



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 385 OF 2016

Santosh S/o. Narayan Kukar,
Age : 21 years, Occu. : Labour,
R/o. Kharola, Tq. Renapur,
Dist. Latur.

... Appellant

Versus

1. The State of Maharashtra,
Through P.S.O. Police Station Renapur,
Tq. Renapur, Dist. Latur

2. X.Y.Z.

... Respondents

...

Mr. Anand V. Indrale Patil, Advocate for Appellant
Mrs. V. S. Choudhari, APP for Respondent - State
Mr. Shaikh Sohail Subhedar, Advocate for Respondent No.2 (Appointed)

...

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

DATED : 14th SEPTEMBER, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Instant appeal is directed against the verdict of learned Additional Sessions Judge-3, Latur, dated 15.03.2016 holding appellant-accused guilty for offence punishable under sections 376(2)(i), 363 of Indian Penal Code (IPC) and under sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

2. Victim - daughter of informant(PW2) was playing in the courtyard of her house around 6:00 p.m. She went missing and therefore was searched, but was not found. Next day in the morning at around 6:30 a.m. PW3 Bhagwat Phutane brought the victim child to the house of informant (PW2). PW2 realized that victim-daughter was without complete clothes and she noticed bleeding injury from the vagina and some bite marks on lips. She initially took her to the hospital and from there approached police and lodged report (Exh.19), on the strength of which crime was registered and investigation was carried out by PW10 Amol Pawar and PW13 Vaishali Shinde, Investigating Officer, who took over subsequent investigation, after gathering sufficient evidence, charge-sheeted accused.

On committal learned Additional Sessions Judge-3, Latur conducted trial and concluded by holding charges proved against appellant-accused and thereby sentenced him to suffer imprisonment for life and to further sentenced awarded in operative order.

The above judgment and order of conviction is now taken exception to by filing instant appeal on various grounds mentioned in the appeal memo.

SUM AND SUBSTANCE OF THE ARGUMENTS RAISED BEFORE US AS UNDER

3. Learned counsel for appellant would submit that implication is false and merely on suspicion. According to him, there is no direct evidence and entire case was based on circumstantial evidence. He pointed out that there is no identification parade and mere identification is got done through victim by showing her photograph. It is submitted that the child came repeatedly to the court and therefore possibility of accused being pointed out by police personnel, who accompanied the victim cannot be ruled out and therefore identification is not free from doubt. He further submitted that there is no witness seeing accused taking victim from her house. Therefore, according to him, when the very identity of actual culprit is absent, accused ought not to have been arrested on suspicion and further ought not to have been held guilty in absence of any cogent, reliable evidence. For all above reasons he submits that trial court failed to consider and appreciate the evidence as well as the law and erred in convicting the accused and hence he seeks to allow the appeal by setting aside the impugned judgment under challenge.

4. In answer to above learned APP would point out that prosecution in support of its case has examined as many as 14 witnesses. Victim was picked up by accused and taken to her

remote area for the entire night, she was sexually abused. Victim has identified photograph of the accused. Medical evidence has supported the charges of rape and sexual assault. Even evidence of victim has remained steadfast and has remained unshaken. Mother has promptly lodged the report. Investigation revealed complicity of accused and therefore he was arrested and charge-sheeted. Finding the evidence full proof, cogent, reliable and trustworthy, learned trial Judge has correctly appreciating the same and has committed no error in returning the guilt. Consequently, it is her submission that there is no merit in the appeal and so she prays to dismiss the appeal. In the light of above submissions, here prosecution seems to have been examined following witnesses. We introduce their status as under :-

PW1 Muktar is the pancha to the spot panchanama (Exh.16).

PW2 is the mother of victim, who lodged report (Exh.19).

PW3 Bhagwat Phutane brought the victim child to the house of informant (PW2).

PW4 Govind is the pancha to the seizure of frock and Odhani of the victim.

PW5 Pandurang, pancha to the seizure of shirt and pant of the accused and under pant of the victim allegedly produced by the accused.

PW6 Savitra, who have seen a boy taking away the victim in the night of incident.

PW7 is the victim.

PW8 Dr. Kranti Kapse is the doctor who examined the victim.

PW9 Dr. Kanifnath Mundhe is the doctor who examined the accused.

PW10 PSI Amol Pawar is the Investigating Officer, who recorded the statement of the mother of victim.

PW11 Shahuraj Kamble is the carrier, who carried seized Muddemal to the Forensic Lab on 26.06.2013.

PW12 Suryaprakash is the carrier, who carried seized Muddemal to the Forensic Lab on 17.06.2013.

PW13 Vaishali Shinde, Investigating Officer, who took over subsequent investigation.

PW14 Dr. Suboor Shakil, who took the blood sample of the victim on 26.06.2013 in DNA Kit.

5. After considering the submissions advanced before us, we being a first appellate court, undertook the exercise of meticulous re-appreciation, re-examination and re-evaluation of evidence of prosecution, more particularly, that of important witnesses like mother (PW2), victim (PW7) as well as PW3 Bhagwat Phutane.

On going through the case of prosecution and the evidence, it is our opinion that, the entire fate of prosecution rest on these three witnesses coupled with evidence of medical expert and forensic evidence.

6. Precisely case of prosecution is that victim a 7 years old girl, daughter of informant (PW2) was kidnapped from the courtyard of the house at around 6.30 p.m. on 13.06.2013 and the next morning, the girl was back in the custody of her mother, but without clothes, bleeding to the vagina and bite marks on her lips.

7. The prosecution in trial court seems to have relied on following circumstances :

Firstly, kidnapping

Secondly, medical evidence

Thirdly, forensic evidence.

8. On going through the evidence of mother (PW2), it is emerging that, victim went missing around 7:30 p.m. She was last seen at around 6:00 p.m. in front of her house. She was searched in the village, but could not be found. One Phutane (PW3), who was residing in the house of one Govind Mali, brought her daughter in the morning of Friday at 6:30 a.m. Victim was only found to be

having red frock and black *Odhani* on her person and there were no other clothes. Her vagina was bleeding. There were bite marks on her lips. She claims that she asked the daughter as to what happened and according to her, her daughter told that one person had taken her away by lifting her.

In cross she has answered that, she lastly saw her daughter in the lane playing with children. That day, darkness prevailed at 7:30 p.m. Omissions are brought regarding daughter being brought at 6:30 a.m. on Friday and Phutane (PW3) residing in the house of Govind Mali and victim telling her one male person taking her away by lifting her.

9. On the point of kidnapping, second important witness i.e. PW3 Phutane, in his evidence Exh.20 deposed that he found a girl in the morning of Friday. According to him, on the earlier day, there was announcement on loudspeaker of Datta Mandir, broadcasting missing of the girl and whether anybody has seen her and a request was also made that if any one finds the girl, then she should be brought back. According to him, the next morning around 5:30 a.m. to 5:45 a.m., when he went to latrine, he found one girl beneath a neem tree. He asked her, how she had come there and where she wanted to do. He stated that, he thought that she was the same girl regarding whom announcement was being

made last night. He found the girl shivering and the girl asked him to reach her near the well near Datta Mandir and accordingly he brought her to her mother and grandmother.

In cross he is questioned whether on the earlier evening it had rained and that whether other villagers also use to go to answer call of nature where he went. He admitted that when he went to answer call of nature, that time, he did not see her and he admitted that clothes of the girl were not smeared with mud. Omissions are brought about asking the girl how she came there, where she wanted to go, about the girl shivering.

10. On analysis of above evidence of PW2 mother and PW3 Phutane, it is emerging that, girl was playing in front of her house around 6:30 p.m., but thereafter she went missing.

11. Victim PW7 deposed that while she was playing outside the house, at that time, one man lifted her and took her away assuring her of black berry and took her towards the field.

In her cross we have not noticed any questions regarding lifting and taking away, rather in para 5 there is suggestion to which she has admitted that when the alleged person

had lifted her, it was dark. Resultantly, there is no cross on the point of removal of the child from lawful custody.

12. On critical analysis of evidence of PW2 mother, PW3 Phutane and PW7 victim, prosecution has shown that victim was kidnapped from the house that too without consent of PW2 mother. PW3 Phutane has brought her from the place where everybody went to answer call of nature. Therefore, required ingredients of kidnapping are available on record. As stated above, very suggestion to give victim shows that there is no serious dispute on the point of kidnapping.

13. According to prosecution, the victim was subjected to medical examination at the hands of PW8 Dr. Kranti. This lady doctor deposed at Exh.34 and narrated the injuries noticed by her on the person of victim who was brought to her on complaint and history of sexual assault. In para 2 of chief, medical expert has described the three injuries on the private part as well as injuries on lips coupled with abrasions. According to doctor, all injuries were caused within 24 hours of examination. Doctor has testified that she examined victim on 14.06.2013. She took samples of nails, blood, vaginal swab, hair of scalp, blood stains on gauze piece of victim for analysis.

The only cross to the above witness is that mother gave the history and that this witness had not issued opinion regarding sexual intercourse. However, she denied that the injuries on the victim were bleeding.

Above experts evidence shows that injury nos.1 to 3 are all on private parts. Doctor has narrated about examining victim with history of sexual assault. Certificate issued at Exh.36 could be reproduced as under :-

“Tear extending at 6 O’clock position to perineum, anal sphincter and anal canal, length 3 cm. X breadth 1.5 cm.

At 4 O'clock position, length 3 cm. x breadth 1 cm. x depth 0.5 cm.

At 1 O'clock position, length 2.5 cm., breadth 0.5 cm. x depth 0.5 cm.

Both labra swollen, tender.

All injuries are recent and within 24 hours.”

In the light of above evidence, though doctor has not specifically opined about sexual intercourse, the above material clearly indicates that there is sexual assault. Hence, offence to that extent is made out.

14. Learned counsel for appellant would strenuously submit that, here, very identity of actual culprit is not established. According to him, firstly identification was got done by confronting

photograph to the victim and secondly on alleged DNA report which according to him is mere corroborative piece of evidence and not substantive evidence.

15. On going through the evidence of Investigating Officer (PW13 Vaishali Shinde), it is noticed that, on 14.06.2013 she took over investigation and caused seizure of clothes of victim handed over by mother. She claims to have visited Government hospital, Renapur. Investigating Officer deposed that victim was not in a condition to talk. Therefore, she took further steps for investigation, like drawing spot panchanama, seizure of legins of the victim and dispatching clothes, samples of blood and vaginal swab to Forensic Laboratory, Mumbai on 17.06.2013, vide communication at Exh.53. Accused is arrested on 19.06.2013. On 21.06.2013, accused gave disclosure memorandum resulting into seizure of his clothes as well as undergarment of victim. In paragraph no.5 and 6, Investigating Officer deposed that she made inquiry about condition of the victim and was reported to be not in a position to talk. On 23.06.2013, doctor told that prosecutrix can give statement and so she recorded her statement in question answer form. According to Investigating Officer, victim told that she could identify the person, who, committed rape on her, and therefore photographs of 10 to 12 persons including that of the accused convict were shown to her and she pointed out his

photograph. Further according to Investigating Officer on 23.06.2013, she got DNA kit procured. Doctor handed over blood sample, nail-clips, pubic hair, sample of urine of accused and on 26.06.2013 she dispatched said samples including undergarment to Forensic Laboratory, Mumbai. He received C.A. reports and made it a part of charge-sheet.

Investigating Officer is subjected to extensive cross, wherein she has admitted that, accused was not traced out for six days after the incident. Investigating Officer answered that accused was absconding. She is then questioned about other rape case in that village and she admitted that accused therein was not traced out. She admitted that both these incidents had become challenged to the police department. She is then questioned about seizure of clothes of victim from mother, how panchas were arranged, at what time she is in hospital, how many people gathered there, she answered that clothes of victim Article-B and Article-C were kept in separate packets. She is asked in whose handwriting is the panchanama written, then she is questioned about spot of incident and circumstances therein. She admitted that legin was not smeared with mud. She is asked who picked up the legin from the spot, distance between the place where legin was found and from where underwear was seized. Whether her staff

and villagers were present there. She answered that undergarment of the victim was picked by accused, but she is unable to state at that time in whose hand the undergarment was handed over. She admitted that seizure was from open place. She further answered that seizure was kept in Muddemal Room and she admitted that the same were not kept in air conditioner room. She stated that accused was got medically examined only once i.e. on 19.06.2013. She is further questioned about panchanamas (Exh.56 & 57), family members of accused, type and condition of the roof of the house. She has flatly denied that Article D, E and F could not belong to accused and that blood and semen stains were made subsequently. She is answered that she received DNA kit on 25.06.2013. A question is posed to her as to whether samples of blood, nails of prosecutrix and accused as well as other samples like semen, vaginal swab were not taken in DNA kit ? Investigating Officer answered that she does know what the doctor had done. She answered that she can tell the names of other persons appearing in other photographs shown to the victim. She admitted that those photographs are not placed on record and no T.I. parade was conducted. Omissions in the evidence of PW3 Phutane, PW6 Savitra, PW7 Victim and PW12 Suryaprakash are got proved which are as under:-

“PW-3 Bhagwat Phutane had not stated in his statement that he had asked the girl as to how she had come and where she wanted to go. PW6-Savitrabai had not stated in her statement that one boy wearing black shirt of white lining and victim were "standing" there. PW7- Victim had not stated in her statement that the man had taken her by lifting and dropped her near Panand and took her towards field. Victim had also not stated that she was wearing red frock, black Odhani and red pant. She had not stated that police had shown her many photographs and she had identified the photo of person, who had taken her away. PW12-Suryaprakash had not stated in his statement that three sealed packets and one sealed box were given to him. It is not true that though there was no evidence showing commission of crime by the accused, I filed false charge sheet against him.”

16. From the above discussion, it is revealed that, Investigating Officer has admitted that no T.I. parade was conducted. Identification seems to have been got done on the basis of photograph. According to Investigating Officer victim pointed out to the accused amongst 10 to 12 photographs, while she was in the hospital. Pondering over the objection raised before us regarding photo identification, in our view, this is a case attracting provisions under POCSO Act. It is to be further borne in mind that, the victim girl is barely 7 years of age at that time. The special statute mandates taking of abundant precaution regarding confrontation of victim with accused. Here, according to Investigating Officer, when victim was in the hospital, at that time, photographs of some suspects were shown to her and she identified

present appellant – convict. Photo identification is recognized mode of identification, more particularly when accused are unknown. In cases of such type, in our view, investigating machinery is free to take recourse to such type of identification. Even at times, hand sketches are required to be drawn for apprehension of culprits. Resultantly, mere failure on the part of Investigating Officer to get T.I. parade conducted, will not be fatal, more particularly, in peculiar circumstances involved in this case. Moreover, victim in witness box has stated that she identified the photo of the person who had taken her. In witness box also she stated that she can identify the person today also and she identified accused in the court as well as clothes shown to her in the witness box.

17. No doubt, victim has answered at the conclusion of her cross that she was told that the person sitting in the dock is the person who did wrong to her, but in her initial cross examination she has flatly denied that police and people have tutored her about what to depose. The small child seems to be almost grilled by defence by repeatedly trying to suggest that accused was confronted to her in the court earlier also. At one point of time the child also seems to have yielded by admitting that whenever she came to the court earlier, she used to see the accused outside the court hall and that her relatives and villagers used to tell her that

the accused had done wrong, but as stated above in para 3 which is first para of her cross, she has categorically denied that she had been tutored to depose. In our view, so much part of her cross would not effect her entire earlier evidence. It would be to much to expect of a child of 7 years to withstand lengthy cross without slight deviation. Resultantly, there should not be any issue about identification of accused.

18. Here, in this case what we have noticed is that, mother of victim handed over frock and *Odhani* of her daughter immediately at the time of lodgment of FIR. Victim was subjected to medical examination at the hands of PW8 Dr. Kranti on 14.06.2013. Doctor had gathered vaginal swab along with blood and nails and same is duly dispatched on 17.06.2013. Accused is arrested on 19.06.2013. This indicates that vaginal swab had already been dispatched to Forensic Laboratory, Mumbai i.e. prior to arrest of accused. Forensic Reports shows that on analysis vaginal swab carried semen which match with that of accused. The analysis / interpretation of DNA is as under :-

“D.N.A. profiling of semen detected in Exh.3 vaginal swab of victim (Name of the victim is written), blood mixed stains of semen detected in Exh.1 Frock of victim (Name of the victim is written), in FSLML case No. DNA-823/2013, Exh.1 full shirt of Santosh Kukar, Exh.4

Nicker of victim, blood detected on Exh.1 Full shirt of Santosh Kukar in FSLML case No.DNA-824/2013 and blood sample Exh.9 of Santosh Kukar FSLML case No. DNA-721/2013 is from same paternal progeny.”

19. Taking above material into consideration, here semen of accused is found on vaginal swab of victim. Resultantly, accusation that semen of accused were planted is rendered valueless for the simple reason that vaginal swab had already reached laboratory much prior to arrest of accused. Therefore, when there is nothing to indicate that there was tampering, planting or contamination of samples, the above forensic evidence which nails down the accused, gains credence.

20. Though, arguments are advanced that DNA sample is not infallible and cannot be relied, we are not ready to accept such arguments.

In the case of *Dharam Deo Yadav v. State of Uttar Pradesh (2014) 5 SCC 509*, the Hon'ble Apex Court observed as under :

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of

nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the

accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangled Diana to death and buried the dead body in his house.”

Likewise, in the case of ***Patangi Balarama Venketa Ganesh v. State of Andhra Pradesh, (2009) 14 SCC 607*** it is held that,

“Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means :-

“(Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred percent precise, experts opine.”

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high- molecular-weight DNA complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See Article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA Profiling and its applications) But in this case there is nothing to show that such precautions were not taken.

42. Indisputably the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross-examination PW-46 had stated as under :-

"If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population."

21. To sum up, on taking audit of entire evidence, prosecution had shown and established commission of kidnapping as well as offence under the provisions of POCSO Act.

22. We have gone through the judgment under challenge. No perversity is brought to our notice in appreciation or the findings reached at by learned trial court. No case on merit being made out, appeal fails and we proceed to pass following order :-

ORDER

- i) The appeal is hereby dismissed.
- ii) We quantify fees of appointed Advocate for respondent no.2 at Rs.10,000/- (Rupees Ten Thousand Only) to be paid by High Court Legal Services Sub-Committee, Aurangabad.

(ABHAY S. WAGHWASE, J.) (SMT. VIBHA KANKANWADI, J.)