

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 31.08.2026

Pronounced on: 10.09.2026

Uploaded on: 10.09.2026

*Whether the operative part or full
judgment is pronounced:* **Full**

Cr1 R No.65/2025

IRSHAD AHMAD MALIK

...PETITIONER(S)/APPELLANT(S)

Through: - Mr. Sajad Ahmad Mir, Advocates.

Vs.

UT OF J&K & ANR.

...RESPONDENT(S)

Through: - None.

CORAM: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1) Initially, the petitioner was convicted by the Court of 2nd Additional Sessions Judge, Srinagar ('the trial court'), in terms of the judgment dated 29th May, 2023, for commission of offence under Section 376 RPC in the charge sheet arising out of FIR No.33/2012 of Police Station, Soura, Srinagar, and vide order dated 31.05.2023, was sentenced to undergo rigorous imprisonment for a period of ten years along with a fine of Rs.25,000/.

2) Aggrieved by the aforesaid judgment and order, the petitioner preferred an appeal bearing Cr1A(S) No.05/2023, which was disposed of by the Coordinate Bench of this

Court in terms of the judgment dated 27.12.2024 with the following observations:

“16. In his statement under Section 342 of J&K Cr. P. C, the appellant had taken a definite stand that he had undergone sterilization and, as such, was incapable of committing sexual intercourse and could not have fathered a child. To rebut this defence of the appellant, the prosecution examined Dr. Shabir Ahmad to prove the certificate, EXC.W-1, but this certificate has not been put to the appellant for his explanation. The learned trial court, while recording conviction against the appellant/accused, has used the aforesaid certificate as evidence against him.

17. The omission on the part of the trial court to put the aforesaid pieces of incriminating circumstances to the appellant/accused for his explanation has caused grave prejudice to him, which is a serious irregularity. The question that arises for consideration is as to whether on account of this irregularity, the appellant deserves to be acquitted or the matter should be remanded to the trial court for recording further statement of the appellant/accused under Section 342 of J&K Cr. P. C

18. In the instant case, the incident has taken place in the year 2012. Although 12 years have elapsed since the date of the incident, yet we are dealing with a case where allegation against the appellant/accused is relating to sexual assault upon a minor girl, who, prima facie, appears to have supported the prosecution case. The only question which remains to be determined is whether the prosecutrix, was minor at the relevant time and whether the appellant/accused was capable of performing sexual intercourse at the relevant time. If the appellant/accused, in these circumstances, is acquitted of the charge on the basis of a technicality, it may result in failure of justice. Conversely, if the appellant/accused is given a chance to explain the material circumstances as indicated hereinbefore, he will be able to put up his defence and explain these circumstances and there would be no failure of justice even from the perspective of the appellant/accused.

19. In view of the fact that all the material circumstances appearing in the prosecution evidence have not been put to the appellant/accused while

recording his statement under Section 342 of J&K Cr. P. C, the impugned judgment of conviction and the order of sentence passed by the learned trial court are set aside. The case is remanded to the learned trial court with a direction to record further statement of the appellant/accused under Section 342 of the J&K Cr. P. C for seeking his explanation regarding incriminating circumstances appearing in the prosecution evidence, as enumerated hereinbefore. After recording further statement of the appellant under Section 342 of J&K Cr. P. C, he shall be afforded an opportunity to produce evidence in defence, whereafter the learned trial court shall pass fresh judgment in accordance with the law. The needful shall be done by the learned trial court within a period of six months from the date a copy of this judgment is received by it.”

3) As is evident, the matter was remitted to the learned trial court for putting all the material circumstances appearing in the prosecution evidence not put to the petitioner while recording his statement under Section 342 of the J&K Cr. P. C. Further, the petitioner was to be afforded an opportunity to produce evidence in his defence.

4) After the matter was remitted to the learned trial court, the petitioner filed an application on 15th April, 2025, seeking a DNA test of the child born to the prosecutrix, on the ground that the DNA test is crucial for the just determination of the case and is the most reliable method for establishing or excluding paternity. Yet another application came to be filed on 21.05.2025 to club the aforesaid application with application dated 28th November, 2014, as it was urged that the application dated 28th

November, 2014 is still pending and has not been disposed of by the court.

5) The learned trial court, however, in terms of order dated 16th July, 2025, dismissed the applications preferred by the petitioner, with an observation that the application dated 28.11.2024 was already decided vide order dated 26th May, 2018 and in that view of the matter, successive application for similar relief is not maintainable.

6) The petitioner has filed the instant petition thereby assailing order dated 16th July, 2025, *inter-alia*, on the ground that the trial court failed to properly appreciate the significance of DNA evidence in determining the guilt or innocence of the accused as DNA testing is crucial scientific evidence that can either corroborate the prosecution case or establish the innocence of the accused and is a key tool to ensure truth and justice. It is also contended that the petitioner was granted an opportunity by the Coordinate Bench of this Court to lead evidence in his defence but the learned trial court has failed to provide opportunity to the petitioner to prove his innocence.

7) Heard learned counsel for the petitioner and perused record of the case.

8) The record depicts that an application was filed on 15th April, 2025 for conducting DNA test of the child born to the prosecutrix. Another application came to be filed by the petitioner for clubbing of the pending application along with previous application filed by him on 28th November, 2014, which was disposed of in terms of order dated 26th May, 2018. Strangely, in the application filed before the learned trial court, it was stated that the application filed on 28th November, 2014 was not decided and pending, whereas in para-10 of the petition, it is stated that defective disposal of the earlier application vide order 26th May, 2018, has created confusion.

9) In terms of the judgment passed by the Coordinate Bench of this Court in the appeal preferred by the petitioner, the matter was remanded to the learned trial court for recording statement of the petitioner afresh after putting all the incriminating circumstances appearing in the prosecution evidence to him. The learned trial court in terms of the impugned order dated 16th July, 2025 has dismissed the aforesaid application on the ground that in terms of the application filed by the petitioner on 18th November, 2014, composite relief for producing the child before the Court and for issuance of direction for conducting the DNA test, was sought and after seeking the

objections from the prosecution, the application was dismissed in terms of the order dated 26th May, 2018. The learned trial court has observed that once the application for similar reliefs stands dismissed, the successive application would not be maintainable.

10) As is evident from the judgment dated 27th December, 2024, in the appeal preferred by the petitioner, the plea was raised by the petitioner that his plea for DNA test was denied by the trial court without cogent reasons, but still the Coordinate Bench, while remitting the matter to the learned trial court did not allow the prayer of the petitioner for conducting DNA test. Rather, the Coordinate Bench of this Court vide judgment dated 27.12.2024 has observed that the only question which remains to be determined is whether the prosecutrix, was minor at the relevant time and whether the petitioner was capable of performing sexual intercourse at the relevant time and bearing these two issues in mind, the Coordinate Bench of this Court remitted the matter to the learned trial court to record further statement of the petitioner under Section 342 of the J&K Cr. P. C and after recording of the statement, he be afforded an opportunity to produce evidence in defence. The judgments relied upon by learned counsel for the petitioner

are not applicable in the facts and circumstances of the present case.

11) Learned counsel for the petitioner has stated that the statement of the petitioner has already been recorded. Now the learned trial court has only to proceed in terms of the judgment dated 27th December, 2024, and, of course, after allowing the petitioner to produce evidence in defence but under the garb of producing evidence in defence, the petitioner cannot re-open the issue that stands already adjudicated upon by the learned trial court in the earlier application preferred by the petitioner.

12) After having examined the order passed by the learned trial court, this Court does not find any reason to show indulgence. The petition is found to be misconceived and the same is dismissed accordingly.

(Rajnish Oswal)
Judge

Srinagar,
10.09.2026

“Bhat Altaf-Secretary”

Whether the **judgment** is reportable: **YES/NO**