

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

CRIMINAL APPEAL NO.164 OF 2021

Jayram Jivan Kumar	Appellant
Versus	
The State of Maharashtra	
and another	 Respondents

Ms. Mallika Sharma, Advocate i/b. Anjali Patil, Advocate for the Appellant.

Mr. S.R. Agarkar, APP, for the Respondent No.1-State.

Ms. Janhavee Joshi, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 02nd JANUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 31.1.2020 passed by the Special Judge under POCSO Act, Dindoshi in Special Case No.330/2016. The appellant was convicted for commission of offence punishable under Section 6 read with Section 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer RI for 12 years and to pay fine of Rs.10,000/- and in default

of payment of fine to suffer SI for six months. He was also convicted for commission of offence punishable under Section 506 of IPC and was sentenced to suffer RI for one year and to pay fine of Rs.1,000/- and in default of payment of fine to suffer SI for fifteen days. In view of this conviction and sentence, no separate sentence was imposed under Sections 376(2)(f) & 376(2)(i) of IPC as well as under Section 4 of the POCSO Act though he was also convicted for those offences. The substantive sentences were directed to run concurrently and the appellant was granted set-off under Section 428 of Cr.P.C.

2. Heard Ms. Mallika Sharma, learned counsel for the appellant, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Ms. Janhavee Joshi, learned appointed counsel for the respondent No.2.

3. The prosecution case is that, the victim was about thirteen years of age at the time of the incident which took place around May, 2016. The appellant was the victim's maternal uncle. He committed rape on her when she was alone in the house. At

that time, the appellant was staying with the victim's family. The victim was staying with her parents and two brothers. On 4.7.2016, she complained of uneasiness and, therefore, she was taken to a doctor. She was referred to the Government Hospital. On 6.7.2016, the Medical Officer at the Government Hospital examined her and found that she was into 10th week of her pregnancy. The victim was minor and, therefore, the Medical Officer informed the police. The victim's mother made enquiries with the victim. At that time, the victim revealed the name of the appellant. Accordingly the victim's mother lodged her FIR vide C.R. No.378/2016 at Juhu police station, Mumbai. The investigation was carried out. The appellant was arrested on 6.7.2016 i.e. on the very date when the FIR was lodged.

4. During the course of investigation, the appellant showed the spot of incident i.e.the victim's house. The victim and the appellant were sent for medical examination. The victim's pregnancy was medically terminated. The blood samples of the victim, her foetus and that of the accused were sent for DNA testing. The DNA report showed that the appellant and the victim were the

natural biological parents of the fetus. The statements of various witnesses were recorded and at the conclusion of the investigation the charge-sheet was filed. The case was committed to the Special Court under the POCSO Act.

5. During trial, the prosecution examined eleven witnesses including the victim, her mother, the Medical Officers, the panchas and the investigating officers. The Chemical Analyst from FSL, Kalina was examined to prove the DNA report.

6. The defence of the appellant was of total denial. In support of his case, he examined a defence witness in the form of the victim's father. The victim, her mother and her father did not support the prosecution case.

7. The learned Judge after considering the evidence before him and after hearing the parties recorded his finding of guilt as mentioned earlier. He relied on the DNA report and also on the contradictory statements of the victim and her mother which were proved through the investigating officers.

8. PW-1 was the victim herself. She has stated that she

was staying with her parents and two brothers. She had three maternal uncles. They were residing in Bihar. After deposing thus, she then did not support the prosecution case and resiled from her previous statement.

She was cross-examined by the learned APP. During cross-examination, she denied having stated before the police that the appellant had committed rape on her. In her police statement, she had stated that on 4.7.2016 she was having fever and therefore she was taken to a private hospital. It was revealed that she was pregnant. Then on 6.7.2016, she was taken to Cooper Hospital. The Medical Officer attached to that hospital confirmed the pregnancy. Her blood sample and her foetus's sample were taken for DNA testing. On 6.7.2016, her mother lodged the FIR. She had stated all these facts in her statement before the police but she resiled from her police statement while deposing during trial. The contrary portions from her statements were marked as "A" to "D". Those portions were ultimately proved through the evidence of PW-6 the police officer Nisha Chavan. Those portions were brought on record as Exhibits-35 to 38. She denied the

suggestion that since the appellant was her maternal uncle, she was deposing falsely to save him.

She was also cross-examined on behalf of the appellant. In that cross-examination, she gave all the answers favourable to the appellant. She stated that whenever the appellant came to meet her family he would never stay at their house. He did not even take water from their house. He did not have bad intentions about her. He always met her in the presence of some family member. She could not read and write Marathi and she did not know what the police had written in Marathi. She denied that the police had recorded her statement. It appears that her statement under Section 164 of Cr.P.C. was also recorded but that statement was not put to her in the cross-examination conducted by the learned APP and, therefore, that statement is not properly proved.

9. PW-2 was the mother of the victim. She had also resiled from her statement which was treated as FIR. In the FIR she had mentioned that she had taken the victim to a doctor and

then her pregnancy was revealed. Thereafter the victim had told her that the appellant was responsible for her pregnancy and that he had committed forcible sexual intercourse with her when no one else was in the house. However, PW-2 admitted her signature on the FIR and that particular signature was marked as Exhibit-24.

In the cross-examination conducted on behalf of the appellant, she deposed that the victim was born in Bihar. The delivery took place in the house. The victim's birth was not registered. When the victim became eight years of age, they shifted to Mumbai. She deposed that she did not know the exact age of the victim. According to her, the victim never complained about any sexual harassment caused by the appellant. The victim had not told her that he had committed rape on her. According to her, the police had forced her to put signature on the FIR and that she did not know the contents of the FIR.

10. PW-6 PSI Nisha Chavan was attached to Juhu police station at the relevant time. On the directions of the Station House Officer, she went to Cooper Hospital and recorded the

victim's statement. She proved the portions from the victim's statement at Exhibits-35 to 38 as mentioned earlier. In the cross-examination, she accepted that she had recorded the victim's statement after the victim's medical examination was over.

11. PW-7 PSI Nagesh Misal was attached to Juhu Police Station. On 6.6.2016, he received a message from the Cooper Hospital that a minor girl, who was two and half months pregnant was admitted in the hospital and that her maternal uncle had committed forcible sexual intercourse with her. PW-7 then went to the hospital with his team. He recorded the statement of the informant i.e. PW-2 as per her narration. Her statement in the nature of FIR is brought on record through this witness at Exhibit-40. He registered the offence vide C.R. No.378/2016 at Juhu police station. Then he visited the spot of incident, which was shown by the informant in the presence of two panchas. The surveillance team of the police had taken the appellant in custody. PW-7 then arrested him formally on 6.7.2016 itself. He recorded the statement of the victim's father.

In the cross-examination conducted on behalf of the appellant, he accepted that he did not obtain any age examination report of the victim. He did not refer the victim for age determination test. He did not record the statement of the medical officer. He did not record the statement of the doctor to whom the victim was first taken on 5.7.2016. He did not record the statement of any of the persons around the spot of incident. He admitted that he did not come across any criminal antecedents of the appellant. He could not recollect whether he had seen any age proof of the victim while applying the provisions of the POCSO Act.

12. PW-3 Dr. Kruti Doshi was attached to Cooper Hospital at the relevant time. On 6.7.2016, the victim was referred to her. The victim had given her history that the appellant was staying with them and he committed rape on her in May, 2016 at around 2:30 p.m., when she was alone in the house. PW-3 then informed the police and the case was registered as a Medico-Legal Case. She found that the uterus size was of ten weeks. The ultrasound report reflected intrauterine pregnancy of 9.05 weeks. She had

informed the FSL, Kalina that the victim's pregnancy would be terminated and the requisite samples would be sent for further investigation. After that, the victim's pregnancy was terminated. The samples of the victim and of the foetus as also the blood samples of the accused were sent for examination to FSL Kalina. The medical papers were produced on record at Exhibit-26.

In the cross-examination she stated that the victim did not tell her the particular date on which the appellant had committed rape on her. She denied the suggestion that she personally did not collect the blood samples of the victim.

13. PW-10 Dr. Ravindra Kuralkar was another doctor. He had conducted the medical examination of the appellant. According to him, there was nothing to suggest that the appellant was incapable of performing sexual intercourse. PW-10 had collected the blood samples of the appellant for DNA testing.

His cross-examination was mainly directed regarding the age of the appellant. In re-examination, he was shown the identification form of the appellant at the time of collecting

samples for DNA testing. That form was produced on record at Article "A".

14. PW-4 Manjunath Gauda was a pancha. He did not support the prosecution case. He was a pancha for the panchnama mentioning that the appellant had showed the spot of incident.

15. PW-9 PC Babasaheb Kamble was the carrier who carried the samples to FSL, Kalina on 7.7.2016.

16. PW-5 Suryaprakash Pathak was another important witness. He was the Headmaster of the school where the victim was studying at the time of the incident. He has deposed that if the admission was given to a child other than in the first standard, then the school leaving certificate of the previous school was taken on record for the purpose of general data entry of the student. He was shown the original bonafide certificate of the victim issued by his school. It bore his signature as the headmaster of the school. According to the General Register, the date of birth of the victim was 5.2.2003. He had produced the

extract of the general register and that extract was marked as Exhibit-32. The victim was admitted to their school in the 6th standard in the year 2013 and the entry was made on the basis of the original school leaving certificate of the victim issued by the earlier Municipal School at Juhu. A copy of the leaving certificate was produced on record at Exhibit-33. It showed the date of birth as 5.2.2003.

17. PW-8 PI Kedari Pawar was the investigating officer. He took over the investigation on 7.7.2016. He made correspondence with FSL requesting for two DNA kits. He was instrumental in getting the samples for DNA profiling. He produced all the letters of correspondence with the FSL and he had sent the samples to FSL. He caused recording of the victim's statement under Section 164 of Cr.PC. Under his supervision, the appellant has taken the panchas to the spot of incident. The bonafide certificate was produced by him at Exhibit-50. At the conclusion of the investigation, he had filed the charge-sheet.

18. PW-11 Sandip Pawar was the Assistant Chemical

Analyzer, FSL. He was M.Sc. in Biochemistry. He had taken special training for DNA profiling. On 7.7.2016, the products of conception and the blood samples of the victim were brought to FSL, Kalina. The samples of the appellant's blood were also received by the Laboratory. He then conducted the DNA profiling test and his opinion was that the appellant and the victim were concluded to be the biological parents of product of conception of the victim. He then forwarded his report to the police officers.

In the cross-examination, he stated that he could not tell about the age of the parents of the fetus. He denied the suggestion that the samples received by the FSL were not in sealed condition and that those were contaminated. He denied the suggestion that he prepared the report at the instance of the police.

19. As mentioned earlier, the defence of the appellant was of total denial. He had not taken any specific defence. However, he examined the victim's father as the defence witness No.1. His evidence is quite different. According to DW-1, the victim's date

of birth was 21.2.1997. She was born at their native place. But he did not have any documents regarding her birth. According to him, he got the victim married in February, 2016 with the appellant at their native place in presence of their relatives. After that the appellant became his son-in-law and he started residing with PW-1's family in Mumbai. There was difference of two years between the appellant and the victim. The appellant was born in the year 1995. According to him, the family members had not lodged any FIR but the doctors from the Cooper Hospital had informed the police. The police took the appellant in custody and forcibly removed Rs.13,700/- from him. It is alleged that the police demanded Rs.50,000/-. DW-1 had approached the superior police officers with such allegations. According to him, since they had not fulfilled the demand of the police officers the appellant was falsely implicated.

In the cross-examination carried out on behalf of the State, he accepted that in the school he had given the date of birth of the victim as 5.2.2003. The victim was earlier going to the Municipal Corporation's school at Juhu. The victim took

admission in that school on 4.7.2013 in the 6th standard. He was then cross-examined about the removal of Rs.13,700/- from the appellant.

. This in short was the evidence led by both the parties.

20. The learned counsel for the appellant made following submissions :

- i. The age of the victim was not proved. The primary source of information should have been the victim's first school record but that record is not produced before the Court and, therefore, the victim's age is not proved.
- ii. The prosecution has failed to prove that the victim was below 18 years of age. The birth of the victim was not registered.
- iii. The father of the victim has deposed that she was born in the year 1997 and, therefore, at the time of incident she was about 19 years of age.
- iv. Neither the victim nor her mother nor her father has

supported the prosecution case.

- v. The defence witness should be treated on par with the prosecution witness and, therefore, there is no reason to disbelieve DW-1 when he deposed that the appellant and the victim were married and both of them were adult at the time of incident.
- vi. The victim and her mother did not know Marathi and, therefore, they did not know what was written by the police in their statements.
- vii. She submitted that the DNA report is not properly proved. It is not conclusive piece of evidence.

21. The learned counsel for the respondent No.2 assisted the Court in analyzing the evidence. The respondent No.2 had not supported the prosecution case during trial. Therefore, the important stand was that of the State. Learned APP Shri Agarkar made following submissions :

- i. It is not necessary that every time the witness turned hostile, acquittal must follow. In this case there are other

circumstances which are clinching in nature and, therefore, the witnesses turning hostile will not make any difference in this particular case.

- ii. The age of the victim is proved not only through the evidence of PW-5 and the documents produced by him but even through the evidence of DW-1 where he has accepted that he has given date of birth of the victim as 5.2.2003 to the school.
- iii. He further submitted that the medical officers attached to Cooper Hospital had acted in accordance with law. And, therefore, there was nothing wrong in the medical officer informing the police about the incident because it was their duty, since they had found that a minor girl was pregnant.

22. I have considered all these submissions. While it is true that PWs-1 & 2 have not supported the prosecution case, however, their contrary statements given to the police are properly brought on record through the respective police officers who had recorded their statements. PW-6 PSI Chavan had recorded the

statement of the victim. She was a woman police officer and as per the rules she had recorded the statement of the victim. She has proved all the contrary portions marked from the victim's statement recorded under Section 161 of Cr.P.C. Proviso to Section 162(1) of Cr.P.C. is important. Section 162 of Cr.P.C. reads thus :

“162. Statements to police not to be signed: Use of statements in evidence.

- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

- (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act.

Explanation.--An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.”

Thus, PW-6 has properly proved the contrary portions from her statement.

23. Similarly PW-7 PSI Misal has proved the statement given by PW-2 which was treated as FIR. The Hon’ble Supreme Court had dealt with the issue of evidentiary value of a hostile witness in the case of **Hemudan Nanbha Gadhvi Vs. State of Gujarat**¹. The relevant reference may be found in paragraphs-10 and 11 of the said judgment. The Hon’ble Supreme Court has held that a criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with

1 (2019) 17 SCC 523

the rights of the victim, and above all the societal interest for preservation of the Rule of law. Neither the Accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the absurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal.

24. In the case of **Bhagwan Dass Vs. State (NCT) of Delhi**², the Hon'ble Supreme Court was considering the effect of a witness turning hostile to support her son. The relevant portions from paragraph-8 of that judgment read thus :

“8. We are of the opinion that the statement of Smt. Dhillon Devi to the police can be taken into consideration in view of the proviso to Section 162(1) Code of Criminal Procedure, and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in the court she denied that she had made such statement

2 AIR 2011 SC 1863

before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso of Section 162(1) Cr.P.C..

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In *Himanshu alias Chintu v. State (NCT of Delhi)* (2011) 2 SCC 36 this Court held that the dependable part of the evidence of a hostile witness can be relied on.

Thus it is the duty of the Court to separate the grain from the chaff, and the maxim "falsus in uno falsus in omnibus" has no application in India vide *Nisar Alli v. The State of Uttar Pradesh* AIR 1957 SC 366. In the present case we are of the opinion that Smt. Dhilllo Devi denied her earlier statement from the police because she wanted to save her son. Hence we accept her statement to the police and reject her statement in court. The defence has not shown that the police had any enmity with the accused, or had some other reason to falsely implicate him."

25. In the present case also the appellant is a close relative of the victim. He is brother of PW-2 and, therefore, it is quite apparent that PW-1, PW-2 and DW-1 want to save him. In this case, the DNA report is a strong incriminating piece of evidence, which cannot be ignored. The prosecution has duly proved the DNA report. It shows that the appellant and the victim were the

biological parents of the fetus. Therefore, inspite of the evidence of PW-1, PW-2 and DW-1 it is conclusively proved that the victim had become pregnant as a result of the act committed by the appellant. There is hardly any challenge to the DNA report and in any case the prosecution has proved the procedure for drawing the samples, carrying them to FSL and the tests carried out for DNA profiling. The evidence of PWs-8, 9, 10, 11 and 3, as discussed earlier, together establish these particular facts. Therefore, though the victim herself had denied the incident, the prosecution has conclusively proved that the appellant had caused the pregnancy.

26. The only issue that remains to be considered now is the age of the victim. For that purpose the prosecution has proved the documentary evidence through the evidence of PW-5. There is no challenge to this evidence at all. He is not even cross-examined. He has produced the extract of register which is maintained in the ordinary course of business. The record was prepared much earlier to the incident. There is no scope to make any allegation that it was forged. In the register, the date of birth

of the victim was mentioned as 5.2.2003. Apart from that, the school leaving certificate showing the same date of birth is also produced on record at Exhibit-33. That school leaving certificate is issued by the victim's earlier school. The bonafide certificate issued by PW-5 is brought on record at Exhibit-50. It also showed the same birth of date. More particularly, DW-1 himself has accepted that he had given the date of birth to the school as 5.2.2003. All these pieces of evidence showed the fact that the date of birth of the victim was 5.2.2003. Therefore, on the date of offence she was below 16 years of age. Hence, the prosecution has conclusively proved beyond reasonable doubt that the appellant has committed offence for which he is convicted and sentenced.

27. Learned counsel for the appellant then argued for reduction in the sentence and in my opinion this argument needs to be considered seriously. She submitted that the appellant is continuously in custody from 6.7.2016. He was never granted parole or furlough leave. The appellant has his old mother to support. He has no criminal antecedents. All the family members

of the victim including the victim herself, her mother and father have not supported the prosecution case. The father of the victim has in fact gone a step ahead and has deposed that the appellant and the victim were married.

28. Learned counsel for the appellant submitted that the minimum sentence provided on the date of offence under Section 376(2)(f), 376(2)(i) as well as under Section 6 read with Section 5(n) of the POCSO Act was ten years, in the year 2016. She, therefore, submitted that the minimum sentence of ten years may be imposed on him instead of sentence of twelve years which is imposed by the trial Court.

29. Learned counsel for the respondent No.2 left this issue to the discretion of the Court.

30. Learned APP opposed this submission. According to him, the sentence imposed on him is proper.

31. I have considered these submissions as well. In my opinion, the submissions of the learned counsel for the appellant has considerable force. The victim and her parents are supporting

the appellant. Therefore, some leniency can be shown to the appellant in the background of the case as submitted by the learned counsel for the appellant. Hence, instead of substantive sentence of twelve years, the appellant can be sentenced for a sentence of ten years.

32. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction of the appellant under Section 6 read with 5(n) of the Protection of Children From Sexual Offences Act, 2012 is maintained. However, the sentence of twelve years is reduced. Now, the appellant is sentenced to undergo RI for ten years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months.
- iii. The appellant's conviction and sentence under Section 506 of IPC are maintained.
- iv. The trial Court had not imposed any separate sentence under Section 376(2)(f), 376(2)(i) of IPC and under Section 4 of the

POCSO Act in view of conviction and sentence under Section 6 of the POCSO Act. The same operative part is maintained and no separate sentence is imposed on him in respect of these offences.

- v. The substantive sentences are directed to run concurrently.
- vi. The appellant is granted set-off under the provisions of Section 428 of Cr.P.C..
- vii. All other clauses of the operative part of the impugned order which are not inconsistent with this order are maintained.
- viii. The appeal is accordingly disposed of.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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