit beyond reasonable doubt.

15 PW 5 Santosh Dahifale is the panch witness to the spot panchnama, who has proved the spot panchnama Exh.35. PW 7 Ramkrushna Khartode is the Carrier. PW 8 API Mr. Sachin Jadhav is the Investigating Officer, who has given the account of investigation he carried out.

16 When the incriminating evidence had come against the accused, all those circumstances were put to him in his statement under Section 313 of the Code of Criminal Procedure. He has answered to many questions as 'it is false' or 'he does not know'. To question No.49 'as to whether he wants to say anything in respect of case', he has stated that 'he has been falsely involved by mother-in-law and father-in-law to grab agricultural land admeasuring 03 acres'. There is no suggestion to that effect to PW 2 in her cross-examination. Then, the accused states that under pressure from one Subhash Karad the victim was deposing falsely against him. He has not given

the story as to why said Subhash Karad should be against the accused. No such question was put to the victim. Therefore, now, there is no question of considering the said defence when the background itself was not led by the accused.

17 We have concluded that the prosecution has proved the offence beyond reasonable doubt against the accused. At the costs of repetition we would say that it is one of the heinous crimes that has been committed by the father upon the daughter. It is said that a daughter is always princess to the father and the daughters consider the father as their Hero. There is also a special bonding between the father and daughter. When such incidents do happen about ravishing of the daughter by the father himself, then, it is a scar on the humanity. Such acts would be done only to fulfill the lust. When a father is expected to protect the daughter and when the daughter is minor, he is the guardian of the daughter, then the father like accused deserve maximum punishment. Here, in this case, the victim has delivered a child. The incident would have left a permanent scar on her mind and thereby the childhood of the daughter has been ruined by the father and, therefore, the punishment that has been awarded after holding the accused guilty of committing offence under Section 376(2)(f)(i) of the Indian Penal Code is perfectly correct. Section 5(j)(ii) of the POCSO Act provides punishment for

the person whoever commits penetrative sexual assault on a child, which in the case of female child, makes the child pregnant as a consequence of sexual assault and it is made punishable under Section 6 of the POCSO Act and the punishment is to the extent of imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person. In fact, the trial Court has not considered it to be the rarest of the rare case as Section 6 of the POCSO Act prescribes death also as alternative punishment to the imprisonment for life and, therefore, it can be said that in that way a leniency has been shown to the accused. The only fact, that is, required to be mentioned here is the learned trial Court has not taken into consideration the provision of Section 42 of the POCSO Act, which prescribes for alternate punishment. It provides that where an act or omission constitutes an offence punishable under this Act i.e. POCSO Act and also under Sections, 376, of the Indian Penal Code or Section 67-B of the Information Technology Act, 2000, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree. Here, punishment under Section 376(2)(f)(i) of the Indian Penal Code and punishment under Section 6 for the offence under Section 5(j)(ii), 5(n) of the POCSO Act is same. Therefore, there is no question of greater degree. But in

that case there cannot be imprisonment in both the sections. Here, both the sentences have been directed to run concurrently, therefore, there is no prejudice to the accused.

18 For the aforesaid reasons, we do not find any merit in the appeal. It deserves to be dismissed. Hence, the following order.

ORDER

1 The Criminal Appeal stands dismissed.

2 We also make it clear that the order in respect of payment of compensation under Section 357(1) as well as 357-A of the Code of Criminal Procedure is also maintained.

3 The fees of the appointed Advocate is quantified at Rs.7,000/- (Rupees Seven Thousand only).

4 In view of dismissal of appeal, the Criminal Application No.3770 of 2022 also stands rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)