

**(2019) 01 BOM CK 0128**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 547 Of 2017**

Shaktiman

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

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**Date of Decision :** 29-01-2019

**Acts Referred:**

Indian Penal Code, 1860 — Section 376(2)(i)(n), 506  
Protection Of Children from Sexual Offences Act, 2012 — Section 2(d), 5(i)(ii)(I), 6  
Evidence Act, 1872 — Section 118

**Citation :** (2019) AllMR(Cri) 741

**Hon'ble Judges :** V.M. Deshpande, J

**Bench :** Single Bench

**Advocate :** R. M. Patwardhan, M.K. Pahan

**Final Decision :** Dismissed

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## Judgement

1. Present appeal challenges the judgment and order of conviction dated 29.06.2017 in Special POCSO Case No.223/2016 by learned Additional Sessions Judge, Nagpur, whereby appellant is convicted for an offence punishable under Section 376 (2) (i) (n) of the Indian Penal Code (IPC) and Sections 5 (i) (ii) (I) punishable under Section 6 of the Protection of Children From Sexual Offences Act (POCSO Act) and sentenced sufferance of rigorous imprisonment of 10 years and payment of fine of Rs.3,000/-. He is also convicted for an offence punishable under Section 506 of the IPC and he is directed to suffer rigorous imprisonment for two years. Both the sentences were directed to run concurrently. Appellant was in jail since 14.05.2006 hence set off was also granted.

2. I have heard Mr. Patwardhan, learned counsel for the appellant and Mr. Pathan, learned A.P.P. for the State. I have also perused the notes of evidence and various proved documents.

3. It is the submission of learned counsel for appellant that he is falsely implicated in crime. He submitted that the victim girl, being mentally retarded girl, her evidence will have to be excluded in its entirety. He submitted that

victim (PW6), who according to the prosecution was also subjected to sexual assault by appellant, has turned hostile, is a pointer towards innocence of the appellant. He submitted that Deoxyribonucleic Acid (DNA) report will have to be excluded since there was no reason for preservation of aborted fetus for DNA testing. Therefore, he submitted that DNA report, Exh.-36 has to be excluded in its entirety from consideration. He relies on the decision in Gopal Natthuji Shreenath Vs. The State of Maharashtra; reported in 2018 ALL MR (Cri) 3399. As per his contention, since the victim is mentally retarded, her evidence has to be excluded. He, therefore, submitted that appeal be allowed and appellant be set at free. According to appellant, there is a delay in lodging the report, which is not explained by the prosecution.

Per contra, Mr. Pathan, learned A.P.P. submitted that DNA report Exh.-36 is a conclusive proof to show that appellant is concluded to be biological father of aborted fetus of victim and said fact is properly considered by the Court below. He submitted that learned Judge of Court below has supplemented good reasons for recording conviction, which may not be upset in the appeal. He prays for dismissal of the appeal.

4. In the present case, charge was framed against the appellant for an offence punishable under the POCSO Act. Therefore, it is obligatory on the part of the prosecution to prove that victim was "Child" within the meaning of Section 2 (d) of the POCSO Act.

Though the age of the girl is not questioned before this Court, the Court cannot absolve itself from determining the said important issue.

5. Mangala (PW1) is mother of victim. She disclosed date of birth of the victim as 29.03.2003. Her submission on oath during her cross-examination is not questioned.

6. During the course of trial, prosecution has examined Krushna Chambhare (PW3), Head Master of Temsana Medium School in which the victim used to take education. Victim's mother also disclosed that her daughter used to take education in the said school and her son is also admitted in the said school.

Head Master Chambhare (PW3) states that he received communication Exh.-17, from the investigating officer demanding bona fide certificate to show date of birth of the victim. During the course of evidence, he brought the original admission register and an attested photocopy of the said is placed on record at Exh.-19. At entry no.2182, name of the victim appears and her date of birth is shown as 29.03.2003. The victim was admitted in this school in 5th standard and prior to that, she was taking education in Zilla Parishad Primary School, Khedi. In admission register, date of birth of the victim was recorded on the basis of transfer certificate issued by Zilla Parishad Primary School, Khedi. Exh.-18 is the said certificate. It shows that date of birth of the victim is 29.03.2003. He also proved bona fide certificate issued by him at Exh.-20 showing the same date of birth.

7. The prosecution has also examined father of the victim Surendra (PW8). During the course of trial, he brought original birth certificate issued by Registrar, Birth and Death Registration Authority, Gram Panchayat, Khedi. Birth certificate is at Exh.-42. It also shows date of birth of the victim as 29.09.2003.

8. In view of the aforesaid consistent oral as well as documentary evidence, which is not at all challenged by the defence either during the course of trial or before this Court, the date of birth of the victim is 29.03.2003.

9. As per the charge, appellant has committed sexual intercourse with the victim during the period of 15.12.2015 to 01.01.2016. Therefor, it is crystal clear that the victim is "Child" within the meaning of Section 2 (d) of the POCSO Act.

10. Submission of learned counsel for appellant that there is a delay in lodging the FIR, in my view, does not dent the prosecution case in view of explanation offered by mother of the victim, the first informant. Exh.-7 is oral statement dated 11.05.2016, on the basis of which the crime was registered, initially against unknown person. Her statement shows that after attaining puberty, victim was having regular menses. However, since last 2-3 months, it was stopped. It appears that that gave anxiety to her to discuss this issue. On that, it was told to her that due to weakness, many times it happens. Therefore, the mother did not pay any attention to said issue. However, though her stomach was showing somewhat abnormality, in her childhood the victim used to eat soil, that was also the reason for not giving much attention to the said issue.

11. Statement Exh.-7 further shows that on 28.04.2016, she along with the victim came to Nagpur to attend a marriage. In the said marriage, her mother in law questioned about the size of the stomach of the victim. Therefore, on 06.05.2016, they all took the victim Medical College and Hospital, Nagpur. On examination, doctor opined that she was having pregnancy on 4 ½ months and for treatment she was admitted in Ward No.22. Exh.-7 further reveals that on inquiry, the victim disclosed that about 4-5 months ago at 5.00 O'clock when she was coming home from school, noticing her alone, one unknown person came near her and talked in good fashion. He offered that he will give something to her if she accompanies her and thereafter she went in the agricultural field where biscuits were given to her and thereafter he committed sexual assault twice on her. It is also stated in the report that the as the girl is unmarried and is taking education and got pregnancy in such a tender age, she and her fame will be defamed. On this, she made a request for medical termination of pregnancy and accordingly, on 10.05.2016 in the night, her pregnancy was medically terminated.

12. After registration of crime, API Anamika Mirzapure (PW7), who was posted in the office of Superintendent of Police in Women Cell, was directed to make inquiry. Therefor, she along with one Sadhna Hatwar, Child Protection Officer, went there. It was revealed to this prosecution witness that pregnancy was already aborted. On the said day, statement of victim, Exh.-8 was recorded, in presence of Protection Officer by API Mirzapure (PW7) wherein the victim

disclosed name of the appellant. Exh.-9 is statement of first informant recorded in presence of Protection Officer. The said reveals that the appellant resides in very same village where the victim resides and is Conductor of a bus. After discovery of name of the appellant, he was arrayed as an accused.

13. In view of the explanation which the first informant has offered, not only in the report but also during the course of trial, no exception can be taken for lodging the report at belated stage and that cannot be the ground for acquittal of the appellant.

14. Insofar as submission of learned counsel for the appellant that entire testimony of the victim has to be discarded because she is mentally retarded, in my view will have to be rejected. The learned counsel heavily relies on Exh-43, certificate to show that the victim girl is mentally retarded. Perusal of Exh.- 43 shows that it is a certificate of Mental Retardation for Government Benefits. Perusal of the said certificate shows that mental retardation was found to be in category of moderation and disability was up to 60% only. The said certificate shows that position of moderation is non progressive and not likely to improve. However, that does not mean that it will worsen.

15. Section 118 of the Indian Evidence Act provides that;

"118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

16. Reliance placed by learned counsel for the appellant on the judgment in Gopal Natthuji Shreenath's case supra, has no relevance in the present case because in the said case, learned Sessions Judge himself has excluded the testimony of the victim. In the said case, on recording a finding that victim in the said case used to give answers "Yes" to every questions.

17. In the present case, there is nothing on record to show that the victim girl was lunatic though she was found to be belonging to mentally retarded category. Further, when the victim was in witness box, before recording her evidence learned Judge of the Court below put questions and only on his satisfaction, the learned Judge recorded evidence of the victim. The learned Judge of the Court below observed that the victim is able to give her evidence. Observation of the learned Judge of the Court below has to be given due importance and weightage, in absence of anything contrary on record.

18. In that view of the matter, submission made by learned counsel that victim's evidence has to be excluded in its entirety because she is mentally retarded, must floor down. Law in respect of appreciation of evidence of victim of rape

cases is well settled. She has stated in her evidence atrocities committed on her by the appellant. Though in her cross-examination she has admitted that the parents and grandmother and brother of the appellant are residing in the house, according to the version, she was subjected to sexual assault when she was alone.

19. It is the submission of learned counsel for the appellant that there was no reason for the medical officer to preserve the aborted fetus, in absence of registration of offence against anybody. In my view, this submission is meaningless. When the victim was brought in hospital on 06.05.2016, she was admitted in Unit No. 5 at Medical College. Evidence of Dr. Kanchan Gadhe (PW10) would show that the victim, a minor unmarried girl was having pregnancy of 19 weeks and at the request of mother of the victim, she operated the victim's pregnancy. The process of abortion started on 09.05.2016 and victim was operated on 10.05.2016 at 9.45 p.m. In my view, though at that point of time, offence was not registered, preservation of fetus in a sealed condition is not unnatural, especially when Doctor was knowing that operation has been done on a minor unmarried girl. Therefore, if by way of precaution Dr. Gadhe (PW10) has preserved the aborted fetus, she cannot be accused of violating anything. On the contrary, it shows that Doctor's presence of mind and her commitment towards her duty.

20. After registration of crime, when the investigating officer got knowledge about abortion, on 12.05.2016 the investigating officer demanded sealed sample of fetus for DNA test which was handed over to the investigating officer, which ultimately reached in sealed condition to the CA.

After following due process, the blood sample of the appellant was obtained and it was also sent for DNA test.

21. Mrs. Mahajan (PW5) is Assistant Chemical Analyser. Her evidence shows that on 12.05.2016, she received sealed plastic container from Police Station, Mouda containing aborted fetus to confirm paternity along with forwarding letter and B-Form. Evidence of Mrs. Mahajan (PW5) shows that she extracted DNA from the aborted fetus and thereafter amplified that DNA by using polymerase chain reaction technique. Then, Short Tandem Repeat Geno Typing was done. Accordingly, she generated her report having number D.N.A.N.339/16. Thereafter, she reserved profile of aborted fetus along with report, Exh.-31.

Evidence of Mrs. Mahajan (PW5) further shows that on 16.05.2016, she received letter from Police Station, Mouda in respect of DNA Kit for accused under requisition, Exh.-32, the said was given. On the same day, she received plastic container containing blood sample of appellant-Shaktiman in DNA kit provided by Chemical Analyser's office. Evidence of Mrs. Mahajan (PW5) shows that she extracted DNA for blood sample and thereafter she amplified that DNA by using Polymerase Chain Reaction Technique. Then Short Tandem Repeat Geno Typing was done. She got DNA profile from that blood sample. Then she tallied DNA

profiles of aborted fetus and blood sample of appellant and found that paternity of the appellant with aborted fetus was matched. Accordingly, she opined that appellant is concluded to be biological father of aborted fetus of the victim. Accordingly, she issued report Exh.-36. Except certain suggestions, nothing is brought on record in the cross-examination of Mrs. Mahajan. Mrs. Mahajan's evidence shows that she has disclosed what technology she has applied for obtaining DNA from both; the aborted fetus and blood sample of the appellant. The technology applied by the Assistant Chemical Analyser is not at all challenged to show that she has committed any fault.

22. Dr. Rathod (PW9) states on oath that appellant was brought in Government Medical College and Hospital on 16.05.2016 for the purpose of DNA sample along with requisition letter and DNA kit. Her evidence would show that she took out sample of the appellant and poured in DNA container and then it was sealed by her by taking seal of Chief Medical officer (CMO). Thereafter, she filled up identification form for taking blood sample of DNA of accused, which ultimately reached to the office of CA. Evidence of Dr. Rathod (PW9) shows that a proper procedure was applied by her for obtaining the blood sample.

23. By now, in view the law laid down by the Hon'ble Apex Court in Mukesh & Anr. vs. State For NCT Of Delhi & Ors; reported in 2017 (6) SCC 1, the DNA report or scientific method to determine the paternity or sexual assault is firmly established. The only challenge for it can be set up that there occurred tampering with the blood sample of the accused at any stage. If something is on record to show that there was a possibility of tampering of the blood sample of the accused then only there could be some room for suspicion about DNA report. But, it will have to be judged from the facts of each case.

In the present case, neither before the Court below nor before this Court it was the submission on behalf of the appellant that at any point of time or at any stage, there was tampering with the blood sample of the appellant.

In that view of the matter, the DNA report, Exh.-36 has to be accepted.

24. Since, the prosecution has established that the victim was "Child" and paternity of the aborted fetus is of the appellant and it is duly proved by scientific method, on reappraisal of the entire prosecution case, I do not find any merit in the appeal. Consequently, I pass the following order.

ORDER

(i) The appeal is dismissed.