

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO.888 OF 2022 WITH
CRIMINAL APPLICATION NO.1384 OF 2023**

Kailas s/o Ashroba Fupate
Age 25 years, Occu. Agriculture,
R/o Jaipur, Tq. Sengaon,
District Hingoli

... APPELLANT

VERSUS

1. The State of Maharashtra
Police Station, Sengaon,
District Hingoli

2. X Y Z

... RESPONDENTS

.....
Mr. S.G. Bobade, Advocate for appellant
Mr. N.T. Bhagat, A.P.P. for respondent
Ms. Neeta Mirajkar, Advocate for respondent No.2
.....

CORAM : R.G. AVACHAT, J.

DATE : 21st APRIL, 2023

ORAL JUDGMENT :

Heard. This is an appeal from conviction. The appellant has been convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/- with default stipulation.

2. The record indicates that, the appellant was prosecuted for offences punishable under Sections 5(n) and 5(j)(ii) read with Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for short). He has been acquitted of the offences punishable under the POCSO Act. The State has not preferred appeal against the appellant's acquittal. As such, the fact remains that the prosecution failed to establish that the victim was a child while the offence was committed against her.

3. The victim (P.W.3) gave her evidence. She testified that the incident took place in 2018. She did not recall the date of the incident. According to her, she was alone in the hut. One unknown person came and committed sexual intercourse with her. It was without her consent and without her wish. She, however, did not even describe the culprit. It is true that, in the F.I.R. the applicant was named as accused. The victim, however, changed her version. She did not stand by the prosecution and even her own statement.

4. Except the D.N.A. report that indicates the appellant and the victim to be the biological parents of the baby, there is nothing to suggest anything incriminating against the appellant herein. Unfortunately, the baby passed away. The Apex Court,

in case of **Rahul Vs. State of Delhi Ministry of Home Affairs & anr.**, [(2023) 1 SCC 83], observed that the D.N.A. report is an afterall opinion evidence.

5. Learned A.P.P. has strong objection to allow the appeal. According to him, the D.N.A. report is conclusive in nature. The same speaks in volumes against the present appellant.

6. The victim has marked her appearance through Advocate. She has even filed affidavit, stating therein that the appellant was not responsible for her pregnancy. It is true that, the affidavit, at this stage, may not be looked into. The fact, however, remains that, since the appellant was acquitted of the offence under the POCSO Act and there being no reliable evidence to indicate the victim to have been subjected to sexual intercourse without her consent and against her wish, the appeal deserves to be allowed. Hence the order :-

ORDER

(i) The Criminal Appeal is allowed.

(ii) The impugned order of conviction and sentence dated 9/11/2022, passed by learned Judge, Special Court, Hingoli in Special Case Child No.18/2018 is hereby set aside. The

appellant is acquitted of the offence under Section 376(2)(f) of the Indian Penal Code. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

In view of disposal of the Criminal Appeal, Criminal Application No.1384/2023 stands disposed of.

(R.G. AVACHAT, J.)

fmp/-