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

CRIMINAL APPEAL NO.306 OF 2016

Suresh s/o Devidas Malche
Age: 32 years, Occu.: Labour,
R/o. Bharvas, Tq. Amalner,
Dist. Jalgaon. **.. Appellant**

Versus

The State of Maharashtra
Through Police Station Marwad,
Tq. Amalner, Dist. Jalgaon. **.. Respondent**

...

Mr. S. K. Adkine, Advocate for appellant (Appointed Through Legal-aid).
Mr. A. V. Deshmukh, APP for the respondent - State.

...

CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.

DATE : MARCH 15, 2023.

JUDGMENT :- ***(Per Smt. Vibha Kankanwadi, J.)***

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Amalner, Dist. Jalgaon in Sessions Case No.25 of 2014 for the offences punishable under Section 376(2)(l) of Indian Penal Code on 08.09.2015. The appellant has been held guilty and directed to undergo imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for two years.

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2. The prosecution story is that the informant is the brother of the victim. Victim was aged 27, however, she is mentally retarded and was unable to speak properly. She was residing with informant, his wife and the other family members. The victim is unmarried. FIR came to be lodged by the informant on 10.05.2013 stating that he had gone to Kolhapur district to work on bricks kiln about eight months prior to the FIR and his wife and daughter were along with him. The victim as well as the younger brother were at their native place. The younger brother is an agriculture labour. About 8 days prior to 10.05.2013, Sarpanch of the village of the native place of the victim and informant gave telephone call to the informant and informed that the victim is pregnant of around 5 to 6 months and, therefore, he should return to the village. Therefore, four days prior to the FIR, informant came back to his village and lodged report against unknown person. It appears that, at that time, the offence was wrongly registered under Section 376(2)(i) and 376(2)(K) of the Indian Penal Code. The investigation has been carried out. The victim was got medically examined. Apart from the physical examination, it was the examination in respect of the mental condition of the victim also. It is then the prosecution story that in the supplementary statement recorded on 13.05.2013, the name of the accused came to be revealed and he came to be arrested on 12.12.2013. He was

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medically examined on 13.12.2013 and thereafter, the DNA samples, which were taken, were sent for analysis. In the meantime, statement of witnesses under Section 161 of the Code of Criminal Procedure were recorded. Panchanama of the spot was carried out and after completion of the investigation, charge-sheet was filed.

3. The prosecution has examined in all eight witnesses to bring home the guilt of the accused and after considering the evidence and hearing both sides, the learned Trial Judge has convicted the accused by holding him guilty. Hence, this appeal.

4. Heard learned Advocate Mr. S. K. Adkine for the appellant and learned APP Mr. A. V. Deshmukh for the respondent - State.

5. With the able assistance of learned Advocate for the appellant and learned APP, we have considered the record and proceedings. What is emerging is that P.W.1 is the brother of the victim, who had lodged the report Exhibit-16. The FIR was against unknown person and even in his examination-in-chief, P.W.1 has stated that when he had asked about the incident to the victim, she had not stated anything to him. That means there was no disclosure of the name of the accused by the victim to P.W.1. P.W.3 Mahendra Borse is the Sarpanch of the village, who resides in the lane where the victim resides along with her brother-in-law. P.W.3 Mahendra has stated

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that when he was in his house, a woman in the lane had given him message and called him to the house of informant and the said woman told Sarpanch that she is suspecting about the pregnancy of the victim and under such circumstance, he had given phone call to the informant. After the informant came to village, Sarpanch had taken informant and the victim to Rural Hospital, Amalner and got the victim medically examined. The medical officer told that victim is pregnant and referred her to Dhule for further treatment. He says that medical officer at Dhule had not got the victim admitted being the MLC Case, but advised them to go to Civil Hospital, Jalgaon. He then says that he had taken the victim to Civil Hospital, Jalgaon, where she was admitted. In categorical term, he also stated that he as well as the informant asked the victim about her pregnancy, but then victim was not in a position to speak. Therefore, his testimony is also not helpful to the prosecution to connect the accused to the crime. P.W.4 is the another brother of the informant and victim. He has deposed that he was residing with the victim when the informant had gone to other village for work. He suspected the victim to be pregnant on 01.05.2013 and called Sarpanch and then Sarpanch gave telephone call to the brother. He then says that accused is his brother-in-law. Though he resides at Bharvas, intermittently he used to come to their house and where he says that they had asked the

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victim and she told the name of the accused. Important point to be noted is that his testimony is very much vague and appears to be contrary to the testimony of his brother P.W.1. P.W.1 says that accused resides by the side of his house. He has not stated that accused is his brother-in-law or brother-in-law of P.W.4. In his cross-examination, P.W.1 has admitted that at the time of incident, accused was residing at his village Bharvas. If the accused is brother-in-law of only P.W.4, then he could be the brother of his wife, but then P.W.4 does not say that his wife was also residing with him. P.W.1 though states that the other two sisters were married, one of their sister is married to accused, is not the statement. So the exact relationship is not established by the prosecution. Further, it is to be noted that P.W.4, in his cross-examination, specifically stated that his sister had not told the name of the accused. In the background of these statements, the testimony of P.W.5 - victim is required to be considered. Though she was mentally retarded, it appears that the learned Trial Judge recorded her testimony. Rather it was the decision by the prosecution to examine the victim though she was mentally challenged. Section 118 of the Indian Evidence Act specifies who may testify. It is prescribed that 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

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answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Therefore, the said Section rather gives a discretion to the Court to consider whether a witness prevented from testifying himself or herself due to above-said in capacities. The explanation of Section 118 of the Evidence Act states that 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. Under such circumstance, even a lunatic/mentally challenged person can also testify, but it would be for the Court to consider the capacity of such witness. With this legal position, if we consider the testimony of P.W.5, it appears that even the oath was administered to the witness. Before administering oath, whether certain questions were put to the victim to testify, whether she is able to give rational answers is not reflected. A note has been taken that witness being mentally retarded, her brother, who can understand the language of the witness and, therefore, he was ordered to stand near the witness box to interpret her statement. We find that proper procedure has not been adopted by the learned Trial Court to record the testimony of P.W.5 - victim. Whether she had given answers by gestures or any other language, is not clarified. Further, P.W.1 - brother of the victim who was allowed to stand nearby the victim when victim's testimony

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was recorded, his own testimony as P.W.1 was recorded on 14.10.2014, whereas the victim's testimony was taken on 06.02.2015. In the note it is stated that he was given the job of an interpreter. If it is so, then again oath ought to have been administered to the interpreter before recording the testimony of the victim. With these procedural lacuna's, we try to consider what the victim has stated. She has stated that she has two brothers and two sisters. P.W.1 is the elder brother. The year prior to her deposition, P.W.1 was out of village. Male issue was begotten to her from guest (पाहुण्यापासून). Then it appears that five photographs were shown to witness and she was asked to identify the "Guest" out of those five photographs and then it is stated that she identified the guest in photograph No.3 and shown to the Court and that photograph is marked as Exhibit-26. Then she has stated that the accused present in the Court is the same guest. We failed to understand what kind of procedure was adopted. The Trial Court has no clarified, who were those other four persons, whose photographs were shown to the victim. When the accused was present before the Court, then why this task was undertaken by the learned Presiding Officer. It is then certain that in her examination-in-chief, she has not given the name of the accused, but she named him as 'guest' (पाहुणा). The learned APP who was conducting the matter before the Trial Court has not taken pains to ask the

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relationship of the accused and how accused could have been termed as 'guest' (पाहुणा). In cross-examination, it has been taken on record that she has two sisters. Both are married and the husband of sister is called as 'guest' (पाहुणा). Now, going back to testimony of P.W.1, at the cost of repetition, it can be said that P.W.1 has not disclosed that accused is the husband of sister. Further, the victim in her cross-examination has stated that the male issue she had begotten was not from the accused, who is present before the Court. That means, she is denying the said fact. Before we further analyse this fact, it is to be noted that in the testimony of P.W.1, it was not brought on record that the victim delivered a child and what happened to the child. It has rather come in the evidence of P.W.3 - the Sarpanch that victim had begotten a male child and after about 2 to 4 days of birth, the child expired. P.W.4, another brother of the victim is also silent on the point of delivery of the victim. Under such circumstance, what emerges is that the victim, in her examination-in-chief, has stated that the male issue begotten to her was from the accused and in the cross-examination, she is denying the said fact. The prosecution has left this anomaly and there was no clarification at all. As regards P.W.4 and P.W.5 are concerned, though they have stated something against the accused in the examination-in-chief, they have given a contrary answer, rather resiled from that statement in their cross-

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examination. Under such circumstance, the prosecution had the option of taking re-examination in the nature of cross, but that has not been resorted to. We can lay our hands to the decision in ***Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat, [AIR 1964 SC 1563],*** which throws light on this aspect. It has been observed that :-

> "Section 137 of the evidence Act gives only the three stages in the examination of witness viz., examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the questions when a party calling a witness when a party calling a witness can be permitted to put to him questions under Section 154 of the Indian Evidence Act that is governed by the provisions of Section 154 of the said Act which confers a discretionary power on the Court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 154 does not in terms, or by necessary implication, confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his

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> examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he states in the examination-in-chief. If his design is obvious, the Court can during the course of his re-examination permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. It cannot also be said that if a party calling a witness is permitted to put such questions to the witness after he has been examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the Court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The Court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief."

Therefore, when this course was available to the prosecution, it has not been resorted to. However, at this stage, we also put caution that while permitting so, the ratio laid down in ***Pandit Omkar Sapkale Vs. State of Maharashtra and another, [1997 ALL MR***

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(Cri.) 832] and ***Rabindra Kumar Dey Vs. State of Orissa, [AIR 1977 SC 170]*** should be borne in mind. Now, the fact remains is that whatever was stated by P.W.4 and P.W.5 in their examination-in-chief stands refuted in their cross-examination. Under such circumstance, they cannot be said to be believable and trustworthy.

6. It is to be noted that the prosecution has heavily relied on DNA report Exhibit-41 and the opinion that was given in respect of the DNA test of the samples taken of the victim, child and the accused; as per Exhibit-41, is that the accused and the victim are concluded to be the biological parents of the child. In the impugned judgment also, the learned Trial Judge has heavily relied on the DNA report. As regards the DNA report is concerned, in **Mukesh and another Vs. State (NCT of Delhi) and others, [(2017) 6 SCC 1]** the Hon'ble Supreme Court has elaborated the procedure to be adopted for selecting the samples as well as the precautions, which are required to be taken in conducting the DNA test. It has been considered that DNA is the abbreviation of Deoxyribo Nucleic Acid and it has been observed in paragraph Nos.221 to 228 by the Hon'ble Supreme Court, as to how the DNA can be encrypted. It is observed that 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,

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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. It has a double helix structure which can be compared with a twisted rope 'ladder'. Further, the provisions of Section 53-A sub-section (2) and 164-A sub-section (2) of the Code of Criminal Procedure were noted and, therefore, in this case also, it was expected from the prosecution to prove that the samples were taken properly and all the other necessary formalities have been adhered to. While considering the law on DNA test, we will have to take a note of the decision in ***Nandalal Wasudeo Badwaik Vs. Lata Nandlal Badwaik, [(2014) 2 SCC 576].*** In that case, the Court had directed DNA test and the DNA result showed that the appellant was not a biological father of the child. Section 112 of the Evidence Act, which raises a presumption, was also considered. Here, there is no question of Section 112 presumption of the Evidence Act, because onus cannot be shifted on the accused to prove non access, but then the importance was given to the scientific test. However, further decision that can be considered is ***Pattu Ranjan Vs. State of Tamil Nadu, [2019 (4) SCC 771],*** wherein it has been observed that :-

> "One cannot lose sight of the fact that DNA evidence is also in the nature of opinion evidence as

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> envisaged in Section 45 of the Indian Evidence Act. Undoubtedly, an expert giving evidence before the Court plays a crucial role, especially since the entire purpose and object of opinion evidence is to aid the Court in forming its opinion on questions concerning foreign law, science, art, etc., on which the Court might not have the technical expertise to form an opinion on its own. In criminal cases, such questions may pertain to aspects such as ballistics, fingerprint matching, handwriting comparison, and even DNA testing or superimposition techniques, as seen in the instant case."

7. Further, the Hon'ble Supreme Court in ***Manoj and others Vs. State of Madhya Pradesh, [(2023 (2) SCC 353)],*** highlighted the need to ensure quality testing and lesser possibility of tampering with the evidence. No doubt, the DNA testing and the report is based on a well developed science and it can lead of a concluded evidence, still it depends upon the extracting of samples, its preservation and ruling out the possibility of tampering. While considering DNA report from the series of the decisions, the legal position for DNA profiling report and its probative value are concerned, it is emerging that the prosecution is duty bound to prove all the steps which were taken by the investigating agency right from collecting the blood samples, preservation etc. We may rely on the decision of the Hon'ble Chattisgarh High Court in ***Kisan Lal @ Champa Yadav Vs. State of***

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Chattisgarh, *Criminal Appeal No.565 of 2022 decided on 22.02.2023,* wherein the account of many decisions on the legal aspect of DNA tests and DNA report has been considered. Further, we may also rely on the decision of the Hon'ble Gujarat High Court in ***Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Another, [2009 Cri.L.J. 2888],*** wherein it has been held that :-

> " Positive DNA report can be of great significance, where there is supporting evidence, depending of course on the strength and quality of that evidence, even if it is positive, it cannot conclusively fix the identity of the miscreant, but, if the report is negative, it would conclusively exonerate the accused from the involvement of charge. The science of DNA is at a developing stage and when the Random Occurrence Ratio is not available for Indian Society, it would be risky to act solely on a positive DNA report, because only if the DNA profile of the accused matches with the foetus, it cannot be considered as a conclusive proof of paternity. Contrarily, if it is solitary piece of evidence with negative result, it would conclusively exclude the possibility of involvement of the accused in the offence. The positive DNA report cannot be therefore accepted by the trial Court in isolation, i.e. as sole piece of evidence to record the conviction of accused under Sections 376, 366 of Indian Penal Code"

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8. Further, reliance can be placed on the decision of the Hon'ble Supreme Court in ***Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra, [(2005) 5 SCC 294],*** wherein it has been held that :-

> " DNA evidence may have a great significance where there is supporting evidence, dependent, of course, on the strength of that evidence.
>
> ....in every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a *prima facie* case."

9. After taking note of the legal position, we would turn to the evidence in the present matter. P.W.6 Dr. Prakash Kisan Tade, is the medical officer, who had taken the blood samples for DNA test of the accused on 13.12.2013. P.W.7 Dr. Hira Damale had examined the victim on 13.05.2013 and after examining her, she has stated that she had taken samples and she has given the certificate Exhibit-33. She has also issued medical certificate regarding mental condition of the victim on 18.05.2013, but then she says that it was after obtaining certificate from another Doctor, who is psychiatric specialist. That means, her role is limited to taking samples, however, if we consider her testimony along with the certificate Exhibit-33, it was restricted to the victim and at that time, it appears that the girl had not delivered the child. In fact, there is no evidence adduced by the

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prosecution, as to exactly when the girl delivered the child, for how many days the child was alive, when the samples of the child were taken and by whom. P.W.8 A.P.I. Pardeshi in his examination-in-chief has stated that the victim had delivered the child on 26.08.2013 and then he had issued the letter to the medical officer to take the samples of the child for DNA testing. The requisition is addressed to P.S.I. Marwad Police Station, Tq. Amalner and it says that the victim was admitted to Primary Health Center, Marwad for delivery, however, concerned Doctor, who extracted the samples of the child has not been examined by the prosecution for the reasons best known to it. Even the death certificate of the child is not collected and produced. Therefore, there is no material on record to show as to whether the said sample of the child were taken when he was alive or when he was dead. We may also refer to a decision in ***Kamalanantha and others Vs. State of Tamil Nadu, [(2005) 5 SCC 194],*** wherein there was a DNA test on dead foetus to establish a paternity, however, in that case, the expert was examined and Hon'ble Supreme Court approved the scientific position stating that even if there was contamination, it would make no difference where there are matching of bands. Here, it is not the case. Exhibit-41 has been exhibited in view of Section 293 of the Code of Criminal Procedure, however, the person who conducted the test has not been

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examined. The examination of the concerned officer from the forensic laboratory was must for the simple reason that in which condition the samples were received, was a question. If we consider Exhibit-41, it says that the forensic laboratory received two sealed plastic containers around 15.12.2013 and it says that the analysis started on 16.12.2013 and completed on 16.08.2014. That means it took for about eight months for the analysis only. When only two sealed plastic containers were received, but it is stated that there were samples of three persons, it further raises a doubt. Another thing to be considered is that samples of the victim were taken on 13.05.2013 by P.W.7 Dr. Hira, then it is around/after 26.08.2013, the samples of the child would have been taken and then the samples of the accused are taken on 13.12.2013. P.W.8 the investigating officer ought to have explained, where those samples were kept, in which condition they were kept and how they were transmitted. P.W.9 A.S.I. Sonawane is the carrier, however, he has not stated as to in which condition, that means in which boxes, he had taken those samples. The method of preservation is not stated by anybody. Under such circumstance, we cannot rely on the DNA test report Exhibit-41.

10. We have considered the ocular evidence as well as the scientific evidence. As regards the ocular evidence is concerned, at the cost of repetition, we would like to say that P.W.4 and P.W.5 are not

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trustworthy as they have changed their statements in the cross. When the ocular evidence was not supporting, conviction ought not to have been based only on the DNA test report i.e. medical report. Therefore, the finding and conclusion in the judgment by the learned Trial Court is perverse and not based on the legal principles. Therefore, it deserves to be set aside. The appeal deserves to be allowed. Hence, we proceed to pass the following order :-

ORDER

(i) The appeal stands allowed.

(ii) The judgment and conviction passed by the learned Additional Sessions Judge, Amalner, Dist. Jalgaon in Sessions Case No.25 of 2014 on 08.09.2015 convicting the appellant for the offence punishable under Section 376 of Indian Penal Code, stands set aside.

(iii) The appellant be set at liberty if not required in any other case.

(iv) Fine amount, if any, be refunded to the appellant after the statutory period.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm

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