



Judgment

358 apeal155.23

1

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

CRIMINAL APPEAL NO.155 OF 2023

Rupchand s/o Dilip Shende,
aged about 28 years, occupation:
labour, r/o Kasturba Gandhi Ward,
Bhandara, tahsil and district Bhandara. **Appellant.**

:: V E R S U S ::

1. State of Maharashtra,
through Police Station Officer,
Police Station Bhandara, tahsil
and district Bhandara.

2. XYZ (victim in Crime No.344/2019
registered by PSO Bhandara). **Respondents.**

Shri VB.Gawali, Counsel for the Appellant.

Shri M.J.Khan, Addition Public Prosecutor for Respondent
No.1/State.

Ms.Mohini Sharma, Counsel Appointed for Respondent
No.2/Victim.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 27/01/2025

PRONOUNCED ON : 21/02/2025

JUDGMENT

2

1. The appellant (accused) has preferred this appeal against judgment and order dated 19.9.2022 passed by learned Special Judge (under POCSO Act), Bhandara (learned Judge of the trial court) in Special Criminal Case No.40/2019.

2. By the said judgment impugned, learned Judge of the trial court convicted the accused under Section 376(2)(h) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and to pay fine Rs.2000/-, in default, to undergo rigorous imprisonment for two months.

The accused is further convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) and sentenced to undergo rigorous imprisonment for ten years and to pay fine

3

Rs.2000/-, in default, to undergo rigorous imprisonment for two months.

3. Brief facts of the prosecution case, emerged from police papers and recorded evidence, are as under:

On 11.5.2019, the victim girl, aged about 16 years lodged a report at Bhandara Police Station alleging that in the year 2016, she left school and was working in “Komal Fruit Centre” owned by one Komal Desai. Her duty hours were 7:00 am to 12:00 am and 2:00 pm to 7:00 pm. The accused was also running fruit shop and used to visit “Komal Fruit Centre” for purchasing stock. Therefore, she got acquaintance with him. In June 2017, he asked for her mobile number, but she has not shared her mobile number. On his repeated asking, she shared her mobile number and he started calling her. This fact came to notice of her mother and, therefore, her mother

4

took her mobile phone. On 7.10.2018, at about 12:00 in the mid night, she along with other girls was returning home. At the relevant time, she was restrained by the accused and forcefully asked her for sexual favour. He forcefully took her along with him and on her resistance, he told her that he will perform marriage with her. On the promise of marriage, he took her along with him in one house and subjected her for forceful sexual assault. Thereafter, on multiple occasions, she was subjected for sexual assault by the accused.

4. Due to multiple sexual assaults, she has not received her menses and, therefore, she approached the accused and disclosed her apprehension, but the accused has not paid any heed towards it and subjected her for forceful sexual assault. Thereafter, he provided her some pills. Though she consumed said pills, she revealed to be pregnant. Thereafter, she insisted the accused to perform

5

marriage with her, but he denied to perform the marriage. Thus, she alleged that by giving a false promise of marriage, he subjected her for sexual assault and thereby committed an offence. On the basis of the said report, the police have registered the crime against the accused.

5. After registration of the crime, wheels of investigation started rotating. During investigation, the victim was sent for medical examination. During her medical examination, it revealed that she is pregnant of five months. The medical officer referred her for Sonography. The Sonography report is also obtained. She has shown spot of the incident. Accordingly, spot panchanamas are drawn. The birth certificate of the victim is obtained to ascertain her age. Her blood samples as well as blood samples of the accused are collected for DNA Examination. Subsequently, she

6

delivered a baby child. The blood samples of the said newly born child are also obtained. All the samples are forwarded for DNA Examination. On analysis of the DNA Samples, it revealed that she and the accused are biological parents of the child delivered by the victim. After completion of the investigation, chargesheet is submitted against the accused.

6. Learned Judge of the trial court framed charge vide Exh.11. In support of the charge, the prosecution examined as many as 19 witnesses, as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	The victim	19
2	Mother of the victim	35
3	Chanda Devidas Nanhe, pancha on spot panchanama	41
4	Dr.Sarla Agrawal	55
5	Dr.Nisha Bhawsar	63
6	Dr.Avinash Gomkale	66
7	Dr.Durgesh Pashine, Medical Officer	70

7

8	Pankaj Yeole, Medical Officer	74
9	Minali Biswas, LPC	81
10	Maroti Ghuge, Police Constable	97
11	Krushna Katkade, Police Constable	106
12	Ashwini Chavhan, Deputy Chief Executive Officer	116
13	Dr.Jyoti Mukhi	122
14	Dr.Muneshwar Bhongade, Medical Officer	124
15	Ajay Kukade, Police Costable	127
16	Hiralal Landage, Police Constable	134
17	Karuna Atram, Investigating Officer	143
18	Megha Gokhare, Investigating Officer	147
19	Dr.Ashish Chindhalore, Medical Officer	174

7. Besides the oral evidence, the prosecution placed reliance on report DNA Report Exh.6, oral report Exh.20, FIR Exh.21, statement of the victim by CWC Exh.28, identification form of the victim for DNA Exh.32, medical case record Exh.36, spot panchanamas Exhs.43 to 45, electricity bill Exh.46, seizure panchanamas Exhs.47, 52

8

to 54, medical certificate Exh.48, extract of the register recording the name of the patients Exh.56, requisition letter Exh.64, medical certificate Exh.65, requisition letter Exh.67, requisition letter Exh.71, medical certificate Exh.72, requisition letter Exh.75, identification form of the accused for DNA Exh.76, requisition letter Exh.77, identification form of the victim for DNA Exh.78, general diary entries Exhs.83 to 88, duty pass Exhs.89 to 91, general diary entries Exhs.92 to 94, duty pass Exh.98, general diary entries Exhs.99, 100, 107 to 109 and 111, duty pass Exh.112, letter to the CA Exh.114, letter to the Chief Officer, Nagar Parishad Exh.116, birth certificate Exh.118, extract of birth register Exh.119, requisition letter Exh.125, identification form Exh.126, duty pass Exh.128, requisition for DNA kit Exh.129, general diary entries Exhs.131 to 132 and 135 to 137, requisition to the CA Exh.138, duty pass Exh.140, general diary entry

Exh.142, requisition to the Medical Officer Exh.146, arrest panchanama Exh.149, general diary entries Exhs.152 to 155, duty pass Exh.156, general diary entries Exhs.157 and 158, requisition to the CA Exh.159, requisition to the Medical Officer Exh.160, Sonography Report Exh.175/1.

8. The accused has also examined three defence witnesses namely DW1 accused himself vide Exh.181, DW2 Dilip Shende vide Exh.183, and DW3 Subhash Barse vide Exh.189. Besides the oral evidence, he placed reliance on application under Right to Information Act Exh.184, list of Corporators Exh.186, station diary entry Exh.193.

9. All the incriminating evidence is put to the accused. The defence of the accused is of total denial and of false implication. It is the specific defence of the

10

accused that the victim has one sided love affair and insisted for physical relationship.

10. Heard learned counsel Shri V.B.Gawali for the accused, learned Additional Public Prosecutor Shri M.J.Khan for the State, and learned counsel Ms.Mohini Sharma for the victim.

11. Learned counsel for the accused submitted that though the victim has stated that she is below 18 years of age, her age is not proved by the prosecution. The entire evidence of the victim sufficiently shows that it was the victim who had one sided love affair with the accused and out of that physical relationship was developed between them. Thus, it is consensual act and physical relationship on insistence of the victim. He further submitted that mere breach of promise to perform the marriage, is not sufficient to attract offences under

11

Sections 376(2)(h) of the Indian Penal Code and 6 of the POCSO Act. It is further submitted that the evidence of the victim is suffering from various infirmities and the same cannot be acted upon as it does not inspire confidence. Learned Judge of the trial court had not considered that under what circumstances the physical relationship was developed between the victim and the accused. Though the DNA Report discloses involvement of the accused, his blood samples were never obtained. For all above these grounds, as the prosecution failed to establish the case against the accused, the appeal be allowed.

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

- 1. Attorney General for India vs. Satish & anr, reported in 2021 ALL MR (Cri) 4694 (S.C.);**

12

2. Ashik Ramjan Ansari vs. The State of Maharashtra and anr, reported in 2023 ALL MR (Cri) 2669, and

3. Dilip s/o Bhaiyyasingh Tekam vs. State of Maharashtra, reported in 2018 ALL MR (Cri) 5092.

13. *Per contra*, learned Additional Public Prosecutor for the State strongly opposed the appeal and submitted that not only the evidence of the victim but also the entire chain of the circumstances is established by the prosecution. As far as the consent of the victim is concerned, the same was obtained under misconception of fact. It is not only a case of breach of promise but also, under the misconception of fact that the accused would perform marriage with her, consent was obtained. Since inception, the intention of the accused was to defraud her. Thus, the prosecution has established the offence against the accused. The evidence of the victim is neither shattered during the cross examination nor the defence

13

has succeeded in proving that she is more than eighteen years of age. The consent of the victim is not relevant as she was below eighteen years of age at the time of the incident. For all above these grounds, the conviction imposed by learned Judge of the trial court is proper and no interference is called for in the judgment impugned in the appeal.

14. Learned counsel for the victim reiterated the said contentions made by learned Additional Public Prosecutor for the State and placed reliance on the decision of the Hon'ble Apex Court in the case of **Naim Ahmed vs. State (NCT of Delhi)**, reported in (2023)15 SCC 385.

15. The accused is facing charge for the offences under Sections 376(2)(h) of the Indian Penal Code and 6 of the POCSO Act. As per the allegations of the victim, the

14

accused under the misconception of fact that he would marry with her subjected her for sexual assault which resulted into her pregnancy and she delivered a baby child. To substantiate the allegation, the victim stepped into the witness box vide Exh .19 and testified about the incident. As per the evidence of the victim, she was below eighteen years of age at the time of the incident. She narrated in detail regarding occurrence of the incident. The sum and substance of the evidence is that the first incident of sexual assault took place on 7.10.2018 when she was returning the home. The accused took her and demanded from her sexual favour. Though she was resisting the act, he forcefully detained her and subjected her for the sexual assault. On her refusal, he promised her for marriage. Thereafter, on multiple occasions, she was subjected for sexual assault. Resultantly, she was pregnant and on disclosing by her to

15

the accused, he gave her some pills, but the pills were not effective and she was constrained to carry pregnancy and deliver a baby child. As per her the evidence, her birth date is 6.10.2003 and she studied upto 9th Std at “Nisha Vidyalaya, Bhandara”. As per her evidence, she delivered a baby child on 21.8.2019.

16. The investigation officer collected blood samples of the victim as well as blood samples of the newly born child for DNA purpose.

17. To corroborate the version of the victim, the prosecution has also examined PW2 the mother of the victim. She also corroborated the story narrated by the victim. As per her evidence, she noted that her daughter is talking continuously on her mobile phone and, therefore, she withdrew the mobile phone. Subsequently, it revealed to her that she is pregnant and, therefore, she

16

inquired with her. She took the victim to PW4 Dr.Sarla Agrawal. Said Dr.Sarla Agrawal disclosed that she is pregnant of 5 and 1/2 months. On inquiring with the victim, she disclosed the name of the accused. Thereafter, the report was lodged. The mother has also disclosed the date of birth as 6.10.2003.

18. Both these witnesses the victim and PW2 the mother of the victim are cross examined by the defence counsel. The defence of the accused was that the victim had one sided love affair with him and, therefore, physical relationship was developed between them. During her cross examination, some minor omissions and contradictions, which are not affecting the core of the prosecution, are brought on record. During her cross examination also, it is brought on record that the accused had not taken her to his house for subjecting her for the forceful sexual assault. However, she has denied that no

17

such incident has taken place. It is specifically brought on record that she was of understanding age to understand the word “Sex”. The tenure of entire cross examination was that as she was having one sided love affair and she wanted to marry with the accused and the accused refused to marry with her, she lodged the report. As far as her desire to marry with the accused is concerned, she admitted the same, but in a subsequent cross examination she specifically stated that now she does not want to marry with the accused as she was forced to suffer by the accused by promising her for marriage.

19. The cross examination of the mother of the victim also shows that the accused has refused to marry and, therefore, the report is lodged.

18

20. To prove the age of the victim, besides the oral evidence of the victim, the prosecution placed reliance on the evidence of PW12 Deputy Chief Executive Officer Ashwini Chavhan examined vide Exh.115. The victim has stated her birth as 6.10.2003. The mother of the victim has also reiterated the same. As far as the cross examination of the victim on the point of age is concerned, except denial, nothing is brought on record. She also denied that she has no document to show her birth date. As far as PW2 the mother of the victim, on the point of age is concerned, she stated that the victim was born at home at Bhandara and her birth date is registered. Though the mother is cross examined, nothing is brought on record to falsify her version as to the date of birth. She specifically stated that after eight days of birth of the victim, she had registered her date of birth. The further cross examination shows that she

denied that the birth dates of her other children are not registered.

21. Now, coming to the evidence of PW12 Deputy Chief Executive Officer Ashwini Chavhan, she stated on oath that she holds the charge of Sub Register (Births and Deaths Register). The birth date of the victim is registered in the record of Chief Officer Nagar Parishad, Bhandara and as per the record, the birth date of the victim was recorded as 6.10.2003 and registration date is 30.12.2003 i.e. after two months of her birth.

PW12 Deputy Chief Executive Officer Ashwini Chavhan is cross examined at length and it is brought on record that parents are required to give information to Nagar Parishad. The information of birth of the victim is given by Brijmonah Katakwar who was Nagar Sewak at the relevant time. The said birth certificate is at Exh.118.

20

22. Thus, the entry of birth of the victim is taken in the birth register by the public authority which is admissible in evidence under Section 35 of the Indian Evidence Act.

23. Thus, the prosecution has placed on record the birth certificate which is at Exh.118 issued by the Sub Registrar, Nagar Parishad, Bhandara under the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 and Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules. The said birth certificate shows the date of birth of the victim as 6.10.2003 and it was registered on 30.12.2003 that is after two months of the birth of the victim. The names of the parents are mentioned in the said birth certificate issued by the Sub Registrar. It is argued that the said birth certificate is not the valid document as it nowhere mentions who has given the information about the date of birth to the Nagar Parishad at Bhandara and, therefore,

21

the said evidence is not sufficient to prove the age of the victim.

24. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the

22

Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act.

25. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, in fact, the extract of Birth Register in respect of entry of birth of

23

the victim child and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by

24

law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The birth certificate is a public document and primary evidence which can be proved by production in view of Section 77 of the Indian Evidence Act.

26. The Hon'ble Apex Court, in the case of **Mahadeo vs. State of Maharashtra and anr, reported in (2013)14 SCC 637**, held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is applicable in determining the age of the victim of rape. Said Rule 12(3) reads as under:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

25

(a) i. the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. the matriculation or equivalent certificates, if available;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

27. In case, exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of the one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as

26

the case may be, record a finding in respect of his age and either of the evidence specified, in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict the law.

28. Thus, the evidence, in the present case, of the victim and her mother states that the date of birth of the victim is 6.10.2003 which remained unchallenged and is corroborated by the evidence of PW12 Deputy Chief Executive Officer Ashwini Chavhan.

29. Thus, the prosecution succeeded in proving that the victim was below eighteen years of age i.e. sixteen years at the time of the incident.

30. The aspect of the sexual assault on the victim, as per the prosecution, is corroborated by the evidence of PW4 Dr.Sarla Agrawal, PW5 Dr.Nisha Bhawsar, PW6

27

Dr.Avinash Gomkale, PW8 Medical Officer Pankaj Yeole,
PW19 Dr.Ashish Chindhalore.

31. PW4 Dr.Sarla Agrawal, examined the victim initially. Her evidence is to the extent that on 7.5.2019 the victim along with her mother came to her. The entry of the name of the victim is taken in the register maintained in the hospital. The victim was sixteen years old and came with a complaint that she missed her menstruation period. From appearance, the size of her belly was enlarged and, therefore she suspected pregnancy. She also referred her for sonography and asked her to approach PW6 Dr.Avinash Gomkale. After receipt of the report from PW6 Dr.Avinash Gomkale, the victim again came to her and it revealed to her that the victim is carrying 22-23 weeks pregnancy. As the victim was sixteen years old and carrying 22 weeks pregnancy, she suggested her to approach the police. The extract of

28

the register wherein the names of the patients are entered is at Exh.56. Reference slip is at Exh.57 and report is at Exh.58. During cross examination, she stated that she disclosed the police that she suspected that the victim is carrying the pregnancy. She further clarified that on examination of the victim, her first diagnosis was pregnancy and the victim was not knowing to her menstrual period and, therefore, to ascertain the exact age of the pregnancy, she referred her to PW6 Dr.Avinash Gomkale.

32. PW6 Dr.Avinash Gomkale, examined vide Exh.66, stated that the victim was referred to him by PW4 Dr.Sarla Agrawal. After obtaining the consent, he carried out sonography examination from which it revealed that there is 22-23 weeks pregnancy. Accordingly, he gave a report.

29

Though the said witness is cross examined, nothing fruitful transpired from his cross examination.

33. PW5 Dr.Nisha Bhawsar, who was serving as Gynaecologist in the Government Hospital at Bhandara, received a letter from Bhandara Police Station as to referring the victim. On examination of the victim, it revealed to her that her menstrual cycle was 16.11.2018 and she was found 24 weeks pregnancy. Accordingly, she advised sonography. The medical certificate issued by her is at Exh.65.

34. PW19 Medical Officer Dr.Ashish Chindhalore, who has carried out the sonography of the victim, also stated that on 13.5.2019 he was attached to the Bhandara Civil Hospital. Dr.Bhavsar, had referred to him the victim for sonography. On sonography, it was found that the victim

30

had 24 weeks pregnancy, as per the clinical report. Accordingly, he submitted report Exh.175.

35. The evidence of PW5 Dr.Nisha Bhawsar shows that the victim has narrated the incident of sexual assault in October 2018.

36. Though these witnesses are cross examined, nothing incriminating is brought on record.

37. PW8 Dr.Pankaj Ganraj Yeole, examined vide Exh.74, deposed that the victim was brought to his hospital on 14.5.2019 for obtaining the blood samples. Accordingly, he collected her identification form and DNA kit brought by the police constable and collected her blood samples in DNA kit and handed over the said DNA kit to the police constable who brought her.

38. PW13 Dr.Jyoti Mukhi, is examined vide Exh.122. As per her evidence, the victim was brought to her

31

hospital on 19.8.2019 as she had labor pains. On 21.8.2019, the victim delivered a female child under her observation. The cross examination of this witness shows that the date of conception probably was after 16.11.2018. She further admitted that conception usually occurs after 14 days of last menstrual period.

39. PW14 Dr.Muneshwar Bhongade, Medical Officer, examined vide Exh.124, stated that he was attached to the Civil Hospital at Bhandara. He received a requisition for obtaining blood samples of a baby delivered by the victim for DNA Testing. The DNA kit was handed over to him along with identification form of the baby. Accordingly, he collected blood samples of that baby and handed over the DNA kit to the police constable, which is marked at Exh.126.

32

40. The accused is examined by PW7 Medical Officer Dr.Durgesh Pashine, who testified that on 12.5.2019 the accused was brought to him. He examined the accused and issued certificate contending that there was no injury on his person. The accused was physically potent to undergo sexual intercourse.

41. PW8 Dr.Pankaj Ganraj Yeole, has also obtained the blood samples for DNA of the accused on 14.5.2019 and DNA kit was handed over to the constable who brought the accused for obtaining the DNA Samples.

42. Thus, the consistent evidence of the Medical Officers shows that the victim was pregnant when she was examined initially by PW4 Dr.Sarla Agrawal and PW13 Dr.Jyoti Mukhi performed her delivery on 21.8.2019. PW8 Medical Officer Pankaj Yeole has obtained the blood samples of the victim as well as the

33

accused in DNA kits and PW14 Dr.Muneshwar Bhongade collected the blood sample of the newly born child.

43. Exh.76 is the identification form of the accused. Exh.78 is the identification form of the victim and Exh.126 is the identification form of newly born child.

44. The set of evidence adduced by the prosecution of PW9 Police Constable Minali Biswas, whose evidence is to the extent that PSI Gokhare issued her duty pass and directed her to take the victim for medical examination. Accordingly, she went to the Government Hospital along with the victim, but the victim was examined on 12.5.2019 as the lady Medical Officer was not available on 12.5.2019. On 12.5.2019, the victim was examined and referred for sonogrpahy. On 13.5.2019, the sonography was conducted. Accordingly, entries were taken in station diary. The relevant entries in the station

34

diary are at Exhs.83 to 88. Duty pass is Exh.89. Her return report is Exh.90.

Her further evidence shows that she was again given duty to collect samples of the victim for DNA Test. Duty pass is at Exh.91. Station diary is at Exh.92. She took the victim along with the DNA kit and handed over the kit and identification form of the victim to the Medical Officer who obtained the blood samples and handed over the DNA kit and identification form to her. The nature of her cross examination is only denial. The concerned station diary is at Exhs.92 and 93, and return report is at Exh.94.

45. PW10 Police Constable Maroti Ghuge, examined vide Exh.97, deposed that on 14.5.2019 he took the accused for obtaining the blood samples for DNA in civil hospital. His duty pass is at Exh.98, station diary entry is

35

at Exh.99. He handed over the DNA to the Medical Officer along with identification form. The sample were collected and handed over to him in a sealed condition. He returned to the police station and handed over the said samples to the Investigation Officer. During his cross examination, he admitted that if the accused is taken out from the lock-up or kept inside the lock-up, the entries are maintained in lock-up register. His duty pass is at Exh.98, return report Exh.101, concerned station diary entries are at Exhs.99 and 100.

46. PW11 Police Constable Krushna Katkade, was sent to the Nagpur Forensic Science Laboratory to collect the DNA kit. His duty pass is at Exh.107. He obtained two DNA kits. Again on 14.5.2019, he handed over the blood samples collected in DNA kits to Nagpur Forensic Science Laboratory. Accordingly, entry in station diary is taken. The DNA kits were in vaccination box in a sealed

36

condition. The cross examination shows that he was given duty pass when he had been to the Forensic Laboratory to collect the DNA kit. Station diary entries are Exhs.107 to 111, duty pass is at Exh.112, return report is at Exh.113, and letter to the Director of Forensic Science Laboratory Exh.114.

47. PW15 Ajay Kukade, is another Police Constable who has also collected DNA kit on 22.8.2109. His duty pass is at Exh.128. He was given the DNA kit and blank form by Forensic Science Laboratory. He handed over the same to the Investigating Officer. Return report is at Exh. 130, letter to the Forensic Science Laboratory is at Exh.129, station diary entries Exhs.131 and 132.

48. PW16 Police Constable Hiralal Landage, examined vide Exh.134, was assigned with the duty to carry DNA Samples. He was handed over the DNA Samples in a

37

DNA kit in Ice Box on 23.8.2019. The station diary entry is at Exh.135. He had been to the Forensic Science Laboratory to hand over the same, but the said Laboratory was closed on 24th and 25th and, therefore, he again went and handed over the same samples on 26.8.2019. The general diary entries are Exh.135 to 137. The letter to the Forensic Science Laboratory is at Exh.138, duty pass is at Exh.140, and the general diary entry is at Exh.142.

49. Thus, on the basis of the evidence of these witnesses, the prosecution claimed that the prosecution has established the chain that since collection of the blood samples in DNA kit, the same were in a sealed condition and there was no chance of tampering. It is further submitted that with the help of the Medical Officer's evidence, the prosecution established the

38

manner in which the samples were collected and those were in a sealed condition.

50. PW17 Karuna Atram and PW18 Megha Gokhare, the Investigating Officers, testified about the investigation carried out by them.

51. The defence of the accused is of total denial and false implication as well as one sided love affair by the victim. To substantiate the same, the accused examined himself vide Exh.181 who testified that the victim had one sided love affair with him and she was desiring to marry with him. His cross examination shows that the victim has disclosed to him her desire to marry with him. He also admitted that he never complained anybody that his DNA Samples were never collected.

52. DW2 Dilip Shende, the father of the accused, testified that birth of the accused is 15.1.1993. He

39

admitted during cross examination that he had not filed any document to show that the victim is four years younger to the accused. The document collected by him under the Right to Information Act is list of the Corporators in Parishad Bhandara, which are at Exh.186. Exh.187 is the disability certificate of the father of the accused.

53. DW3 is Subhash Barse Barse, whose evidence is to the extent that the original record was brought from the period 11.5.2019 to 30.5.2019. His evidence further shows that there is an entry in respect of obtaining the vaccine box to carry DNA kit.

54. Thus, on the basis of the evidence of these defence witnesses, the accused attempted to bring on record that there was one sided love affair by the victim and as he

40

has not performed the marriage with the victim, she falsely implicated him in the alleged offence.

55. The DNA Reports Exhs.6 and 7 show that the samples were received on 14.5.2019 and 26.8.2019. The DNA extracted from the blood sample of the baby of victim and blood sample of the victim and the accused in DNAn-421/2019 was typed as 15 STR LOCI and gender specific Amelogenin locus using PCR amplification technique. The samples are interpreted as follows:

1. for all the 15 different genetic systems analyzed with pcr, putative father Rupchand Dilip Shende in DNAn/421/2019 matched obligate paternal alleles present in baby of the victim at all 15 STR Loci,
2. Similarly, for all the 15 different genetic systems analyzed with PCR, the victim (name of the victim is mentioned in report) in DNAn/421/2019 matched the obligate the maternal alleles present baby of the victim at all 15 STR LOCI.

41

It was opined that the victim in DNAn/421/2019 and Rupchand Dilip Shende in DNAn/421/2019 are concluded to be the biological parents of baby of the victim.

56. Thus, the victim and the accused were analyzed to be the biological father and mother of the child delivered by the victim.

57. The undisputed facts of the case are as under:

1. The victim was sixteen years of age at the time of the incident.
2. She has acquaintance with the accused as the accused used to visit fruit shop whereat she was working. There was communication between them.
3. On 7.10.2018, the accused took her and subjected her for sexual assault on the promise of marriage.
4. The physical relationship between the parties was developed as there was a promise of marriage by the accused which resulted into her pregnancy.

42

58. On appreciation of the evidence, it reveals that a sixteen year girl was subjected for the sexual assault by the accused by promising her for marriage. She has narrated the entire incident regarding the sexual assaults on multiple occasions. She also alleged that on her resistance, the accused promised her for marriage and, thereafter, the physical relationship was developed between them. On disclosure by her about her pregnancy, he declined to perform marriage with her. The defence of the accused is that she was having one sided love affair with him. As far as the forceful sexual assault is concerned, it is denied by him.

59. There is no dispute as to the fact that the victim has delivered a baby girl and the DNA Report discloses that the victim and the accused are biological parents of the baby girl delivered by the victim. She admitted that she wanted to marry with the accused and as he refused

43

to marry with her, she lodged the report. The cross examination of the victim shows that she has not stated in her statement that the accused has promised her for marriage. Though she has admitted that she has not stated the same, recital of the FIR itself shows that at the time of first incident i.e. on 7.10.2018, when she was resisting the act of the accused, as he was insisting her for the physical relationship, the accused promised her for marriage, which is stated by her. The evidence of the mother of the victim also shows that when the victim's belly was found increased, she was taken to the hospital and it revealed that she is pregnant. On enquiry with her, she has disclosed about the act of the accused.

60. The evidence of the victim as to the sexual assault on her is corroborated by the medical evidence. The evidence of PW4 Dr.Sarla Agrawal, PW5 Dr.Nisha Bhawsar, PW6 Dr.Avinash Gomkale, and PW13 Dr.Jyoti

44

Mukhi consistently shows that when the victim was examined, she was pregnant of 22-23 weeks. Her pregnancy was also confirmed by the sonography report. The sonography was conducted by PW6 Dr.Avinash Gomkale as well as by PW19 Dr.Ashish Chindhalore. The history narrated by her before PW5 Dr.Nisha Bhawsar also shows that she was subjected for sexual assault by the accused. The aspect of obtaining the blood samples is also established from the evidence of PW8 Medical Officer Pankaj Yeole, who has obtained the blood sample of the victim as well as the accused. PW14 Dr.Muneshwar Bhongade collected the blood sample of the child delivered by the victim. The chain of the circumstance, that the victim was taken to the hospital by PW9 Police Constable Minali Biswas for medical examination and sonography, is supported by the

45

evidence of the said witness and also corroborated by the relevant entries.

61. The DNA kits are obtained from the Forensic Science Laboratory. PW11 Police Constable Krushna Katkade has brought the said DNA Kits on 13.5.2019 which were two in numbers. The station diary is at Exh.107. PW10 Police Constable Maroti Ghuge took the accused for obtaining the blood samples on 14.5.2019. Accordingly his blood samples were collected by PW8 Dr.Pankaj Yeole on 14.5.2019. The said samples were collected in DNA Kit. PW10 Police Constable Maroti Ghuge has handed over the samples and DNA Kits to the Investigating Officer on 14.5.2019. PW9 Police Constable Minali Biswas, has taken the victim for obtaining her blood samples on 14.5.2019. She has handed over the DNA Kit to PW8 Dr.Pankaj Yeole for obtaining the blood samples. After blood samples were obtained, she

46

collected the said DNA Kit and handed over the same to the Investigating Officer.

62. PW11 Police Constable Krushna Katkade, was again deputed on 14.5.2019 to hand over the samples to the Forensic Science Laboratory at Nagpur. Accordingly, station diary entry No.109 is taken which is placed on record. He has deposited the said samples in the Forensic Science Laboratory on 15.5.2019.

63. The evidence of PW13 Dr.Jyoti Mukhi shows that the victim has delivered a baby child on 21.8.2019.

64. PW15 Police Constable Ajay Kukade, was deputed on 22.8.2019 to bring the DNA Kit from Forensic Science Laboratory at Nagpur. His duty pass is at Exh.128. He brought the DNA Kit and blank form of identification and handed over the same to the Investigation Officer.

47

65. PW14 Dr.Muneshwar Bhongade , obtained the blood sample of newly born child of the victim on 23.8.2019. The samples were received in the Forensic Science Laboratory on 15.5.2019 and on 26.8.2019. The same were analyzed during 19.3.2019 to 11.9.2019. The Samples Examination Report shows that the samples were received along with the seals intact.

66. Thus, the entire evidence on record shows that since obtaining the samples, till the samples are forwarded, the samples were in a sealed condition and there is no case of tampering of the seals.

67. The DNA Report shows that the accused and the victim are the biological parents of the child delivered by the victim.

68. The DNA evidence is now a predominant forensic technique for identifying criminals when biological

48

tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results. The DNA is the genetic blue print for life and is virtually contained in every cell. The DNA testing can make a virtually positive identification when two samples are matched. Thus, the DNA Report is helpful to inculcate as well exculpate the accused.

69. Here, in the present case, the prosecution has established the chain of sampling and collection etc.. Though the accused has taken a defence that his samples were never obtained, the evidence of the Medical Officer and the police officials sufficiently establishes the fact that the accused was taken for obtaining the samples. The samples were obtained and forwarded for the

49

analysis. On analyzing the same, he found to be biological father of the child delivered by the victim.

70. Now, only question remains is, whether the consent of the victim can be taken into consideration.

71. Admittedly, the victim was below eighteen years of age at the time of the incident. It is not a case of love affair between the victim and the accused. The prosecution has come with a specific case that the victim was promised for marriage and on the promise of marriage her consent was obtained and she was subjected for sexual assault.

72. Section 375 of the Indian Penal Code, defines the offence of “rape” and enumerates six descriptions of the offence.

50

The first clause states, where the woman is in possession of her senses and, therefore, capable of consenting, but the act is done against her will.

The second clause states, where it is done without her consent and third, fourth and fifth clauses operate when there is a consent, but it is not such a consent as excuses the offender, because it is obtained by putting her in fear of death or any hurt.

The expression “against her will” means that the act must have been done in spite of the opposition of the woman.

73. Section 90 of the Indian Penal Code defines “consent”, which is reproduced hereinunder:

“90. Consent known to be given under fear or misconception. - A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a

51

misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.— if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.— unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

74. Thus, Section 90 of the Indian Penal Code though does not define the term 'consent', but, in negative terms it describes what does not amount to consent. The “consent” may be express or implied, must be actuated, obtained through deceit or fraud. If the consent is given by the victim under misconception of fact, it vitiates. The consent for the purpose of Section 375 of the Indian Penal Code, requires voluntary participation not only

after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.

75. Whether there was consent or consent was obtained under misconception of fact?

76. The Hon'ble Apex Court, in the of **Uday vs. State of Karnataka (2003)4 SCC 46**, has considered a wherein the victim aged about 19 years old had given a consent for physical relationship with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. She was subjected for the sexual intercourse which resulted into her pregnancy. The complaint was lodged on failure of the accused to marry

53

her. It was held that the consent cannot be said to be given under the misconception of fact. It was held in paragraph Nos.21 and 23 as under:

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on

54

the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the

consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

77. The Hon’ble Apex Court, in the case of **Deelip Singh vs. State of Bihar**, reported in (2205)1 SCC 88 framed two questions relating to consent:-

(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in? and

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?

While answering these questions, the Hon'ble Apex Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law.

78. The Hon'ble Apex Court, in the case of **Deepak Gulati vs. State of Haryana**, reported in (2013)7 SCC 675, has drawn distinction between "rape" and "consensual sex" and held that the physical relationship between the parties had clearly developed with the

consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the accused for several days, and had travelled with him from one place to another.

79. The Hon'ble Apex Court, in the case of **Shivashankar vs. State of Karnataka**, reported in **(2019)18 SCC 204** held that it is difficult to hold sexual intercourse in the course of a relationship which has continued for eight years is 'rape'.

In **Dr.Dhruvaram Murlidhar vs. The State of Maharashtra and ors**, reported in **(2019)18 SCC 191**, the Hon'ble Apex by referring the above decision held that, "thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually

58

wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear

case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence of “rape.”

80. In the case of **Pramod Suryabhan Pawar vs. The State of Maharashtra**, reported in (2019)9 SCC 608 also the Hon’ble Apex Court held that, “where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where

60

such misconception was the basis for her choosing to engage in the said act.”

81. In the instant case, it is an admitted position that there was no love affair between the accused and the victim. They are having acquaintance as the accused used to visit the fruit shop wherein the victim was working. It is also not the case of the accused that the victim was having any love and affection for him. Though he stated that she has having one sided love affair and though his engagement with the victim to have physical relationship and the defence taken by him that the victim is having one sided love affair, the same itself is sufficient to show his intention. It appears that the intention of the accused, as per the testimony of PW1 victim, right from the beginning was not honest and he kept promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused

61

cannot be said to be consent because she was under misconception of fact that the accused intends to marry her and, therefore, she had submitted to sexual intercourse with him. This fact is apparent from the DNA Report. It is more than clear, that the accused made a false promise that he would marry her, from the fact that no circumstances are brought on record by the accused to show that at the relevant time he was intending to marry her, but the circumstances are such that he could not perform the marriage with her. The contention of the accused, that she was having one sided love affair and his engagement with the victim by promising her for marriage, appears to be not *bona fide* since beginning. The accused completely misled her by promising her for marriage. This kind of consent taken by the accused with clear intention not to fulfill the promise and persuaded a girl to believe that he is going to marry and obtained her

62

consent for the sexual intercourse under total misconception cannot be treated to be a consent. Where promise to marry is false and intention of maker at the time of making promise itself was not to abide by it but to deceive a girl to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates girl's "consent". It is not merely a case of breach of promise but it is a case only to seduce the false promise was made and the victim was subjected for sexual assault on misconception of fact. Moreover, the victim who was below sixteen years of age and her consent is not relevant as it is not consent at all.

82. Thus, it is evident that at the initial stage itself the accused had no intention to keep his promise to marry the victim. The accused has not brought on record a circumstance to show that he could not fulfill the promise due to unavoidable circumstances. In such circumstances,

63

the case of the prosecution, that her consent was obtained under misconception of facts, is established. Learned Judge of the trial court has appreciated the entire evidence and also held that presumption under Section 29 of the POCSO Act is attracted. The said presumption is not rebutted though foundational facts are proved. Section 30 of the POCSO Act speaks of presumption of culpable mental state and it shall be the defence of the accused to prove the fact that he had no mental state. The presumption is applicable as the prosecution has proved beyond reasonable doubt. The charges against the accused was of culpable mental state includes intention, motive, knowledge fact and belief.

83. In the light of the above evidence as discussed earlier, the prosecution succeeded in proving the charges against the accused. There are no grounds made out by the accused to interfere with the said findings.

64

84. In this view of the matter, the appeal being devoid of merits is liable to be dismissed and the same is **dismissed.**

Appeal stands **disposed of.**

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!