(2024) 11 BOM CK 0003

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 437 Of 20 21

Vaibhav S/O GajananTekam		APPELLANT
	Vs	
State Of Mah.Thr. Pso Ps Pulgaon Tah.Deoli Dist.Wardha		RESPONDENT

Date of Decision: Nov. 12, 2024

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 15(3), 21
- Code of Criminal Procedure, 1973 - Section 313
- Indian Penal Code, 1860 - Section 375, 417, 504, 506
- Protection of Children from Sexual Offences Act, 2012 - Section 2(1)(d), 3, 6
- Evidence Act, 1872 - Section 35, 65
- Registration of Births and Deaths Act, 1969 - Section 12, 17(2)

Hon'ble Judges: G. A. Sanap, J

Bench: Single Bench

Advocate: Parvez W. Mirza, Swati V. Kolhe, Shubhada Phaltankar

Final Decision: Dismissed

Judgement

G. A. Sanap, J

1. In this appeal, challenge is to the judgment and order dated 09.09.2021, passed by the learned Extra Joint Additional Sessions and Special Judge, Wardha, whereby the learned Judge held the appellant guilty for the offences punishable under Sections 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for short) and under Sections 417, 504, 506 of the Indian Penal Code. He is sentenced to suffer imprisonment for 10 (ten) years and to pay fine of Rs.2,000/- and in default to suffer RI for 6 (six) months for the offence punishable under Section 6

of the POCSO Act. He is also sentenced to suffer RI for 1 (one) year and to pay fine of Rs.500/- and in default to suffer RI for 2 (two) months, on each count, for the offences punishable under Section 417, 504 and 506 of the IPC.

2. **BACKGROUND FACTS :**

PW2 is the victim and the informant. She lodged a report against the appellant on 25.05.2019 at Sewagram police station. The case of the prosecution, which can be gathered from the report and the other materials is that on the date of the incident of penetrative sexual assault on her by the appellant, she was below 18 years of age. The victim was residing along with her father, sisters and grandmother at Sewagram village. The appellant was her neighbour. The appellant and the victim had a love affair for 3 to 4 years prior to lodging of the report. The appellant would request the victim for sexual intercourse. The victim was reluctant for the same and refused to fall pray to the request of the appellant. The financial position of the father of the victim was hand to mouth and therefore, she had started working in a shop by name Bharti Collection at Wardha. She was commuting daily between Sewagram and Wardha. After some time, she rented a room of one Ambekar at Wardha and started residing there. The appellant would pick and drop her from her room to the shop. The appellant would always pester her for sexual intercourse. It is stated that one day, the appellant took the victim to the farmhouse located in the area of Nagapur and Mandavgad. The appellant committed forcible sexual intercourse with the victim at the said place. She became pregnant.

3. It is stated that after the victim became pregnant, the appellant took a rented room at Borgaon (Meghe). The victim and the appellant started residing together. Before committing the intercourse, the appellant had promised to marry with the victim. The victim, therefore, requested the appellant to marry with her. The appellant made a farce of marriage by garlanding her in a rented room in the presence of some of the neighbours. It is the further case of the prosecution that after few days, the appellant started insisting the victim for abortion. The appellant even disowned the paternity of the child. The appellant would say that the victim was conceived from other person. The appellant started giving threat to kill her in case she refused for abortion. This stalemate continued for 2 to 3 months. The appellant started neglecting the victim and as a result thereof, her health was considerably deteriorated. The appellant even refused to take her to the hospital for medical treatment. The victim went back to her father. Her sister (PW3) took the victim to the hospital. After discharge of the victim from the hospital, the appellant went to the house and again took her to Borgaon (Meghe). On the next day, he dropped the victim at her parents' house. Again on the next day, the appellant went to her parents house under the influence of liquor and insisted her to accompany him. The victim at that time refused to accompany him. The appellant, therefore, mercilessly beat her. Again in the month of March-2019, the

appellant went to her parents house and beat her black and blue on the ground that she did not pay the rent of the room. The victim realized that the appellant had made a false promise of marriage with her. He made a farce of marriage. The appellant committed sexual intercourse with the victim under the false promise of marriage. The victim, therefore, went to the police station and lodged report (Exh.42) on 25.05.2019.

4. On the basis of the report (Exh.42), a crime bearing No. 240/2019 was registered against the appellant. PW6 carried out the investigation. After registration of FIR, PW6 referred the victim to the General Hospital, Wardha for medical examination. The appellant was arrested. The medical examination of the victim revealed that she was carrying pregnancy of 31 weeks. PW6 drew the spot panchanama (Exh.33). The blood samples of the victim and samples of the appellant, collected by the Medical Officer, had been seized under the seizure panchanamas (Exh.35 and 36). The victim gave birth to a male child. The Medical Officer, on the requisition of the Investigating Officer (PW6), collected the blood samples of the male child. The samples had been sent to the Regional Forensic Science Laboratory (RFSL), Nagpur for analysis. The statements of the witnesses were recorded. The DNA analysis of the samples revealed that the victim and the appellant were the biological parents of the male child. On completion of the investigation, PW6 filed the charge-sheet against the appellant in the Court of law.

5. Learned Special Judge, framed the charge (Exh.26) against the appellant. The appellant abjured his guilt. The defence of the appellant is of total denial. The second plank of his defence is that they were married and the so called intercourse was the consensual intercourse with his wife. The prosecution, in order to bring home the guilt of the accused, examined eight witnesses. The learned Judge, on consideration of the evidence found the appellant guilty of the charge and therefore, convicted and sentenced him as above. The appellant, being aggrieved by this judgment and order, has come before this Court in appeal.

6. I have heard Mr. Parvez Mirza, learned advocate appointed to represent the appellant, Mrs. Swati Kolhe, learned Additional Public Prosecutor for respondent no.1/State and Mrs. Shubhada Phaltankar, learned advocate appointed to represent respondent no.2/victim. Perused the record and proceedings.

7. Learned advocate for the appellant submitted that the prosecution has miserably failed to prove the birth date of the victim. Learned advocate submitted that the evidence adduced by the prosecution to prove the birth date of the victim is not admissible. Learned advocate submitted that the birth certificate (Exh.48) was not the primary evidence. Learned advocate further submitted that the documentary evidence produced for the first time through PW7 cannot be relied upon, inasmuch as the documents were not part of the charge-sheet. PW7 was not cited as a witness in the charge-sheet. Learned advocate submitted that an entry in the Birth and Death

Register maintained by the Birth and Death Section of Nagar Parishad, Wardha, was made on the basis of the information received from the General Hospital, Wardha. It is pointed out that PW7 did not produce the said information received from the General Hospital, Wardha, which was the basis for the entry made in the Birth and Death Registration Division of Nagar Parishad Wardha. In the submission of the learned Advocate, the documentary evidence produced by PW7 cannot be looked into. Learned advocate submitted that the presumption under Section 35 of the Evidence Act, 1872 is not the absolute presumption and therefore, Section 35 cannot be invoked in this case inasmuch as the prosecution has failed to prove the other relevant facts. In order to seek support to his submission, the learned advocate has placed reliance on the decisions in the following decisions :

1] Alamelu and another .vs. State, represented by Inspector of Police, reported at **AIR 2011 SC 715 ;**

2] J. Yashoda .vs. K. Shobha Rani, report at **(2007) 5 SCC 730 ;**

3] U. Sree .vs. U. Srinivas, reported at **(2013)2 SCC 114.**

8. Learned Additional Public Prosecutor submitted that the birth certificate of the victim, obtained from the Nagar Parishad, Wardha, was provided to the Investigating Officer by the victim during the course of investigation. A copy of the said certificate is on record. The original was produced before the Court at the time of the evidence. The certificate admitted in the evidence is at Exh.48. Learned APP submitted that the documentary evidence produced through PW7 was not introduced for the first time to the surprise of the appellant. It is pointed out that the birth certificate issued from the Nagar Parishad, Wardha, was part of the charge-sheet. Learned APP submitted that through PW7, the prosecution has produced on record the primary evidence of Exh.48. Learned APP submitted that as per the provisions of Section 17(2) of the Birth and Death Registration Act, 1969, this entry made in the Municipal Register has a presumptive value. Learned APP submitted that the original entry from the Birth and Death Register at Exh.92 clearly indicates that this entry was taken on the basis of the information received from the General Hospital, Wardha The entry of registration of the birth date and the birth of the victim was taken on 15.03.2002. Learned APP submitted that it is not the defence of the appellant that this entry at Exh.92 was brought into existence after lodging the report by the victim. Learned APP submitted that merely because of the absence of the document about the information from the General Hospital, Wardha, this entry will not lose its evidentiary value as primary evidence.

9. Learned advocate appointed to represent respondent no.2/ victim, has adopted the submissions advanced by the learned APP.

10. At the outset, it is necessary to consider the law laid down in the case of **Alamelu and another** (supra). In this case, the certificate issued by the government school, duly signed by the Headmaster, was produced. The Hon'ble Apex Court has held that the certificate would be admissible in evidence under Section 35 of the Evidence Act. In this case, the Headmaster was not examined. The entry in the Transfer Certificate was relied upon without examining the Headmaster. The Hon'ble Apex Court has observed that the date of birth mentioned in the Transfer Certificate has no evidentiary value unless the person, who gave the date of birth, is examined. In the case of **J. Yashoda (**supra), it is held that for adducing documentary evidence as secondary evidence, it is necessary for the party to prove existence and execution of the original document. The conditions laid down under Section 65 of the Evidence Act must be fulfilled before secondary evidence can be admitted. In the case of **U.Sree** (supra), the Hon'ble Apex Court has held that mere admission of a document in evidence does not amount to its proof. It is the obligation of Court to decide the question of admissibility of a document as a secondary evidence before making endorsement thereon.

11. At this stage, it would be appropriate to make a useful reference to a decision of the Hon'ble Apex Court in **Birad Mal Singhvi .vs. Anand Purohit**, reported at **1988 SC 1796**. Hon'ble Apex Court has held as under :

"To render a document admissible under Section 35 of the Evidence Act 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 law. An entry relating to the date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the persons in the absence of the material on which the age was recorded."

12. In the backdrop of the above stated submissions and legal position, the evidence on record requires minute scrutiny. It is undisputed that a copy of the Birth Certificate was provided to the Investigating Officer by the victim during investigation. It was compiled in the charge-sheet. At the time of the evidence, the victim had brought the original certificate. Learned Judge, after verifying the original certificate, admitted the photocopy in evidence at Exh.48. Perusal of this birth certificate would show that the birth date of the victim is 02.02.2002. It is undisputed that this certificate was the secondary evidence. The primary evidence of this certificate was the original entry made in the Birth and Death Registration Section of Nagar Parishad, Wardha. It is necessary to mention at this stage that by producing the documentary evidence through PW7, the appellant was not taken by surprise. The Birth Certificate of the

victim was already on record. A copy of the same was provided to the appellant. The prosecution through PW7 has produced the original entry of the birth date of the victim maintained with the Birth and Death Division of Nagar Parishad, Wardha. PW7 has deposed about the contents of the said entry. Before proceeding to deal with the arguments as to the source of this entry, it is necessary to consider the evidence of this witness.

13. PW7 is the Clerk in Birth and Death Division of Nagar Parishad, Wardha. He has deposed on the basis of the documents brought by him that he is the custodian of the Birth and Death Register. He has deposed that on receipt of the information from the hospital about the birth of a child, an entry of the same is made in the register. He has stated that as per the entry in the register, which is at page 97, Sr. No. 448, the birth date of the victim is 02.02.2002. PW7 along with the original entry has produced certified extract of the said entry. It is at Exh.92. The original register was returned to the witness after verifying the original entry and admitting the certified copy as Exh.92. He has further stated that the certificate at Exh.48 proved through the victim was issued from his office on 28.07.2015. He has also produced on record the certified copy of birth certificate of the victim. It is at Exh.93. It is seen that there was procedural error on the part of the learned Judge while admitting this documentary evidence. Learned Judge ought to have given exhibit number to the original entry from the register and then returned the same to the witness. Learned Judge was then required to take the certified extract of the said entry on record and exhibit it. However, this procedural irregularity will not make this document inadmissible. In his cross-examination, PW7 was questioned with regard to the basis of this entry. PW7 has categorically stated that this entry was made on receipt of the information from the General Hospital, Wardha.

14. It is undisputed that the document received from the General Hospital Wardha has not been produced on record. The question is whether the failure to produce the document from the General Hospital, Wardha, the entry from the Register would lose its sanctity as primary evidence. In my view, the answer has to be in the negative. This entry was made by a public servant. This entry was made in compliance of the provisions of Section 12 of the Registration of Births and Deaths Act, 1969. This entry has evidentiary value under Sub-section 2 of Section 17 of the said Act. The admissibility and credibility of the evidence are two distinct aspects. The documentary evidence produced by PW7 is legally admissible. It has sanctity under the law. The Register produced containing the birth entry of the victim is a primary document. In this case, even failure to produce the communication received from the General Hospital, Wardha, would not make this entry as secondary evidence. The basis of this entry has been recorded in the entry itself. It was recorded that this entry was made on the basis of the information received from the General Hospital, Wardha. As far as the credibility of this document is concerned, I have no doubt about it. It is not the case of

the appellant that this entry was made after lodging the report by the victim to create the evidence against him.

15. In this context, a useful reference can be made to the decision of the co-ordinate Bench of this Court in **Mahiboob @ Tanya Peerahamad Shabhai .vs. State of Maharashtra and another,** reported at **2020 All M.R. (Cri.) 2585,** wherein this Court has held that no formal proof of the birth certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and the Rules framed thereunder, is required. It is further observed that Section 35 of the Evidence Act, 1872 provides that if an entry is made by a public servant in an official book in discharge of his official duty, then such an entry becomes the relevant fact and admissible in evidence. In my view, this is the settled legal position. In this case, I reiterate the said legal position.

16. It is to be noted that the Birth and Death Section of Nagar Parishad, Wardha had no reason to create such a false document. This entry was made in the birth register on 15.03.2002. It was made in due discharge of the official duty by the then officer heading the said section. This is a public document. In my view, therefore, the submissions advanced by the learned advocate for the appellant cannot be accepted. In this case, the primary evidence of the birth date is the entry made in the birth register. The register with the relevant entry was produced. The secondary evidence in the form of birth certificate is on record. In this case, there is no grievance on behalf of the appellant that without having even secondary evidence on record, the primary evidence to prove the birth date was introduced for the first time. It is not the case of the appellant that the prosecution has only produced before the Court the secondary evidence. In my view, therefore, the evidence on record is sufficient to prove that the victim was born on 02.02.2002. On the date of commission of the offence, the victim was below 18 years of age and therefore, she is “child” as defined under Section 2(1)(d) of the POCSO Act. In view of the above, the decisions relied upon by the learned advocate for the appellant are not applicable to this case and to accept the submissions on the basis of these decisions.

17. The next important issue that needs consideration is whether the evidence on record is sufficient to prove the charge of penetrative sexual assault on the victim by the appellant. Learned advocate for the appellant made two fold attack and assailed the case of the prosecution. The first submission of the learned advocate is that the victim has categorically admitted that she was married with the appellant. Learned advocate submitted that therefore, the sexual intercourse by the appellant with the victim, if any had taken place prior to her attaining the age of 18 years, would not constitute rape and the offence of penetrative sexual assault, as defined under Section 3 of the POCSO Act. The second submission of the learned advocate is that there was inordinate delay in lodging the report. The appellant has been falsely implicated in this

case. The evidence of the victim is not trustworthy and reliable. The prosecution has miserably failed to prove that the required precaution was taken while collecting the blood sample for DNA analysis. The learned advocate submitted that the chain of evidence from the time of collection of samples till analysis of the samples is not complete. The Medical Officer, who had collected the samples of the appellant and the sample of the male baby, has not been examined. Therefore, the authenticity and credibility of the DNA report (Exh.86) is shaken. Reliance cannot be placed on DNA report to establish paternity of the child.

18. Learned APP submitted that the admissions given by the victim (PW2) in her cross-examination with regard to her marriage with the appellant, cannot be made the basis to accept the submissions advanced on behalf of the appellant. Learned APP submitted that even if it is assumed for the sake of argument that there was marriage between them, the same by itself would not save the appellant from the dragnet of the offence of rape, defined under Section 375 of the Indian Penal Code, and the offence of penetrative sexual assault, defined under Section 3 of the POCSO Act. Learned APP submitted that the victim has categorically stated that the appellant, under the false promise of marriage, committed sexual intercourse with her. Learned APP submitted that the prosecution has proved that the appellant in order to save himself had created a farce of marriage by garlanding the victim. Learned APP further submitted that the DNA Analyst has categorically opined that the appellant and the victim are the biological parents of the male baby. In the submission of learned APP, the DNA report is the scientific evidence and therefore, there is no reason to discard and disbelieve the said evidence. The prosecution, in the submission of the learned APP, has examined the DNA analyst (PW8) and proved the basic facts related to the DNA analysis of the samples. Learned APP submitted that PW8 has categorically deposed that the samples had been received in sealed condition. It is pointed out that this evidence has not been taken in any manner in the cross-examination. Learned APP submitted that without wasting any time, the DNA samples collected by the Medical Officer had been forwarded to the RFSL, Nagpur by the Investigating Officer and therefore, there is no scope to contend that there was a possibility of manipulation or tampering with the samples.

19. The victim in her examination-in-chief has stated that she had love affair with the appellant. She has stated that the appellant under the false promise of marriage committed forcible penetrative sexual assault on her. In her cross-examination, she has categorically admitted that before lodging the report, she had made a complaint to the CWC Section of the office of the Superintendent of Police, Wardha and in the said complaint, mentioned the name of the appellant as her husband. In her cross-examination, she has admitted the photographs at Exhs.52, 53 and 54. In these photographs, the appellant and the victim are shown wearing garlands with other

people. The victim has admitted that in the complaint made to CWC Section, she has stated that the appellant is her husband. She has stated that the photographs are true and correct. The admissions given by the victim have been made the basis of the submission that it was consensual sexual act by the victim with her husband. In my view, this submission cannot be accepted for more than one reason. In this case, the prosecution has proved that the victim on the date of commission of the crime was below 18 years of age. In my view, in this context and to address the submissions advanced by the learned advocate, it would be appropriate to make a useful reference to the decision of the Hon'ble Apex Court in the case of **Independent Thought .vs. Union of India and another,** reported at **2017 (10) SCC 800.** In this case, the Hon'ble Apex Court has addressed the issue/question as to whether the sexual intercourse between a man and his wife being a girl between 15 and 18 years of age, is rape. The Hon'ble Apex Court in this judgment has read down Section 375, Exception 2. In this case, the Hon'ble Apex Court has held as under :

"Sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil. There are really five options before the Court: (i) To let the incongruity remain as it is – this does not seem a viable option, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC – in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes;

(v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, this is the only pragmatic option available. Therefore, there is

absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

20. In view of the law laid down by the Hon'ble Apex Court, this issue is no more res-integra. The Hon'ble Apex Court has held that Exception 2 to Section 375 of the IPC is violative of Articles 14, 15 and 21 of the Constitution of India and contrary to the constitutional morality, human rights concept as also pro-girl child statutory provisions contained in various other legislations. The Hon'ble Apex Court, by adopting a harmonious and purposive interpretation, read down Exception 2 to Section 375 of the IPC. In the backdrop of the law laid down by the Hon'ble Apex Court, the submission that sexual intercourse by the appellant with the victim being his wife would not constitute rape or penetrative sexual assault, cannot be accepted. It needs to be stated that the sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The defence of consensual sex with the wife is not available, when the age of the wife or the girl, who is alleged to be the wife, is below 18 years of age. The non-consensual intercourse with a wife, who is below 18 years of age, is a rape. The legal position has been enunciated by the Hon'ble Apex Court as above. In view of this, in the case on hand, the defence of consensual sex with the wife cannot be accepted. Even if it is assumed for the sake of argument that there was so called marriage between them, in view of the allegations made by the victim that it was sexual intercourse against her consent, it would constitute rape.

21. The victim in her evidence before the Court has reiterated the facts stated by her in the report. It may not be necessary to reiterate all the facts stated by her before the Court. It may be repetition of the same allegations. In sum and substance, the victim before the Court has reiterated the facts stated by her in the report. It is undisputed that the victim and the appellant had love affair. The victim has stated that the appellant, under the false promise of marriage, committed forcible sexual intercourse with her. She has stated that on the date of lodging the report, she was carrying 31 weeks' pregnancy. The Medical Officer (PW4) has corroborated this evidence of the victim. The victim was subjected to searching cross-examination. Perusal of her cross-examination would show that it is not sufficient to discard and disbelieve the evidence of the victim as to the occurrence of the incident of rape on her by the appellant. The appellant would have been justified in seeking acquittal on the basis of the available material, provided the material on record created a doubt about the occurrence of the incident of penetrative sexual assault on the victim. The evidence of

the victim has been corroborated by the Medical Officer. Similarly, her evidence as to her relations with the appellant has been corroborated by her sister (PW3).

22. The prosecution has relied upon the DNA report (Exh.86). The DNA report is a scientific evidence. Before proceeding to rely upon this DNA report, it would be useful to refer to the decision of the Hon'ble Apex Court in **Mukesh and another .vs. State (NCT of Delhi) and others**, reported at **(2017) 6 SCC 1.** The Apex Court has observed that DNA Technology as a part of Forensic Science and Scientific discipline not only provides guidance to investigation but also supplies the Court accurate information about tending features to establish identification of criminals. After the amendment in the Criminal Procedure Code by the insertion of Section 53-A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. It is held that the DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report has to be accepted.

23. In the backdrop of the above, it would be necessary to consider the evidence of the Medical Officer Dr. Manisha Nasare (PW4). The Medical Officer has deposed that on 26.05.2019, she had examined the victim. The victim had narrated the history of assault. The victim had categorically stated the name of the appellant being the perpetrator of the crime. The Medical Officer, on examination of the victim, found that she was carrying 31 weeks' pregnancy. PW4 collected the blood samples of the victim at the time of the examination. She was then referred for USG. The USG report is on record at Exh.59. Similarly, the blood sample of the victim for the purpose of DNA examination was collected on 28.05.2019. The identification form is at Exh.98. The blood sample of the appellant for DNA examination was collected on 28.05.2019. It needs to be stated at this stage that the prosecution has not examined the Medical Officer, who had collected the blood sample of the appellant. The blood sample of the new born male baby was collected on 03.08.2019. It is also evident that the Medical Officer, who had collected the blood sample of the new born baby was also not examined. It is to be noted that these are the major lacunas in the case of the prosecution. The question is whether these lacunas are sufficient to create a doubt about the authenticity and credibility of the DNA report. In my view, the evidence on record is sufficient to conclude that these drawbacks would not go against the case of the prosecution.

24. PW5 PC Sagar Sangole is the carrier of the samples. PW5 had collected the DNA kits from the office of RFSL, Nagpur. He had carried the DNA samples of the appellant and the victim on 28.05.2019. Exh.68 is the requisition letter prepared under the signature of the Investigating Officer, addressed to the Dy. Director, RFSL, Dhantoli, Nagpur. PW5 has deposed that he collected the samples from the Medical Officer and carried the

same to the RFSL, Nagpur. Exh.69 is the acknowledgment issued from the O/o RFSL, Nagpur. Perusal of the acknowledgment would show that the samples had been received in the RFSL, Nagpur on 28.05.2019. It is evident that the samples had not been deposited in the police station. The samples had been carried without wasting any time on the same day to the RFSL, Nagpur. The blood sample of the new born male child was collected on 03.08.2019. The said sample was carried by PW5 to RFSL, Nagpur on 03.08.2019 itself. Exh.72 is the requisition letter to the Dy.Director, RFSL, Nagpur. Exh.73 is the acknowledgment of receipt of the sample. The sample had been deposited on 03.08.2019. The oral and documentary evidence on record is sufficient to conclude that there was no scope for manipulation or tampering with the samples. The samples had been sealed by the Doctor. The samples had been collected in the DNA kit provided by the RFSL, Nagpur.

25. In the above context, the evidence of PW8, who had analyzed the samples assumes significance. PW8 has deposed that two samples had been received on 28.05.2019 in sealed condition. She has deposed that along with the samples, two original DECLARATION forms had been received. PW8 has deposed about the acknowledgment of those samples by the receiving Clerk in the RFSL. PW8 has deposed that the samples had been received in sealed condition. She has deposed about the analysis of the samples. PW8 has deposed in detail about the procedure followed and the relevant tests conducted for analysis of the samples. The DNA report is at Exh.86. PW8 has deposed that on analysis of the samples, she opined that the appellant and the victim are concluded to be the biological parents of the male baby. It is to be noted that in cross-examination, her evidence with regard to the condition of the samples and the seals on the samples being intact, has not at all been challenged. In this case, therefore, failure to examine the Medical Officer, who had collected the samples of the appellant and the samples of the body child, would not go against the prosecution. The appellant would have been justified in capitalizing all these lacunas if there had been undue delay in forwarding the samples to the RFSL, Nagpur from the date of its collection. The carrier (PW5) has deposed that after collecting the samples and on receipt of the forwarding letters, immediately the samples were carried to the RFSL. In my view, this evidence, therefore, cannot be discarded and disbelieved. The DNA report is scientific evidence. It fully corroborates the version of the victim as to the penetrative sexual assault on her by the appellant.

26. On re-appreciation of the evidence, I am satisfied that the learned Judge has not committed any mistake. The findings recorded by the learned Judge on all the counts are supported by the cogent and concrete reasons. I do not see any reason to discard and disbelieve the evidence on record. In the final analysis, I concur with the findings of fact recorded by the learned Special Judge. As a result of this, I do not see any substance in the appeal.

27. Before parting with the matter, it is necessary to acknowledge the able assistance rendered by Mr. P.W.Mirza, learned advocate appointed to represent the appellant and Ms. Shubhada Phaltankar, learned advocate appointed to represent respondent no.2/ victim. The valuable assistance rendered to this Court by them is appreciated.

28. In view of the above discussion, the appeal deserves to be dismissed. Accordingly, the appeal is dismissed.

29. Mr. P.W. Mirza, learned advocate appointed to represent the appellant and Ms. Shubhada Phaltankar, learned advocate appointed to represent respondent no.2/victim are entitled to receive their fees. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fees to the learned appointed advocates, as per the Rules.