

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

CRIMINAL APPEAL NO.241 OF 2021

Babu Zilu Dhebe	Appellant
Versus	
The State of Maharashtra	
and another	Respondents

....
WITH
INTERIM APPLICATION NO.2017 OF 2024
IN
CRIMINAL APPEAL NO.241 OF 2021

....
WITH
INTERIM APPLICATION NO.2155 OF 2024
IN
CRIMINAL APPEAL NO.241 OF 2021

Mr. Vivek N. Arote, Advocate for the Appellant.
Mr. Prashant P. Jadhav, APP for the Respondent No.1-State.
Smt. Manisha Devkar, Advocate (appointed) for the
Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 05th JULY, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 7.2.2019 passed by the Additional Sessions Judge, Mangaon, District-Raigad in Special POCSO Case No.15/2014. There were two accused. The present Appellant was the accused No.2. The accused No.1 was acquitted. The present Appellant was convicted for commission of the offence punishable under Section 376 of IPC; for which he was sentenced to suffer R.I. for seven years and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer R.I. for one month. He was convicted under Section 3 read with 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.10,000/- and in default to suffer R.I. for one month. He was further convicted for the offence punishable under Section 5(j)(ii) read with Section 6 of the POCSO Act and was sentenced to suffer R.I. for ten years and to pay a

fine of Rs.10,000/- and in default to suffer R.I. for one month. All the substantive sentences were directed to run concurrently. He was given set off under Section 428 of Cr.P.C.

2. Heard Shri Vivek Arote, learned counsel for the Appellant, Shri Prashant Jadhav, learned APP for the Respondent No.1-State and Smt. Manisha Devkar, learned appointed counsel for the Respondent No.2.

3. The prosecution case is that the date of birth of the victim is 11.9.1997. Her parents had separated and the present Appellant, who was her maternal uncle, along with his wife had raised her. She was under the shelter of the present Appellant. The prosecution case is that in the year 2012, the victim was found to be pregnant. The school authorities informed the Appellant about her health issues. It was confirmed that she was pregnant. On questioning the victim, she told the police name of the accused No.1 – Chalke as the person responsible for her pregnancy.

Therefore, the FIR was lodged against him. The victim delivered her child on 22.4.2013. The blood samples of the victim, the child and the accused No.1 Chalke were collected and sent for DNA testing. It was revealed that the DNA of the accused No.1 Chalke did not match with the child's blood sample and, therefore, again the investigation was continued to find the real culprit. In that context, the police suspected the victim's two other maternal uncles and one more person as well as the present Appellant. Therefore, the police obtained blood samples of these four persons and sent them for DNA profile matching with the samples of the victim and her child. It was found after DNA profile matching that the present Appellant was the biological father of the child of the victim and, therefore, charge-sheet was filed against him as well. The case was tried against the accused No.1 and the present Appellant as the accused No.2.

4. During trial, the prosecution examined nine

witnesses including the victim, the Appellant's wife, the Headmaster of the victim's school, the Medical Officers and the investigating officer. The victim had turned hostile and had not supported the prosecution case. The defence of the Appellant was of total denial.

5. Learned trial Judge after considering all the aspects, acquitted the accused No.1 Chalke, but, convicted the Appellant based on the DNA report. He was convicted and sentenced as mentioned before.

6. The important evidence in this case is that of the victim herself, who is examined as PW-3. She has stated that the relations between her parents were not cordial. Her mother had performed second marriage. Therefore, she was residing with her maternal uncle and aunt. She did not depose anything further apart from this. She stated that she did not remember whether she was studying in her school which is named in her deposition. The Appellant was her maternal uncle. She did not remember anything about the

accused No.1. She denied having lodged any complaint with the police but she admitted that the complaint had her signature. She denied having gone to the police station. She further denied that in the year 2012, on one occasion, when she had gone for washing clothes near a pond, at that time, the accused No.1 had committed rape on her. Since she was not supporting the prosecution, she was declared hostile and was cross-examined by learned APP. She denied the entire prosecution case. She denied having given her supplementary statement on 23.6.2014. She denied everything about the DNA report, taking samples etc.. The portions marked 'A' to 'E' in her complaint and portion marked 'F' in her supplementary statement dated 7.8.2013 as well as portions marked 'G' to 'K' in her supplementary statement dated 23.6.2014 were shown to her. She denied having stated those portions to the police. Those portions are brought on record through the evidence of the investigating officer PW-7 PI Anil Patil. The portions from her supplementary statement dated 23.6.2014 are exhibited as

Exhibit Nos.41 to 45. The investigating agency did not take efforts and care to get the victim's statement before a Magistrate under Section 164 of Cr.PC.

7. PW-1 was her maternal aunt and wife of the Appellant. She has stated that in the year 2013 the victim was studying in 8th standard in the school in their village. In January, 2013 the Headmaster of the school informed this witness that the victim was suffering from some health issues. Therefore, this witness took her to a Government Hospital where the doctor told them that the victim was pregnant. On inquiry with the victim, she told this witness that the accused No.1 had committed rape on her. After that the victim delivered a female child.

8. PW-2 Devarukhkar was the Headmaster of the school. He has deposed that in February, 2013 there was medical examination of students at their school and it was found that the victim was having some issues. He thereafter called her guardians and told them about this fact. He has

produced the school register and the school leaving certificate of the victim. They are produced on record at Exhibits-26 and 27. As per that record and school leaving certificate, the date of birth of the victim was 11.10.1997. There is hardly any dispute about her date of birth or this record. Therefore, to that extent the prosecution has proved its case that the victim was a minor at that time and her date of birth was 11.10.1997. She had delivered a child when she was still a minor. The offence was, therefore, committed. However, the question is who had committed that offence. From that point of view, the prosecution needed to establish the involvement of the accused before the Court.

9. PW-4 Wadekar was a pancha, in whose presence the spot panchnama near the pond was conducted, where according to the prosecution case, the accused No.1 had committed rape on the victim. However, he had turned hostile and in any case his evidence does not pertain to the

present Appellant.

10. PW-5 Dr. Deshmukh had examined the victim on 24.4.2013. She had obtained the blood samples of the victim. She had not produced any particular form showing that the blood sample was collected for the purpose of sending it for DNA testing. She has merely stated that she had collected the blood sample of the victim. She has not stated further that those blood samples were handed over by this witness to the police. This is an important link in the prosecution case which the prosecution had to connect with the further evidence to show that the same blood samples were collected by the police from this witness and were sent for DNA profile testing.

11. PW-6 Dr. Dabari had examined the accused No.1 Chalke. This witness drew the blood samples of the accused no.1. He sent a forwarding letter to the police which is produced on record at Exhibit-35. That letter merely mentions that this witness had forwarded the samples of the

semen, hairs and nail scrapping of the accused No.1 to the police. There is no reference to the blood sample of the accused No.1 having been sent.

12. PW-7 PI Patil had carried out the investigation in C.R. No.15/2013 of Mahad Taluka Police Station in this case. He deposed that the PH.C. Birwadi had informed the fact that the victim had delivered a child. After that the PSO had recorded the FIR, in which the victim had named the accused No.1. He further deposed that the concerned officer had collected the blood samples of the accused, the victim and the child. It was sent for DNA examination. However, DNA of the accused No.1 did not match with the child. This witness further deposed that, after that, the blood samples of the four suspected persons were sent for comparison with the blood samples of the victim and her child for DNA testing purposes and in that examination it was found that the Appellant's DNA had matched with the child's DNA. This witness recorded the victim's supplementary statement. As

mentioned earlier, the portions from her supplementary statement, produced on record by him were exhibited. The Appellant was arrested on 24.6.2014. At his instance, a chit given by the Headmaster of the school was recovered. PW-7 collected the school leaving certificate of the victim and filed charge-sheet in the Court.

13. PW-8 PSI Pratibha Patil had recorded the statement of the victim as the FIR. She proved the portions from the FIR, which the victim had denied. Those portions were marked as Exhibits-60 to 64. In those portions, the victim had blamed only the accused No.1 for that offence.

14. PW-9 PI Sanjay Sawant was the first investigating officer. He had arrested the accused No.1 Chalke. He had recorded the first supplementary statement of the victim. He had conducted the spot panchnama. He deposed that the blood samples of the victim, her child and the accused No.1 were sent for DNA report on 2.5.2013. The DNA report was negative as far as the accused No.1 was

concerned. Then the investigation was carried out and it was revealed that the victim had relations with 4 to 5 persons. He obtained the blood samples of the suspects with permission of the Sessions Court in October, 2013 and those samples were sent to the Chemical Analyzer. He deposed that he had filed the DNA reports on record.

15. The important documentary evidence in this case is, obviously, the DNA reports, which are produced on record at Exhibit-51. It refers to the DNA profiles of the victim, her child and four others including the present Appellant and the opinion was expressed that the Appellant and the victim were concluded to be the biological parents of the baby. This is the prosecution case.

16. Learned counsel for the Appellant submitted that the prosecution has failed to prove its case beyond reasonable doubt. The victim had turned hostile and has not supported the prosecution case. In fact, the case of the prosecution in the FIR was that the accused No.1 had

committed that offence. The Appellant is falsely implicated. He submitted that the prosecution has failed to establish the link between the DNA report and the blood samples of the present Appellant and, therefore, since the DNA report was the only document on which, the conviction was based; in view of the missing link, the prosecution has claimed that the Appellant has committed that offence beyond reasonable doubt. He submitted that the victim had denied having given any supplementary statement to the police implicating the Appellant. He submitted that considering the very weak nature of evidence, the Appellant be acquitted.

17. Learned APP as well as learned counsel for the Respondent No.2 opposed these submissions. They relied heavily on the DNA report. They submitted that since it is a conclusive evidence and it was opined in the report that the Appellant and the victim were the biological parents of the child, there is no escape from concluding that the Appellant had committed that offence because the victim was a minor.

They submitted that the victim's date of birth i.e. 11.9.1997 is not disputed and there is sufficient documentary evidence in the form of school record showing that particular date of birth. They, therefore, submitted that the prosecution has proved its case beyond reasonable doubt.

18. I have considered these submissions. Initially, the prosecution started with the case against the accused No.1 and inspite of receiving negative DNA report as far as he was concerned, he was still prosecuted because the victim had named him in her FIR. The learned trial Judge acquitted him. The victim had turned hostile. The prosecution case further reveals that during investigation it was suspected that there could be four other culprits, who could have committed this offence. The victim had not named any of them. The investigating agency arranged to get the blood samples of those four persons, including the Appellant and those samples were sent for DNA testing.

19. In this view of the matter, the most crucial

evidence in this case is obviously that of DNA reports. It was the duty of the prosecution to establish clearly that the DNA report was concerning the blood samples of the Appellant alone and, that, there was no possibility of tampering or mixing up of his samples with the other samples. In that context, in my opinion, the prosecution has miserably failed. The prosecution has failed to rule out any possibility that the offence was committed by none other than the Appellant. In this context, it is important to see how the DNA report was brought on record. It is marked at Exhibit-51 but the entire evidence does not show as to who had produced that particular report on record. PW-9 PI Sawant has stated, in his deposition, that he had filed the DNA reports on record, but, in the same continuation it is not reflected that any particular report was given the Exhibit No.51. This witness's evidence was recorded at Exhibit-66 and thereafter whatever he had produced was given the subsequent exhibit numbers. As far as the most crucial DNA report is concerned, it was produced at Exhibit-51. It is not clear how that report was

produced on record. It is not clear at what stage it was produced. It does not appear from the record that it was produced under Section 293 or 294 of Cr.PC..

20. Learned APP and learned counsel for the Respondent No.2, even after going through the record and proceedings could not point out as to how this particular report was produced on record. The defence had not admitted that particular report by giving no objection on the report. This is the most crucial piece of evidence and it is extremely doubtful how it was brought on record.

21. Apart from that, even assuming that the said Report is properly produced and exhibited, the prosecution has also failed to prove as to how these four samples of four suspects were collected, what precautions were taken to keep them separately, whether separate numbers were given and how they had reached the FSL for further examination. The entire evidence in that behalf is completely missing. Therefore, there is a strong possibility that the samples of

these four suspects could have got mixed up at some stage. Neither the carrier nor any witness ruling out this possibility is examined by the prosecution. It was not explained as to what labels were given and what numbers were given to those particular samples. In such a serious case, it was the duty of the prosecution to point out that there was no possibility of deliberate or inadvertent tampering of the blood samples which were sent for DNA testing. The prosecution had produced on record the identification form at Exhibit-50/C which shows that the Appellant's blood was collected on 21.10.2013 at 4.15 p.m.. The prosecution case is that the blood samples of three others were also collected on that date but those forms are not produced on record.

22. A similar form in respect of drawing of the samples of the victim is not produced on record. As mentioned earlier, Dr. Deshmukh's evidence about forwarding the blood sample of the victim to the police, is vague. She has not deposed that she had forwarded or

handed over the blood samples to the police.

23. Thus, there was complete failure on the part of the prosecution to show that care was taken to collect the samples, to keep them safe and to avoid any mix-up till it reached FSL for DNA profiling.

24. In this particular case, the samples of four suspects were sent together. Therefore, in the facts of this case, it was all the more necessary for the prosecution and the investigating agency to have taken care that there was no possibility of mix-up of those samples. This possibility is not ruled out in the facts of the case. The prosecution has miserably failed in that behalf. In such a case, benefit of doubt must go to the present Appellant.

25. In this view of the matter, the judgment and order of conviction and sentence cannot be upheld. Benefit of doubt must go to the Appellant as mentioned earlier. He deserves to be acquitted. Hence, the following order :

:: O R D E R ::

- i. The Appeal is allowed.
- ii. The judgment and order dated 7.2.2019 passed by the Additional Sessions Judge, Mangaon, District-Raigad in Special POCSO Case No.15/2014, is set aside.
- iii. The Appellant is acquitted from all the charges.
- iv. The Appellant shall execute a bond in the sum of Rs.30,000/- for making himself available in case of Appeal against his acquittal. Once this bond is executed, the Appellant be released forthwith, if not required in any other case.
- v. Criminal Appeal is disposed of accordingly. With disposal of the Appeal, the companion Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)

Deshmane(PS)

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