



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.279 OF 2024

Dashrath s/o Tatobaji Salve,
aged about 58 years, occupation : labourer,
resident of Kodegaon, tahsil Saoner,
district Nagpur.
(presently lodged in central jail, Nagpur
since 22.4.2024) **Appellant.**

:: V E R S U S ::

State of Maharashtra,
through Police Station Officer,
Police Station Khapa, Nagpur. **Respondent.**

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Shri G.D.Dani, Counsel for the Appellant.
Mrs.S.S.Dhote, Additional Public Prosecutor for the
Respondent/State.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 14/01/2025
PRONOUNCED ON : 31/01/2025

JUDGMENT

1. By this appeal, the appellant (the accused) has
challenged judgment and order dated 22.4.2024 passed
by learned Additional Sessions Judge-9, Nagpur in
Sessions Case No.731/2019.

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2. By the said judgment impugned, the accused is convicted for offence under Section 376(2)(j) and (l) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years. He is further directed to deposit compensation Rs.2.00 lacs under 357(3) of the Code of Criminal Procedure for survivor (PW1), in default, to undergo rigorous imprisonment for one year and six months.

3. Facts of the prosecution case necessary for disposal of the appeal are as under:

The crime is registered on the basis of FIR lodged by the sister of the victim alleging that she is residing along with her parents and elder sister (the victim) aged about 42 years. The victim is suffering from mental disorder and, therefore, she is unmarried. In the year 2017, the family members of the victim noticed her enlarged belly and, therefore, they called one knowledgeable lady from the village who disclosed that the victim is pregnant. Therefore, the informant took the victim at the Primary Health Center, Khapa where the

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Medical Officer disclosed that she is pregnant of seven and half months. On enquiring with the victim, it was disclosed that the accused who is resident of the same village called her in the house and subjected her for forceful sexual assault on multiple occasions. Therefore, the informant has lodged the report. After lodging of the report, medical examination of the victim was carried out from which it also revealed that she is pregnant of seven and half months. She delivered a child subsequent to the lodging of the report.

4. During investigation, the Investigating Officer has drawn spot panchanama, recorded statement of the victim, collected the sample of the victim and the accused and the child delivered by the victim and forwarded for the DNA Examination. After completion of the investigation, chargesheet is filed against the accused.

5. Learned Sessions Judge framed the charge vide Exh.8. The contents of the charge are denied by the accused and claimed to be tried. In support of the

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prosecution case, the prosecution has examined in all eight witnesses namely PW1 victim vide Exh.14, PW2 sister of the victim vide Exh.15, PW3 Rajeshwar Ramlingam Naidu pancha on seizure, pancha on spot, pancha on seizure of samples of the accused, pancha on seizure of the samples of the victim vide Exh.22, PW4 Dr.Sagar Chiddarwar vide Exh.29, PW5 Ulhas Bhusari Investigating Officer vide Exh.33, PW6 Gopichand Nerkar Exh.41 Investigating Officer, PW7 Dr.Bhakti Deshpande Exh.51, and PW8 Rupali Bhoyar Special Teacher Exh.54.

6. Besides the oral evidence, the prosecution placed reliance on report Exh.16, FIR Exh.17, statement of the informant under Section 164 Exh.18, seizure memo as to the samples of the accused for DNA purpose Exh.23, samples of victim for DNA purpose Exh.24, spot panchanama Exh.27, medical certificate Exh.28, certificate as to the mental health Exh.30, DNA Report Exh.31, CA Report Exh.32, letter to the Medical Officer Exhs.34 and 36, letter to Headmaster Exh.35, letters to CA Exhs.38, 39, 42 and 44, arrest panchanama Exh.49,

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MLC report Exh.52, and report of the special teacher Exh.55.

7. All incriminating evidence is put to the accused by recording his statement under section 313 of the Code of Criminal Procedure for which the accused has denied the allegations and defence of the accused is of total denial. After appreciation of the evidence adduced, learned Additional Sessions Judge held the accused guilty and convicted him as the aforesaid.

8. Heard learned counsel Shri G.D.Dani for the accused and learned Additional Public Prosecutor Mrs.S.S.Dhote for the State.

9. Learned counsel for the accused submitted that the accused is charged for the offence punishable under Section 376(2)(j) and (l) of the Indian Penal Code. The burden is on the prosecution to prove the charge beyond reasonable doubt. As far as the evidence of the victim is concerned, she admitted during her cross examination that the accused has not done any bad act with her. She

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also admitted that she used to work in the agricultural field of one Vinod Thakre. She was also roaming along with said Vinod. It further came in the evidence that there was previous dispute between her family members and the accused. As to the previous dispute, not only the victim but also PW2 sister of the victim has also admitted the same. PW2 has also admitted that the victim is in habit of demanding the "Tobacco Suprari" from various villagers. She was working at the field of one Vinod Thakre and said Vinod Thakre used to take her on his motorcycle to the field. There is a previous dispute between the accused and the family members of the victim on account of fetching of the water. It is submitted that the FIR is rather delayed and no explanation is put forth for the said delay. The samples of the accused and the victim and the samples of the child delivered by the victim were referred for analysis and the accused excluded to be biological father of the child delivered by the victim. The entire evidence of the victim and her sister is not inspiring the confidence. The accused is

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implicated due to rivalry. The statement of the victim is not recorded under Section 161 of the Code. The failure to record statement of the victim under Section 161 of the Code may certainly affect the evidentiary value of her evidence and prejudice is caused to the accused. In fact, the alleged incident itself is not proved by the prosecution and there is no corroboration to the evidence of the victim. The witnesses examined are not wholly reliable and, therefore, their evidence is to be examined cautiously and with scrutiny. For all above these reasons, the appeal deserves to be allowed.

10. In support of his submissions, learned counsel for the accused placed reliance on following decisions:

1. Mahendra Singh and ors vs. State of Madhya Pradesh, reported in (2022)7 SCC 157, and

2. Raju Jaishriram Telgote vs. State of Maharashtra, thr.PSO, reported in 2019 SCC OnLine Bom 1408.

11. Per contra, learned Additional Public Prosecutor for the State supported the judgment impugned in the

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appeal and submitted that the evidence of PW1 the victim corroborated by PW2 the sister of the victim inconsistently points out towards the guilt of the accused. The evidence of the victim before the court, which is substantial evidence corroborated by the evidence of her sister and the medical evidence, merely because DNA report excluded the accused to be biological father, is not sufficient to exonerate the accused from the liability. Mere delay in lodging of the FIR is also not sufficient to discard the prosecution case. Therefore, the appeal is devoid of merits and liable to be dismissed.

12. In support of her contentions, learned Additional Public Prosecutor for the State placed reliance on following decisions:

1. State of HP vs. Gian Chand, reported in (2001)6 SCC 71;

2. State of Punjab vs. Ramdev Singh, reported in (2004)1 SCC 421, and

3. State of Punjab vs. Gurmit Singh and ors, reported in (1996)2 SCC 384.

13. To substantiate the charge against the accused, the prosecution placed reliance on the evidence of PW1 the victim who according to the prosecution is suffering from mental disablement. As far as her evidence is concerned, before recording the same, her ability to depose is verified by Special Judge and on satisfaction that she is a competent witness, her evidence was recorded. As per her evidence, the accused, who is a resident of her village, called her by offering "Kharra" (Scented Supari) and subjected her for sexual assault. She is subjected for sexual assault is revealed to the family members when they have seen her belly size increased. During her cross examination, it came on record that there was a previous enmity between the family members of the victim and the accused. She specifically stated that the accused has not done any bad act with her. She voluntarily stated that she conceived a child from the accused and at the same time she admitted that she used to roam on the motorcycle of one Vinod Thakre. She has also admitted that her sister told

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the police about the incident. She admitted to the extent that she made statement before the Saoner Court as told by one Usha Madam.

14. PW2 the sister of the victim, testified that the victim was not normal since her childhood and, therefore, her marriage was not performed. When she and other family members noticed the belly of the victim is increased, they called one villager who disclosed that the victim is pregnant and, thereafter, she was taken to the hospital and the Medical Officer also disclosed that she is pregnant. Thereafter, the victim disclosed that the accused has subjected her for sexual assault. She delivered a baby boy. After disclosing of the said incident, PW2 the sister of the victim has lodged the report Exh.16 and FIR is at Exh.17. The victim's sister also admitted that there is a dispute between her family members and the accused on account of fetching of the water from the borewell which is in front of the house of the accused. She also admitted that the victim used to work in the field of one Vinod Thakre. They are having

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good relations with said Vinod Thakre. She also admitted that the victim did not complain about the accused and the complaint was filed against the accused on the say of Vinod Thakre.

15. It reveals from the evidence of PW1 the victim and PW2 the sister of the victim that the samples of the victim and her child were obtained during investigation.

16. PW3 Rajeshwar Naidu examined vide Exh.22, also stated that in his presence the police have seized samples of blood which were sealed in separate containers and panchanama at Exh.25 is drawn in his presence. Exh.23 is the seizure memo showing blood samples of the accused for DNA was obtained in presence of panchas. Exh.24 is the seizure memo showing samples of the victim are obtained for DNA Examination. Exh.27 is the spot panchanama, Exh.28 is the medical certificate of the accused.

17. PW4 Dr.Sagar Chiddarwar, was examined vide Exh.29 who testified that at the relevant time, he was

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attached to the IGGMC and Mayo Hospital. The lady patient was referred to him who was brought by WPC from Khapa Police Station. On examination, he found the patient was moderate mental retardation and she is not able to understand what was happened with her and about consequences of any such sexual acts she faced. Exh.30 is the certificate wherein also he mentioned that the victim is not able to understand the nature and possible consequences of the sexual act.

18. PW5 Ulhas Bhusari, working at Khapa Police Station as API, testified that during investigation he referred the victim for medical examination and also issued letter to Manuksha Mentally Retarded School, Gujarkhedi for obtaining services of teaching staff as an interpreter for recording statement of the victim which is at Exh.35. He also collected samples of the victim as well as the accused. As far as her cross examination is concerned, nothing incriminating is brought on record.

19. PW6 Gopichand Nerkar, is also Investigating Officer who narrated about the investigation carried out by him.

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20. PW7 Dr.Bhakti Deshpande, who examined the victim, found that the victim was pregnant for 34 weeks and she had not carried regular medical examination as far as physical assault is concerned. She referred the victim for sonography and report disclosed pregnancy. Accordingly, she issued report Exh.52. She admitted that the victim had not stated the name of the accused or name of the person who had committed sexual intercourse with her. Her sister has not disclosed the same.

21. PW8 Rupali Bhoyar, who is Special Teacher, recorded statement of the victim on 21.6.2018. Her evidence shows that she made the victim comfortable and, thereafter, asked questions and recorded those answers. At the relevant time, the police were not present. During her cross examination, she admitted that neither thumb impression of the victim nor her signatures of family members was obtained by her after recording the statement of the victim.

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22. On the basis of the evidence, the prosecution claimed that the prosecution has proved the case against the accused.

23. The evidence of the victim has to be analyzed keeping in mind the fact that her statement was not recorded during the investigation either under Section 161 or 164 of the Code.

Her statement was recorded by Special Teacher PW8 Rupali Bhoyar Special Teacher.

PW2 the sister of the victim admitted in the cross examination that the victim used to attend the work of agriculture in the agricultural field of villagers. Learned Sessions Judge has also, during preliminary enquiry, declared her as a competent witness. No attempt was made by the Investigating Officer either to record her statement with the help of Interpreter or producing her before learned Magistrate. Besides her evidence, the prosecution placed reliance on DNA Certificate Exh.31

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which excluded the accused to be biological father of the boy delivered by the victim.

24. The evidence of the witness, whose statement is not recorded under Section 161 of the Code, admittedly, is admissible. However, the evidence would have to be tested with extreme caution. Recording of statement of a material witness without any undue delay has its own importance. The possibility of any embellishment or concocted version rules out. The use of the statement recorded under section 161 of the Code is limited. However, from the perspective of the accused and the right of effective defence, the importance and significance of the statement recorded under Section 161 is immense. The witness can be contradicted with such part of the statement as is duly proved. The prosecution is also entitled to use the statement to contradict a witness who resiles from the 161 statement. The statements recorded during investigation not only assist the accused to cross examine the witness but also assist the court to ascertain the truth.

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25. As far as the present case is concerned, admittedly, no attempt was made to record her statement under Section 161 or 164 of the Code.

26. Learned counsel for the accused vehemently submitted that the evidence of PW1 the victim and PW2 the sister of the victim is not sufficient to inspire the confidence. The cross examination of the sister of the victim specifically shows that the victim never complained about the accused or his act. She also specifically admitted that the FIR is lodged against the accused on the say of one Vinod Thakre. The cross examination further shows that the victim used to do the field work in the field of said Vinod Thakare. The victim also admitted that she used to work in the field of Vinod Thakre and also used to go to the village on the motorcycle of said Vinod Thakre frequently. She further admitted that there was dispute between her family members and the accused. The said fact is also admitted by the sister of the victim.

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27. The DNA Certificate, on which the prosecution placed reliance, shows that the accused is excluded to be biological father of the baby delivered by the victim. In the light of the fact that the accused is excluded to be father of the victim, the evidence of the victim is to be appreciated. There is no dispute about the fact that there was previous dispute between the accused and the victim and her family members on account of fetching of the water from borewell which was in front of the house of the accused. As far as the evidence of the victim, that the accused used to call her by offering "Kharra" (Scented Supari), is concerned, not a single villager from the village is examined by the prosecution to ascertain the fact that there was any communication between the victim and the accused.

28. Admittedly, the victim is not a normal person. She was suffering from mental retardation to some extent. Before recording her evidence, learned Sessions Judge has recorded that as witness is not found behaving normal, he asked few questions to ascertain her mental

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ability and on asking the question, he recorded that after appreciating the answers given by the victim, he found that she is a competent witness and, thereafter, recorded her evidence.

29. Considering the evidence of PW1 the victim and PW2 the sister of the victim, it is necessary to refer proposition of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely (1) wholly reliable; (2) Wholly unreliable, and (3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way. it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation.

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In the second category, the court, equally has no difficulty in coming to its conclusion.

It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

30. Coming to the facts of the present case, besides the evidence of PW1 the victim and PW2 the sister of the victim, the evidence of PW7 Dr.Bhakti Deshpande shows that till 19.6.2018, when she examined the victim, neither the victim nor the sister of the victim disclosed the name of the accused before her. Whereas, the FIR shows that the report was lodged against the accused. PW7 Dr.Bhakti Deshpande specially admitted that she examined the victim on 19.6.2018. Neither the victim nor her sister has stated the name of the accused or name of the person who committed the sexual intercourse with the victim.

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31. As observed earlier, besides the evidence of PW1 the victim and PW2 the sister of the victim, the Investigating Officer has not ascertained whether at any point of time the victim was seen along with the accused either in his house or near house of accused or near the house of the victim.

32. Besides the oral evidence of PW1 the victim and PW2 the sister of the victim, the entire reliance of the prosecution is on the DNA Certificate, which is at Exhibit-31, which shows that out of 15 different genetic systems analyzed with PCR, putative father, Dashrath Salve (DNAn-632/18) failed to match obligate paternal alleles present in blood samples of "Baby" of the victim 8 STR Loci. The further analysis shows that for all 15 different genetic systems analyzed with PCR, mother i.e. the victim (DNAn- 632/18 matched obligate maternal alleles present in blood sample of baby of the victim at all 15 STR Loci. It is opined that the victim is concluded to be biological mother of the "Baby" of the victim. Whereas,

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the accused is excluded to be biological father of the “Baby” of the victim.

33. Thus, the material evidence is the DNA Report which specifically shows that the the DNA is extracted from samples and analyzed and the accused is excluded to be the biological father of the victim.

34. DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person’s DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. The nature and characteristics of DNA had been succinctly explained by Lord Justice Phillips in **Regina v. Alan James Doheny & Gary Adams** [1997 (1) Criminal Appeal Reports 369]. The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect.

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DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid- 1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty.

35. Thus, DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals.

36. As far as the present case is concerned, DNA Examination has excluded the accused to be biological father of the child delivered by the victim. As far as collecting of samples is concerned, no evidence is

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adduced by the prosecution that since collection of the samples till the same was forwarded to the DNA Examination were kept in intact condition.

37. It is well settled that the evidence of the witnesses needs no corroboration when it inspires the confidence.

38. As far as the present case is concerned, the cross examination of PW1 the victim as well as PW2 the sister of the victim shakes credibility of the evidence adduced by the prosecution. The evidence adduced in the present case by the prosecution is not sufficient to inspire the confidence.

39. Needless to say that offence of “rape” is a very serious and brutal crime. It is not only an offence against the victim but also a crime against the society. As such, burden is on the prosecution to prove the offence beyond reasonable doubt.

40. The evidence on record sufficiently shows that as there was a previous enmity between the victim, her family members, and the accused, the same can be a

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ground to implicate the accused. As the evidence of the victim is neither corroborated by any other evidence nor is corroborated by the DNA Report, it is inconsistent with the hypothesis of innocence of the accused.

41. The victim has not disclosed the time and date of the incident. The certain questions were put to her by the Presiding Officer also. If the examination-in-chief and cross examination of the victim are considered, it was the effect of tutoring. Moreover, there was previous dispute between the victim and the accused and, therefore, independent corroboration was required.

42. Thus, the evidence of the victim is not of sterling quality as would obviate the need to seek corroboration or assurance of the corroboration. I am further satisfied that there is no evidence on record of any significant corroborative value. Neither the scientific evidence nor the medical evidence implicates the accused. The independent witnesses are not examined. The evidence of the Investigating Officer nowhere shows that he has made any attempt to ascertain the truthfulness of the

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facts by recording the statements of any other villagers. The house of the accused is admittedly in the village. The spot panchanama, which is on record, shows that the spot, allegedly, is the house of the accused, which, as per the spot panchanama, is surrounded by the house of one Ganpat Salve, Chaitram Hande and ors. The statement of none of persons were recorded by the investigating agency to ascertain whether the accused at any time approached the victim or the victim was seen at the house of the accused. In the absence of the corroboration, it would be absolutely unsafe to base the conviction on the evidence of the victim and, therefore, the judgment impugned in the appeal deserves to be set aside.

43. In view of the above discussion, the appeal deserves to be allowed, as per order below:

ORDER

(1) The Criminal Appeal is **allowed**.

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(2) The judgment and order dated 22.4.2024 passed by learned Additional Sessions Judge-9, Nagpur in Sessions Case No.731/2019 is hereby quashed and set aside.

(3) The accused is acquitted of the offence for which he is convicted and sentenced.

(4) The accused shall be released from the jail custody forthwith, unless his custody requires in any other matter.

(5) Fine amount, if paid by the accused, be refunded to him.

The appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!