

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
DB :- HON'BLE JUSTICE ANAND PATHAK &
HON'BLE JUSTICE HIRDESH, JJ**

ON THE 6TH MARCH, 2025

CRIMINAL APPEAL NO. 310 OF 2016

PINTU @ PRATHVIRAJ KOLI

Versus

THE STATE OF MADHYA PRADESH

Appearance:

Shri Atul Gupta- Advocate for appellant.

Shri A. K. Nirankari- Public Prosecutor for respondent- State

JUDGMENT

Per Hirdesh, J:

The present criminal appeal under Section 374 of CrPC has been filed by appellant challenging the judgment of conviction and order of sentence dated 16.01.2016 passed by Additional Sessions Judge, Karera, District Shivpuri (MP) in Special Sessions Trial No.24 of 2015, whereby the appellant has been convicted under Section 376(2) of IPC and sentenced to undergo life imprisonment with fine of Rs.2000/- and in default of payment of fine to further undergo six months' additional imprisonment and under Section 6 of POCSO Act and sentenced to undergo life imprisonment with fine of Rs.2,000/- and in default of payment of fine to further undergo six months' additional imprisonment. Both the sentences have been directed to run concurrently.

2. In brief, the prosecution case is that on 08.03.2015, around 5:00 PM, complainant (PW-1), mother of minor prosecutrix, aged around 02 years,

lodged a report at Police Station, Karera, District Shivpuri alleging therein that accused-appellant Prithviraj Kori, who lives near her hut and works as a Labourer, a day or two ago, came to her house. At that time, her daughter minor prosecutrix was weeping. It is alleged that accused-appellant took her daughter to get biscuits for her from shop. Around 03:00 PM, appellant-accused brought her daughter back to her. Her daughter started weeping. On being asked what happened, her daughter gestured towards her private parts. On seeing, she found that blood was oozing from her vagina. She understood that accused-appellant had done something wrong with her daughter. When she went near the appellant, he ran away. Then, she called her husband and went along-with her daughter to Police Station Karera, District Shivpuri for lodging a report. On the basis of such allegations, FIR at Crime No.129 of 2015 for offence punishable under Sections 376 of IPC and under Section 3/4 of the POCSO Act was registered at Police Station Karera against the appellant-accused.

3. Matter was investigated. During investigation, medico-legal examination of minor prosecutrix was conducted. Vaginal slide and bloodstained underwear of prosecutrix was collected. Spot map was prepared. Statements of the witnesses including mother (PW-1), father (PW-2) and grand-father (PW-3) of minor prosecutrix were recorded. Accused was arrested and he was medically examined. Sealed packets of semen slides and a pair of blue underwear of accused were seized. Blood sample was sent for DNA testing. After completion of investigation and other formalities, the police filed Final Report/charge-sheet before the competent Court of criminal jurisdiction.

4. The Trial Court framed charges under Section 376 of IPC and Section 3/4 of POCSO Act. Appellant abjured his guilt and sought trial. In turn, prosecution in order to prove its case examined 13 witnesses. After completion of prosecution witnesses, statement of accused was recorded under Section 313 of CrPC. In defence, appellant pleaded that he has not committed any offence

and he has falsely been implicated in the case. Accused-appellant did not examine any witness in his defence.

5. After concluding the trial, the trial Court held the appellant guilty for the aforesaid offence and sentenced him accordingly, as mentioned in Para 1 of this judgment.

6. Being aggrieved, appellant has filed the instant appeal on the following grounds:-

(i) The impugned judgment of conviction and order of sentence passed by learned Trial Court is contrary to law, solely on the basis of conjectures and surmises.

(ii) Prema Jatav (PW-5) did not support the prosecution version and there are many contradictions and omissions in the evidence of prosecution witnesses.

(iii) Neither prosecution has recorded statement of any child witness of the scene of incident nor recorded the statement of minor prosecutrix.

(iv) No semen or blood particles of the accused were found on the clothes of minor prosecutrix.

(v) In absence of clear evidence, the appellant cannot be linked with the alleged commission of rape.

(vi) Only on the basis of circumstantial evidence, the learned Trial Court has committed an error in convicting and sentencing the appellant-accused, overlooking the DNA report.

7. On the other hand, it is argued by learned Counsel for the State that there is no infirmity in the impugned judgment of conviction and order of sentence passed by the trial Court. It is neither perverse nor contrary to the record. Minor contradiction or discrepancy should not be a ground for throwing out the prosecution case unreliable. Looking to the nature of allegation and the manner in which, the appellant has committed a heinous crime with a minor child aged around 02 years, the jail sentence awarded by the learned trial Court

is just and proper and the appellant does not deserve any leniency. Hence, he prayed for dismissal of appeal.

8. Heard learned counsel for parties and perused the record as well as the evidence of material witnesses.

9. The moot question for determination of appeal is whether prosecutrix, who is two-year old child was sexually assaulted on the date of incident i.e 08.03.2015 or not?

10. Mother of minor prosecutrix (PW-1) in Para 1 of her examination-in-chief deposed that accused is resident of Jhansi and started living as neighbourhood in Sidhupura Village Toda, Pichhore about two years before the incident. He used to break stones (work as a quarry labour). Two months ago, around 02:00:3:00 in the afternoon, she and her minor daughter were at home. Her husband had gone to do field work. Her daughter was weeping, so accused-appellant came from his house and told her to give the child to him and he will get biscuits for her from shop. After sometime, accused brought her daughter back to her. Her daughter was still crying and unable to speak and gestured towards her private part with her hand. When she looked at her private part, she found that both her urination and defecation areas appeared to be one and there was blood oozing from her vagina. Accused gave minor child to her and went back. This witness further deposed that she realized that accused had done something wrong with her daughter. She called her husband on phone and narrated the incident. This witness in Para 2 of her examination-in-chief deposed that after return of her husband, she along with her minor daughter went to Police Station Karera where a report was lodged *vide* Ex.P1 against the accused. Thereafter, police sent her daughter to District Hospital, Shivpuri for medical examination. Due to serious condition, her daughter was sent to GR Medical College, Gwalior where she was treated. Police prepared spot map in her presence *vide* Ex.P2 and she give her statement to police regarding the incident. Her daughter was treated about 10-15 days in Gwalior

where she also underwent surgery.

11. Dr. Anjana Jain (PW-8) was posted as Medical Officer on 08.03.2015 in District Hospital Shivpuri. She conducted medico-legal examination of minor prosecutrix *vide* Ex.P7 and found following external injuries on the person of the prosecutrix.

“The pulse of prosecutrix was 110 beats per minute and her blood pressure was approximately 94/50. Her condition was lethargic. There was a scratch mark on the right hand of the prosecutrix approximately 1.5cm x 0.5 cm which appeared to be caused by a hard and blunt object and was caused to be within 24 hours of medical examination.”

On internal examination of minor prosecutrix, Dr. Jain found following injuries:-

“Redness was visible on genitals but the prosecutrix was not allowing to conduct the examination. Therefore, general anesthesia was required for examination but she was not fit for general anesthesia. Therefore, she was admitted in hospital for further treatment. At the time of examination, prosecutrix was found wearing green pajama with blood stains which were sealed and handed over to Constable. At the time of examination, under general anesthesia, her hymen was found torn, her perineum was torn, her posterior vaginal wall was torn, the anterior rectal wall was torn and both labia were torn. Two slides were prepared from the torn parts of the prosecutrix which were also sealed and handed over to the Constable.”

According to opinion of Dr. Jain, penetration was done in genitals of minor prosecutrix, which was done to be within approximately 24 hours of medical examination. Aforementioned genital parts were found to be torn due to penetration. Due to severe genital injuries, the minor prosecutrix was referred from District Hospital Shivpuri to surgical ward of Kamalraja Hospital, Gwalior.

12. Dr. Sameer Gupta (P.W.10), was posted as Assistant Professor (Surgical Ward) in Madhav Dispensary, JA Hospital, Gwalior on 09.03.2015. He in his examination-in-chief deposed that after providing first aid to minor prosecutrix, she was taken to Operation Room, where her wounds were

thoroughly cleaned and vaginal opening and rectum were stitched back to their normal state. A colostomy operation was performed on her abdomen for stool passage. The minor prosecutrix remained admitted to JA Hospital until 21st March, 2015 and was also discharged on same day after recovery. Referral slip, examination note, consent of father of minor prosecutrix and operation note are Ex.P11 to Ex.P14. Mental examination of minor prosecutrix is done *vide* Ex.P15 by Dr. Atul Agarwal. Other documents related to examination of minor prosecutrix till her discharge were prepared *vide* Ex.P16 to Ex.P17.

13. No such facts have been merged from the evidence of Dr. Sameer Gupta (PW-10) which could discredit his evidence. Upon examining genitals of minor prosecutrix, Dr. Sameer Gupta found that vagina of minor prosecutrix was completely torn (fourth degree perineal torn), the anus and rectum were completely torn, and the vagina and rectum were both joined into one. Thus, from the evidence of Dr. Gupta as well as medical documents available on record, it is clear that vagina of minor prosecutrix was completely torn due to rape and she was operated on for the wounds in her private parts.

14. Considering the evidence of mother of prosecutrix (P.W.1) and evidence of Dr. Anjana Jain (P.W.8) and Dr. Sameer Gupta (P.W.10), it is clearly proved that minor prosecutrix, who is aged around 2 years, was sexually assaulted on the date of alleged incident i.e 08.03.2015.

15. The next question for consideration of appeal is whether the minor prosecutrix was sexually assaulted by appellant-accused or not ?

16. Dr.A.K. Sharma (PW-4) was posted on 09.03.2015 as Medical Officer at CHC Karera, District Shivpuri. He deposed in his examination-in-chief that he conducted medical examination of appellant-accused with his consent, in which accused was found fully capable of intercourse. Report is ExP-3. No challenge has been made to the statement of Dr. Sharma from the defence. Therefore, there is no reason to disbelieve the evidence of Dr. Sharma.

17. Father of the prosecutrix (PW-2) supported the evidence of mother of

prosecutrix (PW-1) and stated in his evidence that at the time of incident, he was doing agricultural work in the field. When his wife called him, he reached home and entire incident was narrated to him by his wife stating that on seeing the private part of prosecutrix, blood was found oozing. Thereafter, he took his daughter with his wife to Police Station Karera, where report was lodged.

18. The evidence of mother of minor prosecutrix (PW-1) was substantially intact in her cross-examination. Grandfather of minor prosecutrix (PW-3) supported the evidence of father and mother of minor prosecutrix in Para 1 of his cross-examination and specifically denied that there was a dispute over the hut of the accused between his son (father of prosecutrix) and the accused. There are no contradictions and omissions found in the cross-examination of mother, father and grandfather of the prosecutrix (PW-1, PW-2 and PW-3 respectively). Therefore, there is no reason to disbelieve their evidence.

19. The next argument advanced by learned counsel for appellant is that any child witness of the scene of occurrence has not been examined. The minor prosecutrix was not examined by the prosecution and her statement was not recorded by police under Section 161 of CrPC during investigation.

20. On the question of absence of statement of minor prosecutrix, it is undisputed fact that the age of minor prosecutrix was 2-3 years at the time of incident, in such a situation, it does not seem possible for the minor prosecutrix to describe the incident or to speak something. Thus, as per settled principle of law established by the Hon'ble Apex Court in catena of decisions that the accused cannot be acquitted solely based on the absence of recording of statement of minor prosecutrix.

21. Further, learned Counsel for appellant submitted that although the DNA report was filed by the prosecution, but the same is not exhibited and is not supported the prosecution case, therefore, unexhibited document of prosecution can be read in favour of appellant- accused.

22. It is well established principle of law that if an un-exhibited document of

prosecution is in favour of the accused, then it can be read in his favour but an un-exhibited document of prosecution cannot be read against the accused.

23. So far as the submission of learned counsel for appellant that the Trial Court has not taken into consideration the evidence of DNA report for the purpose of recording judgment of conviction and order of sentence against the appellant is concerned, the Hon'ble Supreme Court in the case of **Pantangi Balarama Venkata Ganesh vs. State of AP (2009) 14 SCC 607** has held that " for the purpose of the case, it may not be of much consequence as the Court has not taken into consideration evidence of DNA experts alone for the purpose of recording a judgment of conviction. It has been considered along-with other evidence. The prosecution case has been considered as a whole. Cumulative effect of the evidences adduced before the learned Trial Judge have been taken into consideration for the purpose of arriving at a finding of guilt against the appellant.

24. Although in the present case, the unexhibited DNA report which was submitted on behalf of prosecution before the trial Court in which, it was found that the sources of vaginal slides and green colour *pajami* of prosecutrix did not yield a male DNA profile and the result of DNA test is inconclusive.

25. The Hon'ble Apex Court in recent judgment of **Suresh @ Hanumant vs State (Govt. Of Nct Delhi)** decided on **5 March, 2025 in Criminal Appeal No.2685/2023 in Paragraph 15 held as under:-**

“Once the dying declaration made by the deceased is proved, the fact that the ballistic expert could not give a definite opinion on the question of whether the cartridge recovered from the body of the deceased was fired by the revolver recovered at the instance of the accused no.1, is not relevant at all. Once it is held that the dying declarations are duly proved, this lacuna is insignificant”

26. The Hon'ble Apex Court in various decisions including the decision of **Pattu Rajan v. State of T.N. (2019) 4 SCC 771** considered the value and weight to be attached to a DNA report and held that like all other opinion

evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.

27. Thus, it is imperative that all the evidence surrounding the case are taken as a whole. Consistent and reliable statements of mother, father and grand-father of prosecutrix as well as medical evidence of Dr. Anjana Jain (PW-8) and Dr. Sameer Gupta (PW-10) regarding the incident of penetrative sexual assault cannot be disregarded merely on the ground that FSL report indicates that “the result of DNA test is inconclusive”. Therefore, inconclusiveness of the DNA report should not be given benefit to the accused-appellant.

28. Although Prema Jatav (PW-5) did not support the prosecution version because of the fact that she is a hearsay evidence and she is not an eye-witness of incident, but in view of above conspectus of case, especially in view of evidence of mother(PW-1), father (PW-2) and grand-father of minor prosecutrix duly supported by medical evidence of Dr. Anjana Jain (PW-8) and Dr. Sameer Gupta (PW-10) and other evidence available on record, this Court is of the considered opinion that the prosecution has succeeded in establishing the appellant guilty of alleged offence. No infirmity or illegality is found in the impugned judgment of conviction and order of sentence passed by learned trial Court.

29. At this stage, learned Counsel for appellant submitted that appellant has already served incarceration of more than 10 years without remission,

therefore, the jail sentence of appellant be modified to the period already undergone by him.

30. As per provisions of Section 376(2) of IPC, the alleged incident took place in the year 2015 and minimum punishment has been prescribed at that time for a term which shall not be less than ten years rigorous imprisonment but which may be for life and shall also be liable to fine. Similarly, POSCO Act provides punishment for aggravated penetrative sexual assault for a term which shall not be less than twenty years, but which may extend to imprisonment of life and shall also be liable to fine. Looking to the nature of allegations and the manner in which the accused committed a serious offence with a minor girl aged around 2-3 years, a leniency may not be adopted for modification of the jail sentence of appellant to the period already undergone by him. Accordingly, the prayer is **rejected**.

31. In view of above discussion, the instant appeal being devoid of merits, is hereby **dismissed**. The impugned judgment of conviction and order of sentence dated 16.01.2016 passed by Additional Sessions Judge, Karera, District Shivpuri (MP) in Special Sessions Trial No.24 of 2015 is hereby **affirmed**. The appellant is already in jail. He is directed to serve the remaining part of jail sentence, as awarded by the trial Court.

32. A copy of this judgment along with record be sent to the Trial Court concerned as well as concerned Jail Authority for information and compliance.

(ANAND PATHAK)
JUDGE

(HIRDESH)
JUDGE