



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

CRIMINAL APPEAL NO. 767 OF 2023

Shankar Suryabhan Jadhav
Age: 55 years, Occu.: Agri.,
R/o T.P.S. Road, Near Water Tank,
Osmanabad, Tq. & Dist. Osmanabad

..APPELLANT

VERSUS

1. State of Maharashtra
Through Police Inspector
Rural Police Station, Osmanabad
Tq. & Dist. Osmanabad

2. X.Y.Z.

..RESPONDENTS

....
Mr. S.A. Wakure, Advocate for appellant
Mr. S.V. Hange, A.P.P. for respondent no.1 – State
Mr. P.A. Bhosle, Advocate for respondent no.2
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

RESERVED ON : 12th JUNE, 2024

PRONOUNCED ON : 08th JULY, 2024

JUDGMENT (PER : R.G. AVACHAT,J.) :

1. The challenge in this appeal is to the judgment of conviction and order of consequential sentence dated 29th September, 2020 passed by Special Judge (POCSO), Osmanabad in Special (POCSO) Case No. 15 of 2015. Vide the impugned judgment and order, the appellant was convicted for the offence punishable under Section 376(f)(n) and 506 of the Indian Penal Code ('I.P.C.'). He was also convicted for the offence punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences

Act, 2012 ('POCSO Act'). A sentence of life imprisonment with fine of Rs.10,000/-, with default stipulation has been imposed on him for the offence punishable under Section 6 of the POCSO Act. No separate sentence was awarded for the offences punishable under Section 376(f)(n) of the I.P.C. and under Section 4 of the POCSO Act. He has further been directed to undergo sentence of imprisonment for a period of one year and to pay fine of Rs.1,000/- with default stipulation for the offence punishable under Section 506 of the I.P.C.

2. The facts giving rise to the present appeal are as follows :-

The appellant is the resident of village Junoni, Dist. Osmanabad. He runs a brick kiln there. He has agricultural land at village Junoni and a house as well on the agricultural land itself. The victim ('M') was around sixteen years of age at the relevant time. She hails from village Dhutta. She would reside alongwith her parents and two siblings. She was a drop out of sixth standard. For harvesting of Jawar crop, the victim and her family members had been to Junoni. They were staying in the tin sheet room of the appellant. The victim's parents used to be away for harvesting of crop during the day time. The appellant, finding the victim alone in the room, offered her sweet lemon and bolted the entrance door from inside. The appellant undressed himself. He did undress the victim as well. The appellant then had sexual intercourse with her. Such things are alleged to have happened more than once.

3. It is the case of prosecution that the victim conceived. Her mother, P.W.2 – 'P' (name withheld) realised the same. She, therefore, first took her to a hospital of Dr.Kazi. After having taken the victim into confidence, she related her mother that it was the appellant, who did sexual intercourse with her and thereby she conceived. The victim and her family members, therefore, went to the house of the appellant to question him. He confessed to his guilt (extra judicial confession). He asked her parents that he will ensure that medical termination of the pregnancy (MTP) would take place. He, therefore, took the victim to a clinic run by Dr. Sachin Deshmukh and his wife Dr. Shilpa Deshmukh (P.W.6 & 7 respectively). A sonography was done there. It is the case of prosecution that since something amiss was realised by P.W.7 – Dr. Shilpa, she refused to treat the victim for MTP. The victim and her family members ultimately decided to lodge the police report. They, therefore, approached Osmanabad Rural Police Station. Victim's statement-cum-F.I.R. (Exh.34) was recorded. She was referred for medical examination. She was at an advance stage of pregnancy. Crime scene panchanama (Exh.66) was drawn. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, the appellant was proceeded against by filing the charge-sheet before the Special Court, Osmanabad ('trial Court'). The trial Court framed the charge (Exh.2). The appellant pleaded not guilty. It was his defence that he belonged to a nomadic tribe. He claimed to be the District President of, 'Bharatiya Bhatkya Jati Jamati Sanghatana'. According to him, since the victim and her family members were his relations, they

approached for help. He scolded the victim and her mother. They thereby got annoyed with him. A quarrel took place between him and the victim's mother. According to him, the victim was in relation with one Hari Mane, resident of village of Dhutta. In short, the appellant claimed to have falsely been implicated.

4. To bring home the charge, prosecution has examined twelve witnesses and produced in evidence certain documents. On appreciation of evidence in the case, the trial Court convicted the appellant and consequently sentenced as stated above.

5. Learned counsel for the appellant reiterated the defence of the appellant that was raised before the trial Court. According to him, blood samples of both, the victim and the appellant and even of the new born were obtained. DNA test was conducted twice. Both the DNA reports ruled out the appellant to be the biological father of the new born. Turning to the evidence of the prosecution witnesses, learned counsel would submit that the same too not to have been inspiring confidence. Parents of the victim had their own house at village Dhutta. There was no scarcity of work to earn living. An admission of the victim in that regard was adverted to. Since the victim was in relation with one boy from the very village and she conceived from him, family of the victim had to leave the village. They approached the appellant. He scolded the victim and her mother. A quarrel, therefore, took place amongst them. According to learned counsel, with a view to help out

the victim and her parents, the appellant assisted them to ensure MTP. Since she was at an advanced stage of pregnancy, same could not be done. Statement of P.W.7 – Dr. Shilpa has not been recorded under Section 161 of Cr.P.C. Her husband, P.W.6 - Dr. Sachin Deshmukh would serve at Civil Hospital and during off time would run the clinic. On the given day i.e. on 01st June he was on duty at Civil Hospital as his duty hours were from 09:00 a.m. to 12:30 p.m.

6. Learned counsel for the appellant strongly relied on the DNA reports which rule out the appellant to be the biological father of the new born. According to him, the appellant is behind the bars for little over eight years for no reason. The DNA reports rule out the prosecution case. He relied on the following judgments and urged for allowing the appeal :-

- I) State of Gujarat Vs. Jayantibhai Somabhai Khant, 2015 Cri.L.J.3209**
- II) Sunil Eknath Trambake Vs. Lelavati Sunil Trambake, AIR 2006 Bombay 140**
- III) Salim Ahmed Habibul Rahman Ansari Vs. State of Maharashtra, Criminal Appeal No. 463 of 2017, High Court of Bombay, Nagpur Bench.**

7. Learned A.P.P. and learned counsel representing the victim would, on the other hand, submit that the victim was in the age group of 15-16 years. She was of the age of somewhat understanding. The victim and her parents had no reason to falsely implicate the appellant. Since the appellant threatened the victim, she did not relate the incident immediately to

her parents. P.W.3 - Rekha was a common relative of both, the appellant's and the victim's family. She had no reason to give evidence against the appellant. We have been taken through the evidence of P.W.7 – Dr. Shilpa to indicate that it was the appellant, who took the victim for aborting the fetus. After realising something amiss, she refused to help them out. The appellant made an extra judicial confession before the victim, her mother and P.W.3 - Rekha as well. On the question of DNA reports, they would submit that the same is in the nature of opinion evidence. The trial Court found the victim to be simpleton and gullible. The trial Court had an opportunity to examine demeanour of the victim. According to them, oral evidence of the victim, who suffers ordeal, has rightly been relied upon by the trial Court. Both the learned counsel, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence on record. Let us advert thereto and appreciate the same.

9. P.W.2 – 'P', Mother of the victim testified that the victim was born on the day of Diwali of the year 2000. There is no specific denial to this piece of evidence in her cross-examination. P.W.6 – Chavan, Headmaster of the school, placed on record copy of the school leaving certificate and admission extract of the victim (Exh.71 and 72 respectively). Same indicates her date of birth recorded therein is 23rd October 2000. P.W.8 – Sunita was an *Anganwadi Sevika*. Her evidence indicates that the date of birth of the victim was recorded by her as 06th October, 2000, after visiting the house of

P.W.2 and obtaining information in that regard. From this evidence we find the victim to have been below eighteen years of age when the alleged incident took place.

10. P.W.1 – ‘M’ (victim), while giving evidence before the Court, claimed to be of sixteen years of age. The trial Court had observed her demeanour. The trial Court found the victim to be simpleton and gullible. It is in her evidence that she was residing alongwith her parents and siblings at village Dhutta. About 3/4 months before lodging of the F.I.R. (Exh.34) on 10th June, 2015, all of them migrated to village Junoni. The appellant has an agricultural land at village Junoni and his house as well thereat. Her evidence further indicates that the appellant provided their family a tin sheet room to reside in. Her parents used to be away during day time for harvesting *Jawar* crop. She used to be alone in the room. It is further in her evidence that the appellant would visit Junoni. Her evidence further indicates that the appellant visited her room in the absence of her parents. He offered her a sweet lemon and latched the door from inside. He undressed himself. He then undressed the victim and had sexual intercourse with her. It is further in her evidence that she made hue and cry. The appellant, however pressed her mouth. The appellant extended her threats to kill her parents if she makes the incident public. It is further in her evidence that the appellant visited her many a time in the said room in the absence of her parents and did the same act. Her evidence further indicates that her mother, P.W.2 – P, first took her to Dr.Kazi madam’s clinic. Dr. Kazi found the victim to have

been pregnant. It is further in her evidence that when her parents asked her as to who was responsible for the pregnancy, she attributed the same to the appellant. It is further in her evidence that thereafter she, alongwith her parents went to the appellant and questioned him about the same. The appellant confessed. He requested them not to disclose the matter to anyone. He undertook to take her to the hospital for abortion. First they went to a clinic of P.W.6 - Dr. Sachin Deshmukh. P.W.7 – Dr. Shilpa, a lady doctor was there. She examined her and opined that abortion was not possible. Thereafter victim lodged the report (Exh.34) with the police at the concerned police station. It is further in her evidence that twice her blood samples were obtained. With the passage of time she delivered a baby (male child). Again blood sample of her and baby was obtained.

11. She was subjected to a searching cross-examination. It has been brought on record during her cross examination that her family members including herself would go for work in the field of others. Theirs' was a thatched house. Labour work was available in the village. She belongs to the *Kaikadi* community. It is further in her evidence that the appellant was the District President of Bharatiya Bhatkya Jati Jamati Sanghatana. She, however categorically denied to have illicit relationship with a boy viz. Hari Mane. She went on to deny to have conceived on account of sexual intercourse with him. She denied to have lodged a false F.I.R. In her cross-examination itself she was suggested that the appellant was their relative.

12. We then have evidence of P.W.2 – 'P', mother of the victim. Her evidence is on the lines of evidence of her daughter (victim). Her evidence indicates that the incident took place four months before filing of the complaint. During the relevant time, they were residing in the house of appellant at village Junoni. They had been to village Junoni for harvesting *Jawar* crop in the field of appellant. Her husband and herself used to be away from the house during day time. The victim and her brother used to be at the room. The room was situated outside the village. They stayed there for three months. It is further in her evidence that after having realised the victim to have missed her periods, about eight to ten days prior to lodging of the F.I.R., she took the victim to the clinic of Dr. Kazi madam. Dr. Kazi examined the victim and found her to be pregnant. Then she took the victim into confidence and learnt from her that it was the appellant, who was responsible therefor. Her evidence in examination-in-chief is a reiteration of what has been stated by the victim in her examination-in-chief. As such, the evidence of victim gets reinforced.

13. It is further in her evidence that the appellant runs a brick kiln at Osmanabad. She, alongwith her husband and the victim went to meet the appellant. He was enquired with. He admitted his guilt. He tendered apology and asked them to get the pregnancy terminated. He offered them Rs.5,000/- to approach a doctor for the said purpose. When she (P.W.2) told him to have been unaware about the hospital for termination of pregnancy, then the appellant took the victim to a clinic of P.W.6 – Dr. Sachin

Deshmukh. She had also accompanied them. P.W.7 – Dr. Shilpa examined the victim. The victim underwent sonography. Dr. Shilpa opined the victim to have been pregnant of four months. She refused to terminate the pregnancy. The appellant approached Dr. Sachin, husband of Dr. Shilpa, and made further request. Dr. Sachin expressed his inability. It is further in her evidence that they stopped in the said clinic for the day. All the medical papers of the victim were in the custody of the appellant. He then asked the victim and her parents to stay at the house of P.W.3 – Rekha. He paid them Rs.100/- for auto-rickshaw fare. It is further in her evidence that then they went to the house of Rekha. She related Rekha the incident. The appellant then came there. Rekha questioned him. He admitted his guilt. The appellant asked them not to state the matter to anyone. It is further in her evidence that the appellant told her that if they make the incident public, it would be difficult for the victim to get married. She, therefore, waited for about eight to ten days. Thereafter she approached Osmanabad Rural Police Station. F.I.R. (Exh.34) came to be lodged. Her evidence further indicates that the victim was referred to Civil Hospital, Osmanabad for treatment. It is further in her evidence that her statement was recorded by the Magistrate (under Section 164 of Cr.P.C.). She referred the same. It is at Exhibit 54.

14. She was subjected to a searching cross-examination, wherefrom it has been brought on record that the appellant was permanently residing at Osmanabad. He would run a brick kiln there. About 20-25 labours were

engaged by him. After the incident, she had been to the brick kiln. The distance between village Dhutta to Junoni and Junoni to Osmanabad has also been brought on record. It takes about an hour to reach Junoni to Osmanabad by road, while travel time between Dhutta to Osmanabad is of two hours. She admitted the appellant to be the District President of Bharatiya Bhatkya Jati Jamati Sanghatana. She denied the victim to have had illicit relations with one Hari Mane of their village and therefore, they left the village. She further denied to have approached the appellant to help them to come out of the matter. She denied that the appellant scolded her and the victim and thereupon a quarrel took place between them. She further denied to have had falsely lodged the F.I.R. against the appellant on account of said quarrel. Paragraph nos.10 and 11 of her cross-examination pertain to certain omissions appearing in her police statement. Her police statement is silent to state that she was at the brick kiln of the appellant to enquire him about the incident. It is further in her evidence that she has stated to police that the appellant had admitted his guilt when she questioned him. The same, however did not find place in her statement.

15. It is reiterated that although paragraph nos.10 and 11 of the cross-examination of P.W.2 were adverted to, to bring on record certain omissions in her police statement and even she appears to have admitted the same to have not been finding place therein, it appears that learned A.P.P. in-charge of the case was not attentive. We have perused P.W.2's statement recorded under Section 164 of Cr.P.C. (Exh.54) and police statement dated 13th June,

2015. Her police statement contains substantial incriminating material deposed by her in her examination-in-chief. Same is the case about her statement (Exh.54).

16. Close reading of the cross-examination of this witness indicates that except denial about the appellant to have taken the victim and her parents to Dr. Sachin Deshmukh's clinic for MTP, nothing has been brought on record.

17. Then there is evidence on P.W.3 – Rekha. It is in her evidence that the appellant is her cousin (son of her maternal aunt). The victim is daughter of her maternal uncle. It is in her evidence that about three years before, it was second day of month of June. She was serving with the S.T. canteen, Osmanabad. After working hours, she went to her house. On the way, she met the victim and her parents. P.W.2 related her about the victim to have been pregnant. On enquiry, she learnt the appellant to have committed sexual intercourse with the victim and as a result thereof the victim conceived. Her evidence further indicates that after sometime, the appellant went her house. It is in her evidence that mother of the victim told her that the appellant would visit her (Rekha) residence after a while. Appellant met her. He asked her to accompany him to Civil Hospital. He told her that victim's pregnancy would be terminated in Civil Hospital. She had, therefore, been to Civil Hospital alongwith the appellant. The appellant asked her to stay outside the hospital. After sometime when he came out of

the hospital, she questioned him about the documents of sonography. He told her that the documents are kept in the hospital and asked her to come on the following day for the purpose of MTP. It is further in her evidence that the appellant gave her lift on his motorbike upto Tajmahal talkies and paid her Rs.20/- for auto-rickshaw fare to go home. It is further in her evidence that he paid Rs.100/- and asked her to bring the victim and her parents on the following morning. It is further in her evidence that on the following day the victim and her parents met her at her work place. The appellant too came there by 10:00 a.m. She (Rekha) scolded him. The appellant admitted to have committed mistake (sexual intercourse). It is further in her evidence that the appellant asked her not to disclose the incident to anyone. She had referred to her statement recorded by the Magistrate (under Section 164 of the Cr.P.C.) (Exh.63).

18. In her cross-examination, she admitted the appellant to be the President of Bharatiya Bhatkya Jati Jamati Sanghatana. She, however claimed ignorance as to whether the appellant extends help to all the needy persons of his community. She denied to have purchased bricks from the appellant on credit and failed to repay the money. She denied the quarrel to have ensued between him and the appellant over the amount due and therefore, gave evidence against him. Paragraph no.6 of her cross-examination was referred to bring on record omissions in her police statement. Same thing happened here. Learned A.P.P., in-charge of the case, appears to have not been attentive. Although this witness admitted to

have stated certain material facts and admitted to have not found place in her police statement, we had to refer to her police statement to find that her evidence in examination-in-chief is almost consistent with her police statement. We are conscious of the fact that this statement cannot be a piece of corroborative evidence. The same has been simply referred to so as to observe that no material omissions amounting to contradiction have been brought on record during her cross-examination. Statement under Section 164 of Cr.P.C. (Exh.63) reinforces her evidence before the Court.

19. P.W.4 – Gulve, is a witness to the crime scene panchanama (Exh.66). Since it was drawn long after the crime took place, nothing incriminating was found at the crime scene.

20. Then we have evidence of P.W.6 – Dr. Sachin and his wife P.W.7 – Dr. Shilpa. Their evidence indicate that Dr. Sachin would run an ENT clinic. He would also serve with Civil Hospital. His evidence indicates that he knew the appellant. The appellant himself claimed to be a public figure in Osmanabad, a small town. The evidence of Dr. Sachin that he knew the appellant, therefore, cannot be doubted. According to him, on the given day he was on leave and was, therefore, at his clinic. It is in his evidence that the appellant alongwith the victim and her parents came to his clinic. He referred them to his wife. It is further in his evidence that his wife was a gynaecologist. She refused to conduct MTP of the victim as it was a medico legal case. He was subjected to searching cross-examination so far as

regards registration of his clinic, non placing of registration document before the police and he being at the civil hospital at the relevant time.

21. P.W.7 – Dr. Shilpa's evidence indicates that the appellant had accompanied the victim and her parents for the victim's MTP. It is in her evidence that she filled in the requisite forms. It is further in her evidence that the appellant requested her to conduct MTP of the victim. Since she thought it being a MLC case, she enquired about the age of victim. That time victim's mother gave the victim's age as sixteen years, while the appellant stated it to be eighteen years. All the medical papers in relation to the victim with her clinic have been placed on record vide Exhibits 79 to 82. In her cross-examination, it was suggested that full name of the victim was not appearing in the register. She replied that recording of full name of the patient is not necessary. She admitted to have not recorded identification mark of the patient nor did she obtain identity card of the victim. She has also admitted that no name of the appellant figures in any of her documents indicating him to have had accompanied them to the clinic. Her evidence further indicates that police did not record her statement. It is further in her evidence that when she received the witness summons, she had a talk with her husband.

22. P.W.9 – Dr. Vivek was a Medical Officer, Civil Hospital, Osmanabad, who examined the appellant medically and issued certificate (Exh.92) indicating him to have not been unable to perform sexual intercourse.

23. P.W.10 – Dr. Vasudha was a Medical Officer with Civil Hospital, Osmanabad at the relevant time. Her evidence indicates that on 05th November, 2015 the victim underwent the cesarean as she had labour pain. The victim delivered a baby boy. Medical record in that regard is at Exhibit 97. All the medical papers of the victim at civil hospital have been placed on record.

24. P.W.11 – Dr. Ashvini was a Medical Officer at Civil Hospital, Osmanabad, who had examined the victim on registration of the F.I.R. Her evidence indicates that the victim gave history of sexual assault by the appellant four months back at village Junoni. Since the victim had not stated anything in her examination-in-chief about the history, P.W.11 – Dr. Ashvini's this piece of evidence would not be taken to have been the victim's previous statement to corroborate her own testimony. P.W.11 – Dr. Ashvini placed on record medical examination papers of the victim. Same has not seriously been in dispute.

25. P.W.12 – Ajay was the Police Station Officer of Osmanabad Rural Police Station at the relevant time, who recorded F.I.R. (Exh.34) lodged by the victim, while P.W.13 – Gawade, the then Police Inspector of the said police station, did the investigation of crime.

26. Appreciation of the entire evidence indicate that the victim and her parents were uneducated and rustic. The appellant was closely related to

them. He was also relative of P.W.3 – Rekha. The victim and her family members had migrated to village Junoni and stayed in a tin sheet room provided by the appellant. The appellant was admittedly the President of Bharatiya Bhatkya Jati Jamati Sanghatana. The F.I.R. (Exh.34) was lodged while the victim was pregnant of 3/4 months. Before that she did not relate anything about the incident to anyone. Her mother took her to Dr.Kazi's clinic where-after she learnt the victim to have been pregnant. She then took the victim into confidence. The victim related her that it was the appellant, who used to visit the room in the absence of her parents and had sexual intercourse with her. It is further in her evidence that she conceived by the appellant. Admittedly, with passage of time the victim delivered a baby boy. The boy has been given to the child welfare centre (orphanage). The trial Court found the victim to be simpleton and gullible. It is reiterated that the appellant is the relative of the victim and that of P.W.3 – Rekha as well. Rekha, being a common relative of both of them, on her father's and mother's side, she has no reason to give false evidence against the appellant. Nothing has been brought on record by the appellant to indicate that Rekha had purchased bricks on credit from him and he had a quarrel with her since she did not pay the cost of the bricks purchased. What has been suggested to the victim and her mother was that the victim had relationship with one Hari Mane of village Dhutta.

27. We are conscious of the fact that the appellant has right to keep silent. It is an offence under POCSO Act. After recording of the evidence of

victim, presumption under Section 29 of the POCSO Act comes into play. It is for the appellant to rebut the same. True, he may rebut the same based on preponderance of probabilities. Furthermore, there is presumption of culpable mental state in view of Section 30 of the very Act. The appellant did not lead any evidence in discharge of rebuttal of presumption under Sections 29 and 30 of the POCSO Act. On the contrary, his defence appears to be wrong or inconsistent. According to him, false F.I.R. has been lodged against him since he scolded the victim and her mother about the victim became pregnant. Had there really been a quarrel between them, he had no reason to take them to the clinic of Dr. Sachin and Dr. Shilpa Deshmukh for MTP. True, Dr. Shilpa has testified that some villagers had accompanied them. The fact remains that the appellant had taken the victim to the said clinic for abortion. From scrutiny of entire evidence, we found nothing to have been brought on record by the appellant to indicate the victim, her mother and P.W.3 – Rekha to have any reason to falsely implicate him in the matter. It is reiterated that the victim and her mother were illiterate and rustic. The victim was found to be simpleton and gullible. It is true that during investigation, blood samples of the victim and the appellant were obtained and submitted to FSL for DNA profiling. Thereafter, on the birth of baby boy again blood samples of the trio were obtained and submitted for the DNA profiling. As such, DNA profiling took place twice. The reports favour the appellant. Those reports find place at Exhibits 27 and 30. The appellant has been ruled out to be the biological father of the new born.

28. The facts in the case of State of Gujarat Vs. Jayantibhai Somabhai Khant (supra) indicate that the accused therein was convicted for the offence punishable under Section 376 of the I.P.C. and sentenced to suffer imprisonment for ten years by the trial Court. The DNA report relied on in the said case ruled out the accused in the said case to be the biological father of the child. The High Court, therefore, quashed the conviction therein. We have closely read this judgment and particularly observations regarding the DNA test.

29. Another judgment relied on is of this Court in case of Sunil Eknath Trambake (supra). Same is not of much assistance to the appellant since it was arising out of the paternity dispute. The order directing DNA test of the child without hearing the child and mother was held to be violative of principles natural justice.

30. Then another judgment relied on is in the case of Salim Ahmed (supra), wherein it has been observed that to deny the DNA test report is to deny the truth, relying on the judgment of the Supreme Court in the case of ***Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and Ors., AIR 2014 SC 932.***

31. Learned counsel for the appellant meant to say that the DNA report is a conclusive piece of evidence and since the same ruled out the

appellant to be the biological father of the new born, the appellant deserves to be acquitted.

32. We are not in agreement with the submissions made by learned counsel for the appellant for the following reasons :-

It is reiterated that the trial Court has relied on the oral evidence of the victim. The appellant was the relative of the victim. P.W.3 – Rekha was another witness related to both, the appellant's and victim's family, one from her father side and other from her mother's. She did not have any reason to give false evidence against the appellant. The appellant came with a false defence of having been falsely implicated on account of he scolded the victim and her mother over the victim's affair with one Hari Mane. The evidence of Dr. Sachin and Dr. Shilpa Deshmukh indicate that the appellant had played major role in taking the victim to their clinic for abortion. Dr. Shilpa refused to conduct the MTP as she found it to be a MLC. These witnesses have no reason to speak against the appellant.

33. Coming to the DNA reports which ruled out the appellant to be the biological father of the new born, we wish to rely on the judgment of the Apex Court in the case of ***Pattu Rajan Vs. State of Tamil Nadu, (2019) 4 SCC 771***, a Bench of three Judges was pleased to observe thus :-

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may

be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

34. In the case of **Sunil Vs. State of Madhya Pradesh, (2017) 4 SCC 393**, it has been held as under :-

“Criminal Procedure Code, 1973, - S.53-A – Non-holding of DNA test, or, failure to prove DNA test report, or, DNA test result favouring accused – Effect of – Held, conviction may still be possible based on remaining evidence, depending on facts and circumstances of the case

- Failure to conduct DNA test of samples taken from accused or to prove the report of DNA profiling, as in the present case, 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”

35. In the case of **Manoj and Ors. Vs. State of Madhya Pradesh, (2023) 2 SCC 353**, the Apex Court has made following observations :

“154. In Dharam Deo Yadav v. State of UP, (2014) 5 SCC 509 this court discussed the reliability of DNA evidence in a criminal trial, and held as follows:

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines.....DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the

investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.”

36. Observations in Pattu Rajan's case (supra) have been approved by a three Judges' Bench of the Apex Court in case of Manoj and Ors. (supra) as under :-

“140. This court, in one of its recent decisions - Pattu Rajan v. The State of Tamil Nadu (supra), considered the value and weight to be attached to a DNA report:

“33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

37. The aforesaid authorities lead us to observe that DNA report could not be said to be infallible. The DNA report is after all an opinion evidence. Since the trial Court, after having observed the demeanour of the victim and relying on the evidence of her mother, relative Rekha, Dr. Sachin and Dr. Shilpa held the appellant guilty and consequently sentenced him for the

offence punishable under Section 376(f)(n) of the I.P.C., we found no reason to interfere with the order of conviction.

38. So far as appellant's conviction for the offence punishable under Section 506 of the I.P.C. is concerned, we are not in agreement with the findings recorded by the trial Court. The victim kept mum for three months. In her evidence she has stated to have raised hue and cry. Had it really been so, she would have related the incident to her family members. Until pregnancy was realised, she did not disclose the incident to anyone. Same may lead us to infer it to be with her consent. True, the victim being below eighteen years of age, her consent is immaterial. But her evidence that on account of threats given by the appellant she did not disclose the incident to anyone, is found to be unacceptable. We, therefore, found reason to interfere with the appellant's conviction and consequential sentence as regards offence punishable under Section 506 of the I.P.C.

39. The trial Court has imposed maximum sentence provided under Section 6 of the POCSO Act i.e. life imprisonment. Section 6 of the POCSO Act, before amendment dated 16th August, 2019, reads thus :-

“6. Punishment for aggravated penetrative sexual assault. - Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

40. The appellant is little over sixty-two years of age. In the peculiar facts and circumstances of the case, we are inclined to interfere with the

impugned order as regards quantum of sentence. We propose to reduce it to the minimum term of imprisonment of ten years provided under Section 6 of the POCSO act, as then was.

41. In view of above, we pass the following order :-

ORDER

- (I) Criminal appeal is partly allowed.
- (II) Impugned judgment and order of conviction and sentence dated 29th September, 2020 passed by Special Judge (POCSO), Osmanabad in Special (POCSO) Case No. 15 of 2015 for the offence punishable under Section 506 of the Indian Penal Code is set aside. The appellant stands acquitted thereof. Fine amount for the said offence, if paid, be refunded to him.
- (III) Conviction of the appellant for the offences punishable under Section 376(f)(n) of the Indian Penal Code and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 vide impugned judgment and order of conviction and sentence dated 29th September, 2020 passed by Special Judge (POCSO), Osmanabad in Special (POCSO) Case No. 15 of 2015 is hereby confirmed. However, sentence of life imprisonment imposed on the appellant for the offence punishable under Section 6 of the POCSO Act is reduced to rigorous imprisonment for ten years. Quantum of fine for the said offence stands unaltered.
- (IV) Fees of Mr. Pratik A. Bhosle, learned counsel appointed to represent Respondent No.2, is quantified to Rs.10,000/- (Rupees Ten Thousand).

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

SSD