

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

CRIMINAL APPEAL NO.713 OF 2022

X Y Z
Identity is withheld

**...APPELLANT
(Original Informant)**

VERSUS

- 1) The State of Maharashtra,
Through the Police Inspector of
Sengaon Police Station, Sengaon,
District-Hingoli in CR No.0195/2020,
- 2) Ramesh S/o Arjun Lande,
Age-28 years, Occu:Agriculturist,
R/o-Dhangar Galli, Sengaon,
Tq-Sengaon, District-Hingoli,
- 3) Vitthal S/o Dattarao Ambhure,
Age-33 years, Occu:Agriculturist,
R/o-Dhangar Galli, Sengaon,
Tq-Sengaon, District-Hingoli.

...RESPONDENTS

...
Mr. H.V. Tungar Advocate for Appellant.
Mrs. V.S. Choudhari, A.P.P. for Respondent No.1.
Mr. D.M. Shinde Advocate for Respondent No.2.
Mr. B.S. Chondhekar Advocate for Respondent No.3.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRAGADE, JJ.**

DATE : 8th MARCH, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original informant - mother of the victim, challenging the acquittal of respondent Nos.2 and 3 from the offence punishable under Sections 448, 376(2)(j), (n), (l), 376-D and 506 read with Section 34 of the Indian Penal Code by the learned Additional Sessions Judge-3, Hingoli on 29th July 2022 in Sessions Case No.47 of 2021.

2. The prosecution case, in short, was that the victim is a mentally disabled and she is unmarried. She was suffering from loose motions and stomach pain and when she asked the informant to massage the stomach, at that time informant found that stomach of the victim has become hard. Informant stated the said fact to husband and thereafter they both had made inquiry with the victim who disclosed that when they both had gone to market and victim was collecting wastage of the *tur* crop, at that time original accused No.1 went to the field, carried the victim forcibly in the tin shed situated in the field. Accused No.1 told victim that since her family members had not performed her marriage he would do sexual act with her. The victim told him that her brother would beat her. Then accused

No.1 put handkerchief in her mouth and thereafter by removing her clothes, had ravished her. Thereafter accused No.1 threatened her with dire consequences if she discloses the said fact to anybody. Victim then also disclosed that accused No.1 was continuously committing rape on her for next two days when parents were not present in the field. Informant has then stated that she disclosed all these facts to her son, who has then brought pregnancy test kit and found that the victim was pregnant and then the informant lodged the report.

3. It appears that during the course of investigation, the spot panchnama was carried out, seizure of clothes of the victim as well as the accused after his arrest has been done, so also the statements of witnesses have been recorded. The medical examination of the victim as well as examination of her mental ability was done, so also the medical examination of the accused was done. It is stated that the pregnancy of the victim was aborted and the DNA samples were collected in respect of the victim, foetus as well as accused. During the course of the investigation role of accused No.2 was revealed and therefore he was arrested because it was also the later on case that accused No.2 had also committed rape on the victim.

4. After the charge-sheet was committed to the Court of Sessions, both the accused appeared and charge was framed. It appears that nine witnesses were examined to bring home the guilt of the accused and taking into consideration the evidence on record including the DNA report, the accused persons have been acquitted. The informant is challenging the said Judgment and order of acquittal of respondent Nos. 2 and 3 under Section 372 of the Code of Criminal Procedure.

5. Heard learned Advocate Mr. Tungar appearing for the appellant, learned APP Mrs. Choudhari appearing for respondent No.1, learned Advocate Mr. Shinde for respondent No.2 and learned Advocate Mr. Chondhekar for respondent No.3.

6. With the able assistance of the learned Advocates and learned APP, we have gone through the evidence that was before the learned trial Judge.

7. It has been vehemently submitted on behalf of the appellant – original informant that the learned trial Judge has not considered the evidence in proper perspective. It was not

considered that the victim was a mentally challenged person and it could have been considered on the basis of her cross-examination also. She was giving answers in the affirmative to every suggestion that was put to her. She was not the competent person to depose and therefore, those admissions extracted in her cross-examination should not have been considered at all. Further, the DNA report matches with the DNA sample of accused No.1. That means accused No.1 was the biological father of the foetus and the victim herein was the biological mother. This was in fact sufficient to hold accused No.1 guilty of committing offence under Section 376 of the Indian Penal Code. Further, as regards original accused No.2 is concerned, though the DNA report is negative, yet the testimony of the victim was sufficient to hold him guilty. The testimony of the informant was supporting the prosecution story, so also testimony of PW-3, the son of the informant was also supporting the prosecution story. PW-5 Dr. Umesh Atram was the person who had examined the victim for her mental capacity and he has opined that the victim was mentally retarded / intellectually disabled person of 50%. Her I.Q. (Intelligence Quotient) was 57. Learned trial Judge erred in arriving at a conclusion that victim was a competent witness and therefore the acquittal based on erroneous

conclusion deserves to be set aside and for that purpose the Appeal deserves to be admitted.

8. Per contra, learned Advocates appearing for respondent Nos. 2 and 3 supported the reasons given by the learned trial Judge while acquitting the accused persons.

9. At the outset we would like to consider the testimony of the victim. It is to be noted that the age of the victim is stated to be 30 years and as per the informant, victim is mentally challenged. Admittedly, along with the First Information Report, informant has not produced any document to show that at any earlier point of time the victim was examined by any psychiatrist or she has been certified by any mental health clinic, to be mentally challenged. Victim was examined by PW-5 Dr. Umesh Atram on 2nd June 2020 and as per his testimony, on that day i.e. 2nd June 2020 he had put certain questions to victim and the victim had given answers to those questions. The questions were put by police officer. The statement of the victim is written in question and answer form and then he had signed on the said document Exhibit-31. This is the statement of the victim under Section 161 of the Code of Criminal Procedure. PW-5 Dr. Umesh

does not say that at that time he found the victim as mentally challenged person or in any way she was incapacitated from giving answers to the questions those were put. The next in chronology is the statement of the victim under Section 164(5) of the Code of Criminal Procedure recorded by the learned Judicial Magistrate First Class (JMFC), Sengaoon. It came to be recorded on 12th June 2020. Important is the fact that there is specific endorsement by the learned JMFC that the victim is able to understand Marathi, she is not mentally challenged, she is not physically or mentally incapacitated from giving answers and this observation of learned JMFC is based on his inquiry with the victim and he has also recorded that the witness knows the sanctity of oath. Thus, when even the learned JMFC had found her to be a competent witness, he proceeded to take her statement under Section 164(5) of the Code of Criminal Procedure.

10. Next in chronology is that PSI B.R. Jadhav i.e. the investigating officer had given letter on 9th July 2020 to PW-5 Dr. Umesh Atram to examine the victim and give opinion as to whether she is mentally disabled person or not. That letter is on record at Exhibit-32. Thereafter Dr. Umesh Atram, as psychiatrist

and one Amol Nimbalkar as clinical psychologist, examined the victim on 10th July 2020. Then they found that victim is mentally retarded / intellectually disabled person of 50%, her I.Q. is 57 and then he has given said certificate Exhibit-33. Interesting point to be noted is that all these facts have come in the examination-in-chief of PW-5 Dr. Umesh, but the prosecution has failed to extract explanation from him that when he had examined victim on 2nd June 2020 he had not found her to be mentally challenged or retarded, he rather certified that she was able to answer the questions, then all of a sudden how on 10th June 2020 how it was noticed that the victim was mentally retarded / intellectually disabled person. In his cross-examination all these facts have come on record. He has stated that on 2nd June 2020 in all 13 questions were asked to the victim and in Exhibit-31 he has not given certificate that the victim is intellectually disabled person. In fact he was not prevented from giving his opinion at that point of time itself. Secondly, as regards I.Q. is concerned, he has stated that said Amol Nimbalkar had assessed the I.Q. However, said Amol Nimbalkar has not been examined by the prosecution for the reasons best known to it. Under such circumstance, the

testimony of PW-5 Dr. Umesh Atram, on the point of incapacity of the victim to depose cannot be relied upon.

11. The learned trial Judge has treated the statement recorded under Section 164(5) of the Code of Criminal Procedure as examination-in-chief in view of Section 164 (5-A)(b) of the Code of Criminal Procedure and then allowed the cross-examination on behalf of the accused persons. However, prior to that also he had asked certain questions to the victim and he was also satisfied with the fact that victim was able to give answers to the questions those would be put to her. Section 118 of the Indian Evidence Act declares that all the persons shall be competent witnesses / competent to testify unless they are barred by incapacity, mentally infirm declared by the Court or considered by the Court. That means satisfaction of the Court is of prime importance and here two competent Courts found victim as competent to testify. Therefore, the victim in this case was competent under Section 118 of the Indian Evidence Act and whatever she has stated in her cross-examination cannot be now discarded on the ground that she has given admissions. The record would show that at no point of time the prosecution has taken any objection rather the cross-examination was taken in

the presence of the informant herself. Note to that effect is on record in the cross-examination of the victim. In the cross-examination it has been admitted by the victim that her brother had caught her and one Datta and they both were beaten. The victim has admitted that it was decided after her abortion that she should give the name of accused No.2 to the police and accordingly she has given the name. As regards accused No.1 is concerned, it is stated that sister in law of the victim used to speak with accused No.1 which was not liked by the brother of the victim. Victim has admitted that though she had no desire to lodge any report against accused No.1, she was forced to say that. In clear terms the victim has stated that accused No.1 has not committed rape on her. Taking into consideration all these admissions, the learned trial Judge has rightly held that the offence is not proved.

12. As regards the testimony of other witnesses is concerned, it is in fact hear-say i.e. as regards the mother and brother of the victim are concerned. Important point to be noted is that DNA report is positive and though DNA report can be considered as conclusive evidence, yet it will have to be proved that the samples have been taken properly. The doctor who had taken

the sample of the foetus, has not been examined. PW-6 Dr. Pote is the person who had examined the victim and had taken her sample. The learned trial Judge has relied on ***Ganesh Madne vs. the State of Maharashtra, 2019(5) Mh.L.J. (Cri.) 314*** and ***State of Maharashtra vs. Vishnu Tulshiram Karwate, 2021 All MR (Cri) 277***, wherein it was held that the prosecution should show that the blood samples were taken properly, then only credence can be given to the DNA report. We find that this reliance is proper. PW-9 Dr. Shailesh Devkar is the doctor who has taken the DNA samples of the accused, however, in the reference letter there was no mention that his sample should be taken. Through the cross-examination of Dr. Shailesh it has been brought on record that the preservation procedure of the sample is that it is to be kept in icebox, but that appears to be not followed and PW-8 Baburao Jadhav, the investigating officer, has stated that he had kept the samples in the freeze of his house. Therefore, the protocols for preservation of the sample and then sending it for analysis have not been properly followed. Under such circumstance, the said DNA report cannot be accepted and it is rightly not accepted by the learned trial Judge.

13. Taking into consideration all these aspects, we find that the trial Court was justified in acquitting the accused persons and no interference is required. No case is made out to admit the Appeal and it deserves to be dismissed at the threshold.

14. Accordingly, the Appeal stands dismissed.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/MAR23