

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

CRIMINAL APPEAL NO.192 OF 2018

Devidas Baburao Nanaware, Age 61 years,
Occ.Cook, R/o.Swami Samarth Apartment,
Flat No.A-7, S.No.22/23, Balaji Nagar,
Dhankawadi, Pune.

(Presently lodged in Yerwada Central Prison)

Appellant

versus

1. The State of Maharashtra.

2. Rohini Umesh Deshmukh, Age 19 years,
Occ.Education, R/o.Survey No.22/15,
Swami Samarth Housing Society,
Flat No.A7, Near Mahavir Jewellery,
Balaji Nagar, Dhankawadi, Pune-43.

Respondents

Mr.Pramod G.Kathane, Advocate for appellant.

Mr.Arfan Sait, APP, for Respondent no.1 State.

Mr.Harshad Sathe, appointed Advocate for Respondent no.2.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 18th April 2022

Date of Listening for Clarification : 6th June 2023

Date of Pronouncing the Judgment : 22nd June 2023

JUDGMENT :-

1. The appellant challenges the Judgment and Order dated 30th January 2017 passed by Additional Sessions Judge, Pune in Special Sessions Case No.147 of 2015 convicting the appellant for offence punishable u/s.376(1) and 376(1)(n) of Indian Penal Code and sentencing him to suffer imprisonment of 11 years and to pay fine of Rs.15,000/-. Appellant is also convicted for an offence punishable under Section 506(1) of IPC and sentenced to suffer

rigorous imprisonment for one year. Appellant is further convicted for offence u/s.4 and 6 of Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 11 years on each count. The Judgment of Trial Court is, however, silent whether substantive sentence of imprisonment imposed upon appellant are to run concurrently or consecutively.

2. The case of prosecution in brief is as under :-

(i) The complainant is the mother of the victim girl. She resides with her two children, husband, father in law and brother in law. The accused is residing in the same building. The victim girl complained of abdominal pain. She was taken to hospital. Sonography was conducted. After sonography the Doctor opined that the victim is pregnant of six weeks;

(ii) Complainant and her husband had a talk with the victim. She disclosed that she had been to the house of the accused to watch T.V programme. At that time the accused sent his daughter out for some work. Accused removed her clothes and subjected her to penetrative sexual assault. The accused threatened her not to disclose the incident to anybody otherwise he would kill her and her family members. Accused used to call her in the house whenever his married daughter is out of house. Accused used to send his other daughter out of house for work and repeat the act of sexual assault;

(iii) After learning about the aforesaid incidents, complaint was lodged with police and FIR was registered. Victim was aged about 12 years. FIR was registered vide Crime No.53 of 2015 u/s.376 and 506(1) of IPC and under Sections 3,4,6,7,8,11 and 12 of POCSO Act;

(iv) During the course of investigation police visited the spot and prepared spot panchanama. Police seized clothes of the victim. Statements of witnesses were recorded. Victim was referred for medical examination. Accused was referred for potency test. It was opined that accused potent for sexual intercourse. Charge sheet was filed.

3. Charge was framed against accused. Evidence of witnesses was recorded. The prosecution examined seven witnesses. The defense examined three witnesses.

4. Learned advocate for appellant submitted that prosecution case suffers from serious doubts. Although it is the case of prosecution that victim was subjected to sexual intercourse by the appellant and that she was pregnant, however, DNA profile of the product of conception has matched with that of victim girl but does not match with DNA of accused. Hence the prosecution has not proved that victim became pregnant due to sexual assault by appellant-accused. The Chemical Analyzer report in respect of nail clippings, pubic hair, vaginal swab, vaginal simmer etc is negative. As per medical report, no internal or external injuries including redness or swelling except torn hymen is found on the victim girl. Labia Majora and Labia Minora were found normal. There is no explanation as to why there is no laceration, redness, swelling or abrasion found on the Labia Majora, Labia Minora and other private parts. There are contradictory versions of the victim girl while narrating the incident to police, statement u/s.164, medical history narrated to the doctor and evidence before Court. As per evidence of DW-1, there were Christmas holidays to the school from 24th to

28th December 2014 and victim was absent on 5th, 6th and 7th January 2015 in school, which corresponds with the suggestion offered to the victim and her mother during their cross, and also with the age of foetus, as per medical report and therefore the case of the defense that during absence from the school the victim had gone to her maternal uncle's house and became pregnant which creates doubt about involvement of appellant. Statement of victim suffers from serious infirmities, inconsistencies and deliberate improvements on material points, hence no reliance can be placed on the said version. The statement to police, statement u/s.164, medico-legal history narrated to the doctor suffers from serious infirmities. The sole testimony of the prosecutrix can be relied upon for the purpose of conviction of the same inspires confidence but if the Court finds it difficult to explain the versions of prosecutrix on its face value, it may look for corroboration. In the present case DNA Report of the foetus does not match with DNA of victim girl, which prima facie does not inspire confidence and there are further infirmities in evidence of victim. The learned Special Judge had framed charge us.376(i) and 376(n), 506(i) of IPC and Sections 4,6,8,11(i)(6) and 12 of POCSO Act, however, there is no section identical to Section 11(i)(6) as charged by learned Special Judge. Further learned Judge has not framed specific charge while sentencing the appellant u/s.6 as punishment u/s.6 is provided for aggravated penetrative sexual assault which is defined u/s.5(a) to (u) of POCSO Act and therefore unless the specific charge in respect of specific nature of aggravated penetrative sexual assault is framed against the appellant, the appellant cannot be sentenced u/s.6 of POCSO Act. That, every sexual assault includes sexual harassment and if the accused is acquitted from the charge of sexual harassment

then while recording findings of conviction, learned Trial Court has to consider all the evidence and if there is inconsistencies in the evidence as well as chemical analysis report the benefit of doubt is required to be given to the accused. In the present case the appellant was charged with both sexual assault as well as sexual harassment and was acquitted from the charge of sexual harassment and therefore while convicting the appellant for commission of sexual assault including penetrative sexual assault, learned Trial Court as per mandate of Section 30(2) of POCSO Act was required to consider all the evidence on record in its entirety to believe it to exist the charge of Section 4 and section 6 so framed beyond reasonable doubt and cannot record the findings of conviction only on the basis of preponderance of evidence.

5. Learned advocate for appellant had relied upon following decisions :

- (a) Gambhir Vs. State of Maharashtra
AIR-1982-SC-1157;
- (b) State of Gujarat Vs. Jayantibhai Somabhai Khant
Criminal Appeal No.224/2012 with Criminal
Appeal no.863/2012, decided on 30-4-2015.

6. Learned APP and learned advocate for respondent no.2 submitted that the victim was aged around 12 years at the time of incident. She was subjected to penetrative sexual assault by the accused. Minor discrepancies are not sufficient to discard the evidence of victim. The victim has attributed overt act to the appellant. There is no reason to disbelieve her version. Merely on the ground that DNA report does not support prosecution case, the

victim's version cannot be discarded. There is no reason for falsely implicating the appellant in the crime. The Trial Court has analyzed the evidence and gave a finding of conviction. Victim was a minor girl aged about 12 years at the time of incident. The appeal may be dismissed.

7. Learned APP has relied upon following decisions :-

- (a) The State of Rajasthan Vs. Om Prakash
(2002)5-SCC-745;
- (b) Sunil Vs. The State of Madhya Pradesh
(2017)4-SCC-393;
- (c) Ganesan Vs. State (Tamil Nadu)
(2020)10-SCC-573;
- (d) Dashrath s/o Hiranman Johare vs. The State of
Maharashtra and anr. - 2021-ALL MR (Cri)-3598.

8. Charge was framed vide order dated 3rd December 2015. The case of prosecution is that accused had committed penetrative sexual assault upon victim. She stated that accused resides adjacent to her house. During Diwali of 2014 she had been to the house of accused to play. The wife of accused was out for work. His younger daughter Pooja was at home. Accused told her to go out of house. The married daughter of the accused had gone out. Accused removed her clothes. Accused threatened her. He penetrated his private part in the private part of victim. Thereafter she was suffering from abdominal pain. She was taken to doctor for check up. The doctor advised sonography. She was taken for sonography to the hospital. After that the doctor had opined that she was pregnant of six weeks. She disclosed about the sexual assault by

accused. Her parents approached police. Her statement was recorded on 19th February 2015. Police had taken her to Sassoon Hospital. She was examined by doctor. Her statement was recorded by Magistrate. Her date of birth is 9th July 2003. She was 12 years old at the time of incident. In the cross examination she stated that she used to play with her friends in the building. Thereafter she volunteered that there are no girls of her age in the building. In her statement before Magistrate it is not mentioned that Pooja was sent out by accused and Deepali along with her children had gone to her parents house. She did not state in her statement to the police that accused had closed the door of hall and she had questioned the accused as to what he was doing with her. The word "frighten" is not mentioned in her statement. She had disclosed the incident to Dr.Shilpa Ekke in presence of her parents. Till she returned home from hospital she did not disclose anything to her parents. She denied that she was not pregnant from the accused and that she was pregnant from the member of her maternal uncle's family and to save prestige of family, she lodged false report. She also denied that she gave statement to police and Magistrate at the instance of her mother.

9. On scrutiny of evidence I do not find any reason to discard the version of victim that she was subjected to penetrative sexual assault by accused. The cross-examination of witnesses conducted at the instance of accused does not shake the core evidence of victim girl. Minor discrepancies in her evidence would not be a reason to disbelieve the victim. It is pertinent to note that at the time of evidence victim girl was aged around 12 years. Some deviations in the statement of the victim u/s.161, her evidence

before the Court and statement u/s.164 of Cr.PC would not result in demolishing the prosecution case.

10. PW-2 Vaishali Umesh Deshmukh is the mother of victim girl. She has stated that accused resides adjacent to her house along with his family. Her daughter was suffering from abdominal pain on 17th February 2015. She was taken to hospital of Dr.Shilpa Ekke who advised them sonography. Thereafter they went for sonography at Bharti Hospital. After sonography doctor had opined that victim girl is pregnant of six weeks. She spoke to the victim girl and at that time victim disclosed about penetrative sexual assault committed by accused. Medical examination of victim was conducted. The date of birth of victim is 9th July 2003. She had provided birth certificate issued by Deputy Registrar, Registration of Birth and Death, Pune. She was cross examined by advocate for accused . However, her cross examination has not resulted in any damage to the prosecution case. She stated that though victim had abdominal pain for one week, she did not take her to hospital. They were consulting Dr.Shilpa Ekke since last 2 to 3 years. Dr.Ekke had not prepared the case papers of victim girl. She denied that from 25th December 2014 to 5th January 2015 the victim girl and the witness had been to the house of her brother at village Tambat. During the medical examination of victim girl she had given the history to the doctor. She denied that she purposely disclosed the name of accused while providing history.

11. PW-3 Dr.Vishal Patil was attached to Bharti Hospital. He stated that he had examined witness girl on 18th February 2015. She was referred by Dr.Ekke for sonography. The age of the victim

on the date of sonography was 11 years 7 months. After sonography he came to the conclusion that victim was pregnant of 6 weeks and 4 days on the date of sonography. Accordingly he issued report of examination under his signature. In the cross examination he deposed that he has not brought letter issued by Dr.Ekke. On 18th February 2015 he had conducted several sonographies. The age of patient is mentioned in the report of examination on the basis of information given by patient. There is nothing in the cross examination to doubt the version of this witness.

12. PW-4 Dr.Pratibha Pandurang Pawar is medical officer. She was attached to Sassoon Hospital, Pune. She deposed that she examined the victim girl. The victim was admitted to hospital from 19th February 2015 to 23rd February 2015. She had recorded the history from the victim and her mother. As per history the victim was knowing the accused. The victim used to go to his house to watch T.V In Diwali of 2014, accused subjected her to sexual assault. He touched her inappropriately. He raped her. Accused had put his private part inside her private part. Accused continued said act thereafter. The age of victim was 11½ years. She examined the victim clinically and conducted pregnancy confirmation test. The test was positive. The victim was pregnant for 7+1 week. Her pregnancy was terminated medically. The foetus was sent for DNA test and chemical analysis. The vaginal swab, vaginal smear, nail strappings, blood, pubic hair of victim were sent for chemical analysis. As per history and clinical examination, she found that there was penetrative sexual vaginal intercourse with 7 weeks pregnancy. In the cross examination she stated that medical examination report Exhibit-30 does not bear her

name and signature. Exhibit-30 is signed by Dr.Tanya Anand as examining authority. The contents of Exhibit-30 are not in her handwriting. When the victim was brought to the hospital, she had brought the report of sonography from Bharti Hospital. As per report of sonography, she was pregnant of 6 weeks and 4 days. History of patient was given in the letter Exhibit-29 by police.

13. I have perused the medical case papers of Sassoon Hospital which are part of record. The medical report refers to the history as provided by victim and her mother. The history indicated penetrative sexual assault committed by accused upon the victim girl. The report also mentions that there is evidence of penetrative sexual vaginal intercourse with the pregnancy on the date of examination.

14. PW-5 Dr.Rohidas Munde has stated that he received a letter from police about samples i.e. blood of victim, blood of accused, POC product of conception. The samples were sent to them to test the paternity and to ascertain as to whether the POC belongs to the victim and the accused. He examined the samples and done the DNA profiles of the samples. The DNA profile of POC is identical and from one and the same source of female origin and matched with the DNA profile of the victim. They could not come to the conclusion as to whether the POC belongs to the accused or not as it was in very small quantity. Hence they have given only interpretation and not the opinion. In the cross examination he stated that samples were received on 21st February 2015 and the analysis was completed on 21st June 2015. DNA analysis is scientific and accurate method to test the paternity. In every case of DNA examination they are required to do 16 STR (short tandem

repeats) and thereafter they can give definite opinion.

15. From the evidence of aforesaid witnesses it can be seen that the Doctor could not come to the conclusion as to whether POC belongs to the accused or not. One of the reason provided by him is that it was in very small quantity and therefore instead of giving opinion, interpretation has been provided. Accused/appellant is strongly relying upon aforesaid test of DNA profile to claim that he is not the person who had subjected the victim to sexual intercourse. However, said defense cannot be accepted merely on account of the fact that report of DNA does not support the prosecution. There is no reason to disbelieve the strong evidence against appellant that he has committed alleged act. Merely on the ground that Doctors could not come to the conclusion as to whether POC belongs to the accused or not, could not exonerate the accused from the charge of commission of penetrative sexual assault.

16. PW-6 Snehal Sambhaji Thorat was attached to Sahakar Nagar Police Station as Police Sub Inspector. She has stated that mother of victim girl had been to the police station in respect of sexual assault on her daughter. She prepared report. FIR was registered. The victim was sent to Sassoon General Hospital, Pune for medical examination. She recorded statements of witnesses and seizure panchanama of clothes of accused, seizure panchanama of clothes of victim etc. On completing investigation she filed chargesheet. In the cross examination it is stated that FIR bears signature of Station Diary Officer. The contents of FIR were written by PSO J.A.Patil. Lady social worker was called in police station on 18th February 2015. Building in which accused and complainant reside is situated

in thickly populated area. She had inquired with the persons residing in the flat situated in front of the flat of accused. She did not record their statement as they did not disclose anything. At the time of recording statement of victim by police, presence of lady social worker is necessary. When she recorded statement of victim, lady social worker was not present.

17. PW-7 Dr.Sagar Sudhir Bhalerao was working in Urology Department at Sassoon Hospital, Pune. He examined the accused. He noted the history of said patient and performed his potency test. There was no evidence to suggest that appellant was impotent. He has not brought OPD register in respect of MLC No.2533 dated 24th February 2015. It remains in the custody of Casualty Medical Officer. He does not have the note of opinion given on Exhibit-45. He had issued the report to PSI Phadtare. The date is not mentioned below his signature.

18. Evidence of all the aforesaid witnesses relied upon by prosecution supports prosecution case. It is corroborative in nature. Their evidence inspires confidence. There is no reason to doubt the veracity of incident.

19. Accused had examined three defense witnesses. DW-1 Manisha Ajit Jadhav has deposed that she was working as Head Mistress of Dnyanesh Prathamik School, Pune. The victim was studying in 6th standard in 2014-15 in the school. There were Christmas holidays to the school from 25th December to 28th December 2014. The victim was absent on 5th, 6th and 7th January 2015. She produced attendance register. In the cross examination by learned APP she stated that she has not brought authority letter

issued by President of school authorizing her to adduce evidence in the Court today. There is only one holiday in the Christmas i.e. on 25th December every year. The attendance register remains in her custody. As per school register the date of birth of victim girl is 9th July 2003. On 26th and 27th December 2014, school was closed to adjust holidays on account of gathering. The victim and other students got knowledge of holidays on 26th December 2014.

20. DW-2 Pooja Devidas Nanaware is the daughter of accused. She deposed that she is residing jointly in the house with parents and with married sister. Her father is caterer. There were some quarrels with the family of complainant. In Diwali 2014, she was residing with parents and her sister and her children in the said building. Her father was arrested on 18th February 2015. In the cross examination she stated that she was doing job in the year 2014-15 at Modern Colony as Back Officer. She used to leave house at about 10 am for service and return at 7 pm. She was getting Diwali and Christmas holidays. Her mother leaves the house at 9 am for service and returns at about 4 p.m. Her elder sister is staying with them due to discord with her husband. She is not doing any work. They had not lodged any complaint with police about quarrel with complainant's family. She never visited the house of complainant.

21. DW-3 Shailendra Mohan Chawan is working in Sassoon Hospital, Pune. He brought MLC Register of entry No.2533, dated 2nd February 2015. The P.C register was brought by him as it was relating to examination of person in police custody. The case papers are maintained in respect of P.C register. The case papers in respect of P.C register are handed over to police. In cross examination it

was deposed that when the accused in police custody is brought to hospital, such entry is taken in P.C register. Accused is brought with covering letter for his examination . The entry of the name of accused is taken in P.C register with the name of police officer who brought him. As per entry No.2533 in the P.C register, accused was brought for his medical examination. He was examined by medical officer. Accused was brought for potency test. He brought original of Entry No.2533 dated 24th February 2015. Patient is first examined by Casualty Medical Officer and then he is sent to particular department. In MLC register the history of offence is mentioned.

22. The defense witnesses examined by the accused are not of any assistance to the appellant to disprove the charges against him. The prosecution has proved the case beyond all reasonable doubts.

23. in paragraph 40 of the impugned judgment, the Trial Court has opined that prosecution has proved all the factors enumerated therein, which reads as under :

“40. Thus, considering all the evidence, as discussed above in detail, in the light of above citations, it is proved that

(i) Accused has committed rape on minor school going victim girl, who was less than 12 years, repeatedly under threat.

(ii) Victim was examined by Dr.Tania Anand and Dr.Pratibha Pawar. Medical report states that hymen of victim was completely torn. Sonography report shows that victim was pregnant of about 6 weeks and some day on 18.2.2015 and it is proved by Dr.Pratibha Pawar that pregnancy of victim was terminated medically (MTP) in Government's Sassoon General Hospital.

(iii) Victim was minor girl of tender age of less than 12 year studying in 6th standard had no reason to falsely

implicate accused. Except some minor omissions, her evidence is consistent and trustworthy which is supported by medical evidence also. Human memory is apt to get dulled with passage of time and we cannot expect stereo type of evidence from such minor child. There is no video player in human brain to replay every scene on mental screen as it is.

(iv) Non examination of Dr.Shilpa Ekke, who had examined victim first and to whom she had narrated the history first, is not fatal as other two doctors who performed sonography who examined victim in Govt. hospital and performed abortion, are examined by prosecution.

(v) So far as false implication on account of some disputes with accused is concerned, accused has not examined his landlord or any other person of same building to prove strained relations of parents of victim with him. No parents would put future of their own minor, unmarried girl on stake by making allegations of rape on her.

(vi) So far as other defence that statement of any person of building is not recorded by police is concerned, incidence of rape does not take place openly. Second thing that parents would not disclose anybody rather to neighbour that their minor school going daughter is pregnant. Therefore it is not necessary that neighbours must be knowing about it. Hence, it is not fatal;

(vii) It is proved from medical evidence that accused is competent for sexual intercourse. His potency test was positive;

(viii) Though DNA test of product of conception (POC) is failed it is not fatal to case of prosecution because, we are concerned here with charge of rape and not with issue of paternity;

(ix) There is no delay in lodging FIR as Investigating Officer has explained that report was taken at Police Chowky first and then it was sent to police station for registration. In police station number of reports are received in a day and hence, when report is actually entered in station diary (registered) serially, that time is mentioned in FIR as time of receipt of information.

Hence, I have come to conclusion that prosecution has proved that accused has committed rape on victim girl who was below the age of 12 years in Diwali 2014 and thereafter also repeatedly under threat. It is the defence of accused that victim girl has not stated that accused committed the rape

repeatedly in her evidence. However, she has stated that, thereafter also accused to call her. This sentence is to be read in connection with her preceding statement that accused had committed the rape in Diwali 2014 and not in isolation of the earlier statement. Therefore, I have come to the conclusion that the accused committed rape repeatedly after Diwali 2014 by calling her to his house. Hence I answered points No.1 to 4 as proved, point no.5 accordingly and point no.6 as not proved.”

24. In the case of Gambhir Vs. State of Maharashtra (supra), it is observed that when a case rests upon circumstantial evidence, such evidence must satisfy three tests. Viz (a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused, and (c) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. It is pertinent to note that present case cannot be said to be based on only circumstantial evidence. There is cogent evidence of victim who was sexually assaulted by accused, which inspires confidence and supports prosecution case.

25. In the case of State of Gujarat Vs. Jayantibhai Somabhai Khant (supra) decided by Gujarat High Court and relied upon by advocate for appellant, the factual aspects would indicate that though DNA report was conclusive of the fact that victim was the mother of child, it was also determined that accused was not his father. The High Court of Gujarat discussed the relevance of DNA report and observed that several Courts in India have accepted DNA analysis as totally reliable as long as the laboratories employ sufficient skill and care in doing so.

26. In the State of Rajasthan Vs. Om Prakash (supra), it was observed that when the testimony of the prosecutrix and her relatives and the doctor who examined her found to be trustworthy, convincing and reliable, non examination of other witnesses cannot be a ground to reject the prosecution case. The Court should adopt a sensible approach in dealing with child rape. Conviction can be based on sole testimony of prosecutrix. The testimony of child has to be carefully evaluated. Onerous responsibility lies on Court to provide proper legal protection to the victim.

27. In the case of Sunil Vs. State of Madhya Pradesh (supra), it was observed that non holding of DNA test or failure to prove DNA test or DNA test favouring accused, conviction may still be possible based on remaining evidence. Failure to conduct DNA test of samples taken from accused or to prove the report of DNA profiling, would not necessarily result in failure of prosecution case. Though a positive result of DNA test would constitute clinching evidence against accused, if however, result of test is in the negative i.e. favouring accused or if DNA profiling had not been done or proved in a given case, weight of other materials and evidence on record will still have to be considered.

28. In the case of Ganesan Vs. State represented by Inspector of Police (supra), it is observed that where testimony of victim is found reliable and trustworthy, conviction on the basis of her sole testimony is permissible. In the case of Dashrath Hiranman Johare Vs. The State of Maharashtra and another (supra), this Court found that DNA report exonerated the accused. However, there is other reliable evidence against accused. Hence conviction is held proper.

29. In the light of principle enunciated in aforesaid decisions and the evidence on record, it is evident that prosecution has proved the charges against the appellant. The victim girl was aged around 12 years. She has categorically stated that accused has subjected her to penetrative sexual assault. Presumptions under Sections 29 and 30 of POCSO Act could not be rebutted. There is no infirmity in the charge framed against accused. No ground is made out to set aside the judgment of conviction. However, it appears that in the operative part of judgment and order, the Trial Court has not specified whether the sentences to run concurrently or consecutively. It needs to be clarified that substantive sentences of imprisonment imposed by the Trial Court shall run concurrently.

ORDER

- (i) Criminal Appeal No.192 of 2018 is dismissed;
- (ii) The judgment of conviction dated 30th July 2017 passed in Special Sessions Case No.147 of 2015 is confirmed;
- (iii) Substantive sentences of imprisonment shall run concurrently.

(PRAKASH D. NAIK, J.)

MST