



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

Criminal Appeal No.493/2018

Mithun @ Dhananjay Khamban
Nisad, C-9805, detained in Central
Prison Nagpur.

... Appellant.

VERSUS

State of Maharashtra
through Police Station Officer,
Police Station, Mouda, District Nagpur.

... Respondent.

Ms. Neerja G. Chaubey, Adv. (appointed) for appellant.

Mr. S.S. Doifode, APP for State.

**CORAM : M.S. SONAK &
PUSHPA V. GANEDIWALA, JJ.**

DATE : 29-11-2021.

JUDGMENT : (Per: Pushpa V. Ganediwala, J.)

The appellant Mithun @ Dhananjay Khamban Nisad has faced the trial for the offences punishable under Sections 363, 366-A, 376 (2)(i)(j) of the Indian Penal Code (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) in Special Case Child Prot.No.153/2015,

wherein he found guilty of the offence of aggravated penetrative sexual assault and allied offences and sentenced to suffer rigorous imprisonment for life on two counts with fine and other sentences on different counts vide judgment and order dated 06-10-2017 which is challenged in this appeal.

2. We have heard learned Advocate Ms. Neerja Chaubey, appointed by High Court Legal Aid Services Sub Committed, Nagpur, to appear on behalf of the appellant and learned APP Mr. Doifode, appearing on behalf of the respondent-State.

3. PW-1, the father of the victim lodged a report on 25-04-2015 stating therein that on 24-04-2015, at about 8.00 pm, the appellant/accused, who is residing near his house, kidnapped his 18 months daughter with the intention to rape her, took her to the forest area and raped her. Based on his report, Crime No.88/2015 came to be registered against the appellant/accused for the offences punishable under Sections 363, 366-A, 376(2)(i)(j) of the IPC and Section 6 of the POCSO Act. The investigation in this crime was handed over to PSI Shri. Narendra Shamrao Tayade (PW-12). PSI

Shri. Tayade, looking at the critical condition of the victim, referred the victim to PHC Mouda and from there she was referred to Mayo Hospital, Nagpur through WPC Nalini (PW-5) with requisition letter (Exhibit-50).

4. PSI Shri. Tayade initiated the proceedings for spot panchanama (Exhibit-45). The place where the incident occurred was at a distance of 300 mtrs from the site of bricks factory (place of residence of the complainant and the appellant) and it was surrounded by trees. In the presence of spot panch-Jaigopal (PW-11) PSI Shri. Tayde seized from the spot articles like simple earth (mud), earth mixed with blood, grass with blood stains and one nicker. On the same day PSI Shri. Tayde arrested the accused and sent him for the medical examination. Medical officer collected samples of blood, nail clippings and other necessary samples from the accused, sealed and handed it over to the police constable who escorted the accused to the hospital for medical examination. PSI Shri. Tayde seized and sealed the same from the police constable through (Exhibit-46) in the presence of panchas and deposited the same in Muddemal room. PSI Shri. Tayde also seized the clothes of

the victim (Exhibit-47), the clothes of the appellant (Exhibit-48), the blood and vaginal swab sample of the victim (Exhibit-28) and deposited the same in Muddemal room. On 07-05-2015 PSI Shri. Tayde sent the seized muddemal to the Chemical Analyzer's office through NPC Manoj Jaiswal B.No.1425 (PW-8).

5. Thereafter, PSI Shri. Tayde availed the sketch map of the spot of the incident from Tahsildar (Exhibit-56). PSI Shri. Tayde also recorded statements of witnesses and after investigation filed chargesheet before the Special Court for the trial of the offences under POCSO Act, 2012, Nagpur. The learned Judge of the Special Court framed the charge against the appellant for the offences punishable under Sections 363, 366A, 376(2)(i)(j) of IPC and Section 6 of the POCSO Act, 2012. The charge was read over and explained to the appellant in his vernacular. The appellant denied the charge and claimed to be tried. The learned Judge recorded the plea of the appellant.

6. The prosecution examined in all 12 witnesses in support of its case. The learned Special Judge recorded the

evidence of the prosecution witnesses and marked the documents and articles produced and proved by the prosecution. Based on the incriminating evidence brought on record by the prosecution, the learned Judge put questions to the appellant and recorded his answers under Section 313 of the Code of Criminal Procedure, 1973. The defence of the appellant is of total denial and false implication. The learned Special Judge also called upon the appellant to enter upon his defence, which he refused. The learned Special Judge after hearing the arguments on both the sides and having regard to the evidence brought on record by the prosecution, recorded the finding that the prosecution proved the charge against the appellant/accused beyond reasonable doubt and sentenced him as under :-

"For the offence punishable under Section 363 of the IPC the appellant is sentenced to suffer RI for 5 years and fine of Rs. 2000/-, default sentence SI for 3 months.

For the offence punishable under Section 366-A of the IPC the appellant is sentenced to suffer RI for 7 years and fine of Rs. 3000/-, default sentence SI for 3 months.

For the offence punishable under Section 376 (2)(i)(j) of the IPC the appellant is sentenced to suffer life

imprisonment and fine of Rs. 5000/-, default sentence SI for 1 year.

For the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, the appellant is sentenced to suffer life imprisonment and fine of Rs. 5000/- in default SI for 4 months."

7. It is also directed by the learned Special Judge that the substantive sentences imposed for the offences punishable under Sections 363 and 363-A of the IPC shall run concurrently and first the appellant has to undergo the said sentences and after its completion, the appellant has to undergo the sentence for the offences punishable under Sections 376(2)(i)(j) of the IPC and Section 6 of the POCSO Act, concurrently. The learned Special Judge also directed the State to recommend the case of the victim for compensation and rehabilitation. The learned Special Judge further directed that fine of Rs. 15000/- if paid by the appellant, shall be remitted to the victim towards compensation. This judgment is impugned in this appeal.

8. Learned Counsel Ms. Neerja Chaubey appearing for

the appellant/accused submitted that the learned Sessions Judge has misconstrued the prosecution evidence led during trial. The learned Special Judge failed to appreciate the fact that the medical report of the victim does not corroborate the fact of sexual intercourse committed by the appellant with the victim. She further states that the learned Special Judge failed to appreciate the evidence on record as there was no eye witness to the incident and the prosecution could not prove its case beyond reasonable doubt. The prosecution also failed to examine Ganesh who first time noticed the victim in the jungle. His evidence could have been the best evidence. Non-examination of Ganesh creates doubt in the prosecution story which incompletes and breaks the chain of circumstances. The learned Counsel Ms. Chaubay urged to acquit the appellant/accused.

9. On the contrary, learned APP Shri. Doifode appearing on behalf of the State while supporting the impugned judgment and order submitted that the prosecution has proved the guilt against the accused through cogent, clinching and convincing evidence. Shri. Doifode, learned APP took this Court through the oral testimony of material witnesses and the medical findings of the victim and the

accused so also DNA findings. The learned APP states that the crime committed in this case is of a heinous nature as the girl of 18 months was taken to forest area and rape was committed on her and thereafter she was left unattended and in the morning she was found in the jungle when one neighboring boy had gone to ease himself. The learned APP Shri. Doifode submits the prosecution could prove each and every link in the chain of circumstances, which unerringly points finger to the appellant only and no one else. Shri. Doifode urged to dismiss the appeal being devoid of any merits.

10. The rival contentions fall for consideration of this Court. We have perused the record with the assistance of the learned counsel for both the parties.

11. At the outset, to establish the charge against the accused, the prosecution examined in all 12 witnesses and also brought on record the necessary documents and the articles. There is no eye witness to the incident. The case is based on the circumstantial evidence. On circumstantial evidence, the Hon'ble Apex Court in a series of decisions has consistently held that when a

case rests upon circumstantial evidence such evidence must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See: Padala Veera Reddy v. State of Andhra Pradesh, AIR 1990 SC 79, Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622).

12. In this case, the victim being of 18 months' age, there is no question to examine the victim. However, the testimony of the child witness (PW-2), brother of the victim is crucial. It is

worthwhile to note that in terms of Section 33(7) of the POCSO Act, 2012, the names of some of the witnesses related to the victim are not disclosed to ensure that the identity of the victim remains undisclosed. PW-2 is examined on the point that he had seen the appellant lifting the girl and taking her away towards the heap of bricks. Immediately he informed about the same to his parents. The appellant was known to this child witness as he was residing near his house. Evidently, the father of the victim and the appellant were working in the same brick's factory and residing in hutments with their respective families on the site of the factory. Evidently, around 50 families of the labour class were residing on the site of the factory.

13. To assess the competency of PW-2, the child witness of age 10 years, the learned Special Judge asked him certain preliminary questions regarding his age, education, value of oath etc. On his satisfaction about the competency of the child witness, his ability to understand and answer rationally and to understand the sanctity of oath, the learned judge administered oath to him.

14. PW-2 testified that on the day of incident at around 8.00 pm while he along with his brother and sister was playing in the courtyard, appellant came there and took the victim towards the heap of bricks. He further deposed that he was knowing the accused as the accused was residing near his house. He (PW-2) immediately informed his parents, who were inside the house. The testimony of this witness is relevant only on the aspect of last seen theory. A perusal of his cross examination with the assistance of learned counsel for the defence, we could not find anything to doubt the credibility of this witness. In his cross examination, he has admitted that he did not make hue and cry when the accused took the victim. However, spontaneously he volunteered that he informed about it to his parents. He also admitted that the accused had been to their house 2-3 times prior to the incident. This suggestion in the cross examination would, infact, suggest that the accused was not a stranger to this witness. It has further come in his cross examination that within one minute he informed his parents. All other adverse suggestions put to him in cross examination have been flatly denied by the witness, being incorrect.

15. We found the testimony of this witness trustworthy. There is no reason to doubt his testimony. Why should have he taken the name of the accused, if the accused would not have lifted the victim. The accused was not stranger to him. He was knowing the accused as the accused had been their house 2-3 times prior to the incident. PW-2, even though a child of age 10 years , stuck to his version and withstood the searching cross examination. He denied the suggestion that he has been tutored by his parents. There is no reason not to consider his testimony which is further corroborated with the testimony of his father (PW-1) and other connecting evidences.

16. PW-1, the father of the victim deposed that he was working as a labour in a bricks' factory and staying in the factory premises with his family consisting of wife and three small children. He further deposed that he was knowing the accused as the accused was residing near his house and working at the same site. He testified that on getting information from his son (PW-2), they searched the victim for 2/3 hours but could not trace the girl. Thereafter, he went to the manager of the factory Shri. Chaware

(PW- 3) and narrated the incident. He further deposed that he along with the manager Shri. Chaware searched the victim for the entire night. In these wee hours, one Ganesh brought the victim to their house and informed them that when he went to answer nature's call, he saw the victim lying there and therefore he had brought her in the house. (PW-1) father of the victim noticed that the clothes of the Victim stained with blood and blood was also oozing from her private part. (PW-1) along with the Manager-Chaware (PW-3) and other persons went to Police Station Mouda and lodged report against the appellant.

17. In his cross examination, he has admitted that he did not go to the house of the accused in search of the victim. However, he spontaneously volunteered that brother of the appellant himself came there in search of the accused. PW-1 also admitted that his children did not make hue and cry when appellant lifted the victim. However, he said his son narrated the incident to him. We found the testimony of this witness consistent with the testimony of his son PW-2 and Shri. Chaware PW-3, the manager of the factory. Nothing substantive could be brought in his cross examination to doubt the

veracity of his testimony. There is no reason for this witness to depose false against the appellant when admittedly, there was no enmity between the two.

18. The testimony of PW-1 is further corroborated with the testimony of PW-3. Shri. Chaware, the manager of the bricks factory. With regard to the incident, PW-3 deposed that on that day i.e 24.04.2015, there was a weekly off to the factory. Shri. Chaware deposed that the complainant came to him at about 8.30 pm and informed him about missing of his daughter and further informed that the appellant had taken her daughter. They searched for the appellant and he was found in his house. This witness noticed blood stains on the clothes of the appellant. Interestingly, PW-1 does not say that they searched the appellant in his house and he was found there. In any case, the learned counsel for the defence could not bring on record that this fact in the testimony of PW-3 is an omission. This would suggest that this fact is not an embellishment on the part of this witness. Furthermore, considering the other clinching evidence against the appellant, we do not find it as a material contradiction worthy of causing any dent to the prosecution

story.

19. Shri. Chaware further deposed that in the morning hours, the daughter of the complainant was found to one Ganesh. Thereafter, they went to the spot of the incident. They saw that the victim was in unconscious condition. They took the victim to the police station. This witness also denied all the adverse suggestions put to this witness during cross examination.

20. PW-10, PI Shri. Gaibole is the witness who took report of the complainant and registered crime against the appellant. This witness deposed that on the basis of the report of PW-1, the father of the victim, he registered crime at No.88/2015 (Exhibit-9). PI Gaibole (PW-10) in his cross examination has deposed that there were 4 to 5 persons along with the complainant, who came for filing the complaint. This fact is corroborated with the testimony of the informant PW-1.

21. PSI Shri. Tayde (PW-12), the investigation officer, deposed that on 25-04-2015 the investigation in Crime No.88/2015

was marked to him. He deposed that as the victim was in critical condition, he shifted her to PHC Mouda, from there she was referred to Mayo Hospital, Nagpur through WPC Nalini B.No.1714. PSI Shri. Tayde further deposed that thereafter he proceeded to the spot and seized simple earth, blood mixed earth, grass having blood stains and nicker of the victim vide seizure panchanama (Exhibit-52). Spot panch Shri Jaigopal (Exhibit-11) fully supports the version of PSI Tayde with regard to visit to the spot and seizure of the articles from the spot. Spot panch Shri. Jaigopal (PW-7) also acted as a panch for seizure of other articles during investigation i.e. samples collected from the appellant, clothes of the victim and the appellant. (Exh. 46 to 48).

22. The further connecting link in the chain of circumstances is that the Chemical Analyzer's Report (Exhibit-18) confirms the human blood stains on the earth and grass which were seized from the spot of the incident. C.A. Report further confirms two semen stains ranging from about 0.1 to 1 cm in diameter spread at front portion to the nicker which was seized from the spot and semen detected on the nicker is of human.

23. PSI Shri. Tayde deposed that he arrested the accused on 25-04-2015 and referred him to the Mayo Hospital for medical examination on 27-04-2015 through PC-Manjur Ahmed B.No.2021 through forwarding letter (Exhibit-53). PSI Shri. Tayde further deposed to have seized and sealed the blood sample, pubic hair, nail clippings, swab of glans penis, swab of shaft of penis collected by the Medical Officer in the presence of panchas and sent the same for Chemical Analyzer's analysis in a sealed condition. Chemical Analyzer's report (Exhibit-21) does not show detection of semen or blood on the above articles. The learned counsel Ms. Nirja Chaubey for the appellant raised doubt on the prosecution story considering the negative C. A. report regarding the samples of the appellant. The doubt raised by the learned counsel, according to us, is misplaced. Admittedly, the appellant was sent for medical examination on the third day of the date of the incident and therefore there is every possibility that he must have taken bath during this period. Be that as it may, considering the other connecting links in the chain of circumstances, much weightage can not be given to this part of the evidence. The most crucial is the positive DNA profile report against the appellant, which we propose

to discuss in the forthcoming paragraphs.

24. PSI Shri. Tayde further deposed to have seized and sealed the clothes of victim in the presence of panch vide panchanama (Exhibit-47) and deposited the same in Malkhana and thereafter sent the same for Chemical Analyzer's analysis. C. A report (Exh.21) shows the moderate number of human blood stains ranging from about 0.1 to 5 cm in diameter spread at places. This is another circumstance to indicate the commission of the offence alleged.

25. PSI Tayade further deposed that he has also seized and sealed the clothes of the accused in the presence of panch vide Exhibit-48 and deposited the same in Malkhana and sent the same for Chemical Analyzer's analysis. C. A. report shows moderate number of blood stains ranging from about 0.1 to 3 cm in diameter spread at places on the full pant of the appellant, so also few blood stains ranging from about 01. to 1 cm in diameter spread at places on shirt of the appellant and moderate number of blood stains ranging from about 01. to 10 cm in diameter spread at places to the

nicker of the appellant. The blood found on these articles is human. The appellant failed to explain the circumstance as to how human blood is found on his clothes.

26. PSI Shri. Tayde further deposed that on 26-04-2015 he has seized and sealed the blood, vaginal swab samples etc. of the victim vide panchanama (Exhibit-28) and deposited the same in Malkhana and thereafter sent the same for Chemical Analyzer's analysis. He further deposed that he got the sketch map of the spot of incident drawn through Tahsilder, Mouda.

27. In his cross examination PSI Shri. Tayde admitted that during investigation he had inquired as to whether there is any enmity between the appellant and the complainant and he did not find any dispute between them. He has denied all other adverse suggestions in toto. The testimony of this witness is important for connecting the links in the chain with regard to seizure of articles at various stages, sealing it, depositing it in malkhana, sending it for chemical analyzer's report, and collecting the reports etc. Evidently, the reports of clothes of the accused and the victim,

various samples collected from the person of the victim, articles collected from the spot are positive, connecting the accused for the commission of the crime.

28. In the instant case, which is based on circumstantial evidence, the forensic evidence played a major role and for that matter the purity in the procedure from the stage of collection of the samples till the collection of the reports is to be established beyond doubt. The defence could not point out any lacunae in the procedure followed during the investigation.

29. Now we turn to the medical evidence of the victim. With regard to medical examination of the victim, Dr. Damodhar Saliwkar (PW-9) deposed that on 25-04-2015 victim aged 18 months was brought to him by WPC Nalini for medical examination. She was accompanied by her parents and on examination he found that the general condition of the victim was moderate, she was febrile. He suspected victim was raped therefore he advised to consult senior physician and gynaecologist and referred her to Government Medical College and Hospital at Nagpur for management, relevant

investigation and opinion. He accordingly issued certificate (Exhibits-39 and 40). He denied all the adverse suggestions in his cross examination. In fact, there is no effective cross examination of this witness. The evidence of this witness can be said to be one of the links in the chain of circumstances.

30. Dr. Madhuri Patil (PW-4) deposed that on 24-04-2015 she was working as an Assistant Professor at Indira Gandhi General Hospital, Nagpur. Victim was brought by WPC Nalini of Police Station Mouda. The mother of the victim accompanied her. The age of the victim was 18 months. She deposed that after obtaining consent of the mother she examined the victim in the presence of Dr. S.S. Giri. She found that victim was semi conscious, her pulse rate was high 100/111. On general examination she found that blood stains present in pubic area and buttock. Dr. Madhuri Patil (PW-4) noticed the following injuries on her person :

- "1] contused abrasion on left knee about 1cm x 1cm.
- 2] contused abrasion on left side scapular region about 4 cm x 2 cm.
- 3] linear abrasion on anterior surface of left thigh, lower 1/3rd of size 1.3 cm."

31. Dr. Madhuri Patil (PW-40) further deposed that on local examination of genital she found that there was redness and induration over libia minora, inflammed on clitoris, tears extended to rectum on fourchette and introitus/vagina, hymen injury present, bleeding and edma present, position of tears posteriorly, perineal tear extended upto anal canal and rectum, urethral opening edematore, anus spinctel injury present extended upto rectum.

32. Dr. Madhuri Patil (PW-40) further deposed that as the victim was not cooperating due to pain, anesthesia was applied to her. In her examination she found severe perennial tear involving annul canal and rectum up to 5 cm, bilateral vaginal well tear present, periurethal area conjested and edematous.

33. Dr. Madhuri Patil (PW-40) further deposed that she has collected blood, vaginal swab, finger nail clippings and rectal swab of victim. He has sealed and labelled and handed over the same to the WPC on duty. She noticed all the injuries on the person of the victim were fresh. In the opinion of Dr. Madhuri Patil the evidence of sexual intercourse cannot be ruled out. After going

through the Chemical Analyzer's report filed at Exhibits-18 to 21 Dr. Madhuri Patil opined that there is evidence of sexual intercourse with the victim accordingly, she prepared Medical Examination Report (Exhibit-23). In her cross examination she has denied each and every suggestion put to her by the learned defence counsel. She admitted that victim was admitted in their hospital for one day and thereafter she was referred to Government Medical College and Hospital, Nagpur for further treatment. Chemical Analyzer's Report (Exhibit-19) reflects that the aforesaid samples which were collected by Dr. Madhuri Patil were referred for DNA analysis. WPC Nalini Uike (PW-5) supports the testimony of Dr. Madhuri Patil with regard to her role in taking the victim for medical examination and collecting aforesaid samples from Dr. Madhuri Patil and handing it over to PSI Shri. Tayde. The evidence of Dr. Madhuri Patil with regard to the injuries she noticed on the person of the victim and her opinion about sexual assault on the victim is another crucial link in the chain of circumstances.

34. Prosecution examined Dr. Vaishali Mahajan (PW-6) from the forensic department. Dr. Mahajan deposed that on 07-05-

2015 she was attached to C.A. Office at Nagpur. That on the requisition from P.S. Mouda, she received the medical samples and clothes of the victim and the accused. They were marked as BN-1748/15, penal swab of accused were sealed as per specimen sent and marked as BN-1751/15. Medical samples of victim were marked as BN-1749/2015 and medical samples of accused were marked as BN-1750/15.

35. Dr. Vaishali Mahajan (PW-6) further deposed that all these cases were analyzed by U.M. Sarate, Astd. C.A. She further deposed that on 31-08-2015, Dr. Sarate sent positive blood stain cutting, semen stain cutting from clothes of victim and accused, blood mixed earth and grass and prepared blood stained of victim and accused alongwith vaginal swab and rectal swab of victim to DNA Department.

36. With regard to the DNA analysis, para 3 of the deposition of Dr. Vaishali Mahajan (PW-6) is important, which is reproduced below :

"I abstracted the DNA from all these samples. It was

amplified by using polymerase chain reaction. STR Genotyping was done by me. I got DNA profile from Exh.1 frock. Exh.2 necker, Exh.3 full pant, Exh.5 necker in PN No.1748/15. Similarly I got DNA profile from Exh.1 prepared blood stained of victim, Exh.3 vaginal swab, Exh.4 rectal swab in BN 1749/15 and DNA profile from Exh.1 prepared blood stained of accused in BN-1750/15. I tallied all these DNA profiles. Accordingly in my opinion DNA profiles obtained from blood detected on Exh.1 frock, Exh.3 full pant, Exh.5 necker in BN-1748/15, Exh.3 vaginal swab, Exh.4 rectal swab in BN-1749/15, they were found to be identical and from one and the same source of female origin and these profiles matched with DNA profile of victim. Similarly, DNA profile obtained from semen detected on Exh.2 necker of victim in BN-1748/15 is of male origin and matched with DNA profile of accused. Accordingly I generated my report and marked as DNAn-518/15 of P.S.Mouda in Crime no.88/2015. The report now shown to me is the same. The contents are true and correct. It bears my signature. It is at Exh.30."

37. In the opinion of Dr. Vaishali Mahajan, DNA profiles obtained from blood detected on the clothes and vaginal and rectal swabs of the victim girl found to be identical and from one and the same source of female origin and these profiles matched with DNA profile of victim. She further opined that similarly, DNA profile

obtained from semen detected on knicker of victim is of male origin and matched with DNA profile of accused. Accordingly she generated her report handed over to P.S.Mouda in Crime no.88/2015. This is the crucial evidence against the appellant pointing finger towards him and no other person for the commission of the crime.

38. Interestingly, it has been brought in the cross examination of this witness that DNA profile of each person is unique and is not similar to each other except mono zygotic twins. This expert witness further admits that DNA test is 100% full proof test and she has given report as per the samples provided to her. The Hon'ble Apex Court has considered in depth the aspect of DNA evidence in criminal trials in *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1. Hon'ble Smt. Justice Bhanumati in the concurring judgment, after referring to the various literature on the subject, noted that DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes, etc. recovered from the accused or from the

witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA fingerprinting makes it possible to obtain conclusive results. With regard to the infallibility of identification by DNA profiling and its accuracy with certainty, the Hon'ble Court noted that DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the bloodstained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match..

39. To rule out the incapability of the appellant to perform sexual intercourse, the prosecution examined Dr. Mohd. Jafar Iqbal (PW-7). This witness medically examined the appellant on 27-04-2015 and opined in his reports (Exhibits-32 and 33) that there was nothing to suggest that the appellant is incapable to perform sexual intercourse. He denied each and every suggestion put to him by the learned Counsel appearing for the appellant/accused. The evidence of Dr. Mohd. Iqbal completes the chain of circumstances against the appellant. The non-examination of Ganesh who had first time

noticed the victim in the forest area, we do not think that it caused any serious dent to the otherwise well-established edifice of the prosecution story.

40. Even in the statement of the appellant recorded under Section 313 of the Code by the learned Trial Court, the appellant could not say anything except that he has been falsely involved in this crime. This is also an additional circumstance in the chain of circumstances established by the prosecution against the appellant. (See: *Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681*).

41. Furthermore, the appellant has failed to rebut the reverse presumption under Sections 29 & 30 of the POCSO Act, 2012 both in relation to the commission of the offence of aggravated penetrative sexual assault on the minor child in terms of Section 3 read with Section 5(m) of the POCSO Act, 2012, and to the presumption to his culpable mental state has essentially to be drawn in as much as the child was only of 18 months at the time of the commission of the offence.

42. Considering the overwhelming eyewitness account, circumstantial evidence, medical evidence and DNA analysis which has been brought on record by the prosecution, we have no hesitation to hold that the prosecution has conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. Each and every link in the chain of circumstances have been firmly established by the prosecution pointing towards the appellant that he is the only person and no other person than the appellant has committed rape on the victim of age 18 months. The defense could not raise any probable doubt through the searching cross examination of the prosecution witnesses and could not give even a single dent to the prosecution story. The learned trial Court has appreciated the evidence in its correct prospective. No error can be found to have committed by the learned trial Court. The prosecution could prove that the appellant lifted the victim of 18 months, who was playing in the courtyard along with her siblings, took her in the isolated forest area, committed heinous crime of rape and left her there at her fate. The DNA profile of the appellant with the victim has been matched. The integrity and genuineness in the procedure for DNA sampling

is also remained unquestionable and indubitable. No interference is warranted in the impugned judgment of conviction.

43. However, with regard to sentences which the appellant is directed to undergo, it is worthwhile to note here that the learned Special Judge has imposed sentence upon the appellant for the offence punishable u/s 376(2)(i)(j) of Indian Penal Code (now 376(2)(i) is omitted w.e.f. 21-04-2018) so also for the offence punishable u/s 6 of POCSO Act 2012 and for both the offences awarded sentence of imprisonment for life and fine separately. Evidently, the proved act of the appellant constitutes offences defined under both these provisions. In this context, Section 42 of the POCSOA provides for the alternate punishment. In terms of Section 42, the appellant shall be liable for punishment which is greater in degree. For the offence of aggravated penetrative sexual assault which is punishable under section 6 of the Act, the punishment prescribed (as on the date of commission of offence i.e. 24.4.2015) is rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life, while the punishment prescribed for the offence punishable under section 376(2)(i)(j) is

for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine.

44. Comparing the aforesaid two sentences, the sentence punishable under Section 376(2)(i)(j) is greater in degree, and therefore, the appellant is liable to undergo sentence of life imprisonment as contemplated under this provision with fine of Rs.5,000/-, in default, to suffer further imprisonment for a period of one year. Therefore, the separate sentence for life imprisonment and fine of Rs. 5000/- for the offence punishable u/Section 6 of the POCSO Act, 2012, is set aside. In the circumstances, all the sentences shall run concurrently. The operative part of the impugned judgment is modified to the above extent.

45. The State to report the compliance of the direction of the learned Special Judge under Section 33(8) of the POCSO Act. The appeal therefore, stands disposed of in the above terms.

46. We appreciate the valuable assistance rendered by the learned counsel Ms. Nirja Chaubey, appointed by the High Court Legal Aid Sub-Committee to appear on behalf of the appellant. We quantified her fees as per rules.

(Pushpa V. Ganediwala, J.)

(M.S. Sonak, J.)

Deshmukh