

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.524 OF 2021

Sameer Shashikant Jadhav	Appellant
Versus	
The State of Maharashtra & Anr.	 Respondents

Mr. Mandar Soman, Advocate (appointed) for the Appellant.
Mr. S.R. Agarkar, APP, for the Respondent No.1-State.
Smt. Megha Bajoria, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 06th JANUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 25.3.2021 passed by the Additional Sessions Judge, Ratnagiri in Special Case No.19/2018. The appellant was convicted and sentenced as follows :

- i. He was convicted for commission of the offence punishable under Section 363 of the Indian Penal Code and was

sentenced to suffer RI for three years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer SI for five months.

- ii. He was convicted for commission of the offence punishable under Section 376 of IPC and was sentenced to suffer RI for 10 years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months.
- iii. He was convicted for commission of the offence punishable under Section 504 of IPC and was sentenced to suffer SI for one month.
- iv. He was convicted for commission of the offence punishable under Section 506 of IPC and was sentenced to suffer SI for one month.
- v. He was further convicted for commission of the offence punishable under Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer RI for 10 years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months.
- vi. He was also convicted for commission of the offence punishable under Section 5(i),(j)(ii),(l) read with 6 of the POCSO Act and was sentenced to suffer RI for 10 years and to pay fine of Rs.10,000/- and in default of payment of fine

to suffer SI for six months.

- vii. All the substantive sentences were directed to run concurrently.

He was granted set off under Section 428 of Cr.P.C. Learned Trial Judge directed that the fine amount, if recovered from the appellant, shall be paid to the victim towards compensation in view of Section 357(1) of Cr.P.C. r/w Section 33(8) of the POCSO Act. The District Legal Services Authority, Ratnagiri was requested and recommendation was made for providing additional compensation to the victim as per the provisions of Section 357-A of Cr.P.C.

2. Heard Shri Mandar Soman, learned appointed counsel for the appellant, Shri S.R. Agarkar, learned APP for the respondent No.1 and Smt. Megha Bajoria, learned appointed counsel for the respondent No.2.

3. The prosecution case is that the victim was born on 6.4.2001. The alleged incident had taken place in June and August, 2018. The victim was knowing the appellant. It is her

case that the appellant had taken her to a secluded spot and established physical relations with her. As a result, she became pregnant. She told this to the appellant. In August, 2018 again the appellant took her to a secluded spot and again established physical relations. In the meantime, the victim's father had lodged a report of her missing and possible abduction, at Lanja police station. The FIR was registered vide C.R.No. 87/2018 on 26.8.2018. The appellant's father produced the appellant and the victim before the police. The appellant was arrested on 29.8.2018. The investigation was carried out. Various statements were recorded. The appellant and the victim were sent for medical examination. Their blood samples were collected for DNA profiling. The pregnancy of the victim was medically terminated and the samples of the foetus were also sent for DNA profiling. The DNA report showed that the appellant and the victim were the biological parents of the foetus. The investigation was completed and the charge-sheet was filed. The case was committed before the Special Court.

4. During trial, the prosecution examined fifteen witnesses including the victim, her father, various medical officers, the investigating officers, Gram Sevak of the Gram Panchayat where the victim was born, the headmaster of the school where the victim was studying and finally the police officers.

5. The defence of the appellant was of total denial.

6. At the conclusion of the trial, the appellant was convicted and sentenced, as mentioned earlier.

7. The most important witness in this case is PW-2-the victim herself. She has stated that she was residing in her village with her parents and siblings. At the time of the incident, she was studying in the 12th standard. Her school timing was between 9.00 a.m. to 5.30 p.m.. Her date of birth was 6.4.2001. In May, 2017, she got acquainted with the appellant in a mobile phone shop and since then they remained in touch through telephonic calls. He promised to marry her. On 15.6.2018, he called the victim to a bus-stop and suggested that they would go to a secluded spot. Then he established physical relations with her. It is

her case that he started threatening her that he would kill her parents. On 16.6.2018, he repeated the same thing and established physical relations. It is her case that on both these occasions, she was taken in a jungle area. In the same month, she missed her menstrual cycle. She went to a doctor. He diagnosed that she was pregnant. She did not tell anything to her family but she told this fact to the appellant. He told her not to disclose this fact to anyone else. On 24.8.2018 again he called her at the same bus stop. He took her with him in the bus. It is her case that for five days they stayed in a jungle. On 28.8.2018, the appellant's father took them from that place and produced them before the police on 29.8.2018. Even during those five days, the appellant established physical relations with her. She further clarified that they had stayed in the jungle only for a day and then they had gone to some relative's place in another village but in that village they did not have physical relations. The appellant then took her to another village and there he again established physical relations. Finally on 29.8.2018 the appellant's father took them before the police. She was taken to the Rural Hospital,

Lanja. There, her pregnancy was confirmed. By that time, she was into second month of her pregnancy. She had handed over her clothes to the police. This was her evidence. She identified the appellant during re-examination.

In the cross-examination, she gave details of the phone number through which they kept in touch. She was cross-examined about the spot where they had gone. She denied the suggestion that said spot was visible from a tea-stall located nearby. There was some minor contradiction from her earlier statement regarding when exactly they had met initially. She denied the suggestion that on 24.8.2018 she had gone to the house of the appellant on her own. She emphasized that she was taken by the appellant. She denied the suggestion that since the appellant refused to marry her, she had lodged this FIR against him.

8. PW-1 was the father of the victim. He has deposed that the victim's birth date was 6.4.2001. On 24.8.2018, she left the house at about 9.00 a.m. for going to school but she did not

return till evening. On 26.8.2018 he lodged his report in the police station making grievance that somebody had kidnapped her. The FIR was lodged vide C.R. No.87/2018 under Section 363 of IPC at Lanja police station. It is produced on record at Exhibit-33. On 29.8.2018, he went to the police station as the police called him there. The victim along with some unknown person was present in the police station. The victim told him that the appellant had kidnapped her and had established physical relations with her in the jungle area. In the cross-examination he stated that the victim's school was 2 kms away from the house.

9. PW-3 Sushma Dhanavade was a pancha for various panchnamas. She was a pancha for seizure of clothes of the accused and the victim. That panchnama is at Exhibit-42. She was also a pancha for spot panchnama where the incident had taken place in jungle area. That panchnama is at Exhibit-43. Another spot was mentioned in another spot panchnama at Exhibit-44. One more spot was mentioned from the village where the victim was taken. That panchnama is taken on record at Exhibit-45.

In her cross-examination she stated that the village where the victim was taken was 47 kms away from the victim's school.

10. The next set of witnesses is of the medical officers. PW-4 Dr. Ajit Patil was having his dispensary in the victim's village. On 22.8.2018, the victim had approached him and had told him that she had missed her period since past one and half month. He found that her urine test was positive.

11. PW-5 Dr. Kranti Dikale was attached to Rural Hospital, Lanja. On 29.8.2018, she medically examined the victim. The victim gave the history of sexual intercourse committed on 15.6.2018 and 16.6.2018. This witness found that she was into 8th to 10th weeks of her pregnancy. On 31.8.2018, this witness examined the appellant. According to this witness, there was nothing to suggest that the appellant was incapable of performing sexual intercourse.

12. PW-10 Dr. Shubhangi Bedekar was another medical officer. She was attached to Civil Hospital, Ratnagiri. On

30.8.2018, the victim was brought to her. According to her clinical finding, the victim was pregnant for 14 to 16 weeks. Her blood sample and other samples were collected for examination.

In the cross-examination, she admitted that the ossification test was not conducted. According to this witness, the ossification test was not required as the age proof was available. She also admitted that there was some interpolation in the report mentioning the history. The word 'forcible' was introduced before the words 'physical relations'.

13. PW-12 Dr. Shrikant Babar was attached to CPR Hospital, Kolhapur. On 8.9.2018 the victim was admitted in his hospital. He performed medical termination of pregnancy procedure on 12.9.2018. The samples of the foetus were collected for DNA testing. He also collected the blood sample of the victim. They were handed over to police constable Karande for DNA testing.

In the cross-examination, he denied most of the suggestions regarding not following the procedure and not

completing the documentation.

14. PW-6 Police Constable Mali attached to Lanja police station had carried the samples to the Chemical Analyzer at Kolhapur on 5.9.2018 and 10.9.2018. PW-7 Police Constable Karande had carried the samples of the victim and the foetus from CPR Hospital, Kolhapur to Chemical Analyzer at Pune for DNA examination on 13.9.2018. PW-9 Police Constable Valavi had carried the blood samples of the appellant to Chemical Analyzer at Pune on 1.9.2018.

15. PW-14 Rohidas Munde was working as Assistant Chemical Analyzer in DFSL, Mumbai. He was in Pune Laboratory at the relevant time. He had conducted DNA testing on the samples sent in this case. He started his analysis on 1.3.2019 and completed it on 29.3.2019. His report is produced on record at Exhibit-61. It mentions that the victim and the appellant were concluded to be the biological parents of the foetus of the victim. He also conducted the DNA testing for clothes of the appellant and the victim. But in the context of the case that particular report

is not very material.

In the cross-examination, he denied most of the suggestions regarding the documentation part. On technical aspects there was hardly anything in the cross-examination in favour of the appellant.

16. PW-15 Anil Salokhe was another Assistant Chemical Analyzer and at the relevant time he was working at Kolhapur. After his preliminary report and analysis he had sent these articles for DNA analysis to Pune. His evidence is not important as the evidence of PW-14.

17. PW-13 PSI Rekha Jadhav was the investigating officer. She had carried out the investigation. She has deposed that on 26.8.2018, the victim's father had lodged this FIR. On 29.8.2018, she recorded the victim's statement. She sent the victim for medical examination. The appellant was arrested on 29.8.2018. The clothes of the appellant and the victim were seized and were sent for chemical analysis. The spot panchnama was conducted. The samples of the victim, the appellant and the foetus were

collected and sent for DNA testing. The victim's school record was collected to establish her date of birth. The victim's statement was recorded under Section 164 of Cr.P.C.. That statement is produced through this witness but it was not shown to the victim when her deposition was recorded and, therefore, it could not be used for corroboration of the victim's deposition.

The investigating officer was mostly cross-examined on the procedural aspects viz., maintaining log book etc. She was also cross-examined about the location of the spot and its accessibility.

18. The crucial evidence in this case is regarding age of the victim. For this purpose the evidence of two witnesses i.e. PW-11 Prabhakar Nimbalkar and PW-8 Swapnali Jathar is very important. PW-11 Prabhakar Nimbalkar was the Headmaster of the school where the victim was studying at the relevant time. He has produced the bonafide certificate of the victim issued on 7.9.2018. It is produced on record at Exhibit-83. It showed her date of birth as '6.4.2001' as per the school record.

19. PW-8 Swapnali Jathar was the Gram Sevak of the Panchayat Samiti, Lanja. On 1.9.2018, she received a letter from the investigating officer asking for birth certificate of the victim. This witness accordingly made request to the Block Development Officer for providing the birth extract from the Register of Births and Deaths. Accordingly she got the birth certificate. As per the birth certificate the victim's date of birth was 6.4.2001. The birth certificate was signed by the Additional Registrar of Births and Deaths who was also the Block Development Officer. He was senior to PW-8. She identified his signature. She identified that document. It is produced on record at Exhibit-71.

In the cross-examination, she stated that the registers are maintained with her office for one year only and then they were sent back to the Block Development Officer but because of some difficulties, all the registers since 1970 were kept with the Grampanchayat. All the registers were in the custody of the Block Development Officer. She denied the suggestion that her office did not receive the prescribed form No.1 from the person making

entry in the year 2001. She had not brought that form to the Court.

She was cross-examined regarding the name of the victim appearing on the birth certificate showing that the birth was registered on 10.4.2001 and yet the name was mentioned immediately in the record though as per the customs, the naming ceremony was to be held after twelve days from the birth. In answer to the court question, this witness clarified that after naming ceremony of the child; usually the parents came to the office and intimated about the name of the child and thereafter necessary entry is made in the register.

. This, in short, was the prosecution evidence.

20. Learned counsel for the appellant basically attacked the age proof of the victim. He submitted that the overall reading of the evidence and in particular, that of the deposition of the victim shows that it was a clear case of consent and therefore, the most crucial aspect in this case would be the age of the victim. He submitted that the prosecution has relied on the evidence of

PW-11 and PW-8 apart from the documentary evidence i.e. Exhibit-71 i.e. the birth certificate.

21. He further submitted that the evidence of PW-11 Prabhakar Nimbalkar is not very material because his bonafide certificate is not based on any primary source of information. Therefore, the evidence of PW-8 and the document at Exhibit-71 are very important.

22. He submitted that PW-8 herself had not certified Exhibit-71. She has not even endorsed a copy and, therefore, it was necessary for the prosecution to have examined the Block Development Officer who had certified Exhibit-71. There is no evidence brought on record to show on what basis and with reference to which particular register this birth certificate was prepared.

23. He further submitted that though it purported to be a certified copy of public record, still, the contents of this document were required to be proved independently through cogent evidence of the maker of the document.

24. He further submitted that form No.1 referred to in the cross-examination was not brought on record. Apart from that there are lot of contradictions in the deposition of the victim and it is clear that she has not stated the truthful version of the case.

25. He further submitted that the dates given by the victim do not match with the medical evidence regarding the period of pregnancy.

26. Lastly, he submitted that there was delay in lodging the FIR in August, 2018 when the incident had allegedly taken place on 15th and 16th June, 2018.

27. Learned counsel for the respondent No.2 as well as learned APP submitted that the prosecution has proved its case beyond reasonable doubt. Both of them submitted that this is not a case of consensual sexual relationship. The victim in her deposition has clearly stated that the physical relations were established by the appellant under threats. Every time she was taken to a secluded spot under threats and then she was forced to have sexual relations. Therefore, in any case the offence of rape is

made out.

28. They further submitted that the prosecution has successfully proved that the victim was below 18 years of age on the date of incident. They particularly relied on the DNA report at Exhibit-61 which mentions that the appellant was the biological father of the foetus of the victim.

29. Both of them further submitted that inspite of knowing that the victim was pregnant and inspite of the victim seeking help from him, she was again taken to different places and the appellant had established physical relations taking wrong advantage of her helpless position and, therefore, in any case the offence is proved.

30. According to them in such cases it cannot be said that there was delay in approaching the police. Till the last day the victim was trying to seek help from the appellant and ultimately when she did not return from her school her father lodged the FIR. The appellant's father produced the appellant and the victim before the police. All these events form a complete chain

explaining why the victim had not approached the police immediately.

31. I have considered these submissions. As emphasized by Shri Soman, one of the most important features of this case is regarding age of the victim. As discussed earlier, two witnesses i.e. PW-8 and PW-11 are examined in that behalf. A document i.e. Exhibit-71 is the birth certificate of the victim. Exhibit-83 is the bonafide certificate issued by PW-11. These documents consistently show the date of birth of the victim as 6.4.2001. Therefore, in June and August, 2018 she was below 18 years of age. The question is whether the prosecution has proved this evidence regarding the age beyond reasonable doubt. In this context, the birth certificate of the victim is more important. It is a document certified by the Block Development Officer who was also Additional District Registrar for Record of Birth and Death. It bears official seal of the Panchayat Samiti, Lanja, District-Ratnagiri. PW-8 has identified the signature of the Block Development Officer who was her senior. In this context, certain

provisions of the Indian Evidence Act, 1872 are important. They are as follows :

“74. Public documents.-- The following documents are public documents: --

- (1) Documents forming the acts, or records of the acts --
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive, ¹[of any part of India or of the Commonwealth], or of a foreign country;
- (2) Public records kept in any State of private documents.

75. Private documents. – All other documents are private.

76. Certified copies of public documents.-- Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees there for, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation. -- Any officer who, by the ordinary course of official duty, is authorized to deliver

such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Proof of documents by production of certified copies. –

Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

78. xxxx

79. Presumption as to genuineness of certified copies.-- The

Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.”

32. In the present case the birth certificate and the births register is a public document within the meaning of Section 74 of

the Evidence Act. Exhibit-71 is a certified copy satisfying the ingredients of Section 76 of the Evidence Act and more importantly Section 77 provides that this certified copy can be produced in proof of the contents of this birth certificate. The Block Development Officer was the person who was authorized to issue the certified copy. He was authorized to keep it in his custody. Therefore, all the necessary ingredients of these sections are satisfied. Besides this, there is also a presumption under Section 79 of the Evidence Act. There is nothing in the evidence of this case to suggest that this presumption is rebutted directly or indirectly by the appellant. Therefore, this document is duly proved by the prosecution and hence it is established beyond reasonable doubt that date of birth of the victim was 6.4.2001. Hence, she was below 18 years of age on the dates of the incidents and, therefore, her consent was immaterial even if it is assumed that it was there.

33. A learned Single Judge of this Court in the case of **Mahiboob alias Tanya Peerahamad Shabhai Vs. State of**

Maharashtra¹ has taken a similar view. Paragraph-10 of the said judgment reads thus :

“10 The Birth Certificate Exhibit 57 is issued under the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, Exhibit 57, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the

¹ 2019 (3) ABR (CRI) 890

Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate Exhibit 57 is, infact, the extract of Birth Register in respect of entry of birth of the victim child/PW1, and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant

in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is a public document and it constitutes primary evidence. Proof of contents of a public document can be had by production thereof as envisaged by Section 77 of the Evidence Act. In this view of the matter, no formal proof of the Birth Certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and Rules framed thereunder is required.”

34. For ready reference, Section 17 of the Registration of Births and Deaths Act, 1969 is reproduced as follows :

“17. Search of births and deaths register

(1) Subject to any rules made in this behalf by the State Government, including rules relating to the payment of fees and postal charges, any person may

(a) cause a search to be made by the Registrar for any entry in a register of births and deaths; and

(b) obtain an extract from such register relating to any birth or death:

Provided that no extract relating to any death, issued to any person, shall disclose the particulars regarding the cause of death as entered in the register.

(2) All extracts given under this section shall be certified by the Registrar or any other officer authorised by the State

Government to give such extracts as provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872), and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.”

35. The observations made in the said judgment are squarely applicable to the present case. Apart from that the Hon’ble Supreme court in the case of **Jarnail Singh Vs. State of Haryana**² has also held that the age of the victim can be determined as per the Rules established under Juvenile Justice (Care and Protection of Children) Act for determination of age of the victim on the basis of birth certificate.

36. In any case the victim has deposed that the physical relations were kept under threats and, therefore, there was no consent. In such cases, the presumption under Section 114A of the Evidence Act is also applicable. Therefore, either way the defence cannot get any benefit in the facts of this particular case.

37. The other seriously incriminating piece of evidence is the DNA report Exhibit-61. As mentioned earlier, it shows that the appellant was the biological father of the foetus of the victim.

² (2013) 7 SCC 263

There is no reason to doubt this report. The chemical analyst is cross-examined in detail, but, there is no material brought out through his cross-examination which would be in favour of the defence in any manner. Thus, the prosecution has proved beyond reasonable doubt that the appellant had established physical relations with the victim causing her pregnancy. The ingredients of all the offences, for which the appellant is convicted, are duly proved by the prosecution beyond reasonable doubt. Even the sentence awarded is the minimum sentence and it cannot be reduced further. Therefore, I do not find any merit in the appeal and the appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

Deshmane (PS)