

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL APPEAL NO.334 OF 2016.**

Rajratan s/o Sahebrao Nawghare
Age 26 Years, Occu. Labour,
r/o Balirampur, Taluka and
Dist. Nanded.

... APPELLANT.

VERSUS

- 1) The State of Maharashtra,
through Nanded (Rural) Police
Station, Nanded, Dist.
Nanded.

... RESPONDENT.

...

Shri Mahesh Ghatge, Advocate for appellant.
Smt.V.N. Patil – Jadhav, APP for the State.

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CORAM : V.L. ACHLIYA, J.

Reserved on : 6th April, 2017.
Pronounced on : 6th July, 2017.

JUDGMENT:

Being aggrieved by the judgment and order dated 22.04.2016 passed in Special Case (POCSO) No.10/2013 by the Sessions Judge, Nanded, the appellant has preferred this appeal. By the impugned judgment and order, the learned Sessions Judge has convicted the

appellant - accused for the offence punishable under Section 376(1) of IPC and sentenced to suffer R.I. for ten years and to pay a fine of Rs.1000/-, in default of payment of fine, to undergo R.I. for three months. The appellant is also convicted under Section 5(j)(ii), 5(1) and 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act) and ordered to undergo R.I. for ten years and to pay a fine of Rs.1000/-, in default of payment of fine, to suffer R.I. for three months. Being aggrieved, the appellant has preferred this appeal.

2. Brief facts of the case leading to prosecution of the appellant as unfolded during the course of trial are summarized, as under:

(a) On 25.7.2013, complainant Purnima Bhimrao Paikrao (P.W.1) mother of the prosecutrix lodged written complaint alleging therein that the appellant and one Bablu Digamber Gaikwad a child in conflict with law (hereinafter referred to as

juvenile) sexually exploited and repeatedly committed forcible sexual intercourse with her minor daughter for a period of more than one and half year and, caused pregnancy to her daughter. It is alleged that while she was lying admitted in the Hospital, it was revealed to her that her daughter was carrying pregnancy of four months. When she enquired from her about her pregnancy, she disclosed that the appellant and Bablu Gaikwad a child in conflict with law repeatedly committed sexual intercourse with her by putting under the threat to kill her and the appellant – accused committed sexual intercourse with her by making promise to marry with her. When she met her brother, who is also father of the appellant and disclosed to him the act committed by his son, he asked her to get terminated the pregnancy of her daughter or sent her to some Ashram. He threatened that in case she files complaint with police, he will kill her and her family. She has further mentioned in her report that her daughter

had given birth to female child on 28th March, 2013 in Government Hospital at Nanded.

(b) On the basis of the complaint lodged by Purnima (P.W.1), offences punishable under Section 376(2)(g), 506 r.w. 34 of IPC and section 9(g)(1) of POCSO Act came to be registered against the appellant and co-accused Bablu Gaikwad vide CR No.277/2013 with Police Station, Nanded (Rural) by API Suresh Unawane (P.W.10) and Conducted investigation. He arrested the appellant – accused and referred him for medical examination. He also visited the spot of incident and made panchanama. He obtained the kit for the purpose of DNA test and later on, obtained blood samples of the victim girl, newly born baby as well as appellant – accused and the a child in conflict with law arrested in the case for the purpose of DNA test and forwarded the same to the laboratory for report. He referred the victim girl for medical examination. He also obtained extract of admission

register pertaining to victim girl from the school where she was admitted. On completion of the investigation, the Investigating Officer filed charge-sheet against the appellant in the Court of J.M.F.C., Nanded. He has filed separate charge-sheet before the Juvenile Justice Board against the juvenile.

(c) In due course, the case was committed to Court of Sessions. Initially, the charge was framed under Section 376(2)(g), 506 r.w. 34 and section 9(g)(I) of POCSO Act. The charge was altered. Charge under Section 376(2)(g) r.w. 34 of IPC, the charge under Section 5(g) r.w. Section 6, 5(j(ii) r.w. Section 6, 5(1) r.w. Section 6 and 5(n) r.w. Section 6 of the POCSO Act came to be framed against appellant by deleting charge under Section 9(g)(I) of POCSO Act. The accused pleaded not guilty to the charge and claimed to be tried. The accused had taken defence that prosecutrix is his wife and both of them stayed together at his residence for two

months. Later on the mother of prosecutrix took her to her residence due to ant bites to her. Thereafter, the prosecutrix was not sent back and a false case has been filed against him.

3. In order to prove its case, the prosecution has examined eleven witnesses which include, Purnima (P.W.1) the complainant and mother of the prosecutrix, the victim (P.W.4) and her father Bhimrao (P.W.8). Prosecution has further examined Dr.Dattatraya Pawar (P.W.2) who has taken sample for DNA test and Dr. Surabhi Bajpai (P.W.3) who examined the prosecutrix. Prosecution has examined Dr.Avinash Puri (P.W.7) who examined the accused and also obtained his blood sample. Besides said witnesses, prosecution has examined Rahul (P.W.6) and Raju (P.W.9) as panch witness to spot panchanama and Sudhakar (P.W.11) Head Master of the school. Prosecution has examined Police Constable Vitthal (P.W.5) who carried Muddemal property to the Chemical Analyzer and P.I. Suresh Unawane (P.W.10) the Investigating Officer.

4. In defence, the appellant has examined Krushnabai Navghade (DW 1) mother of Purnima i.e. complainant and grandmother of appellant – accused. On due consideration of the oral and documentary evidence, learned Additional Sessions Judge has found the appellant guilty of offence punishable under Section under Section 376(1) of IPC and Section 5(j)(ii), 5(1), 5(n) and Section 6 of the POCSO Act and awarded sentence as stated above. Being aggrieved, the appellant has preferred this appeal.

5. I have heard submissions advanced at length by the learned Counsel for the appellant and APP for the respondent – State and carefully perused the record & proceedings.

6. Mr. Ghatge, learned Counsel for the appellant assailed the reasons and findings recorded by the trial Court as perverse and not sustainable in law. He submitted that the prosecution has failed to adduce

cogent and convincing evidence to establish that at the time of incident the prosecutrix was minor in age and the appellant has committed forcible sexual intercourse with her. By referring the evidence adduced by prosecution, learned Counsel submits that the witnesses examined by the prosecution on the point of alleged rape inspire no confidence. He further submits that there is no corroboration to testimony of prosecutrix. As per DNA report, the appellant is not found to be the biological father of the female child given birth by the prosecutrix. By referring the testimony of the prosecutrix, it is contended that her evidence is not of a nature to solely base the conviction. It is further contended that the conviction of the appellant under the provisions of POCSO Act is not sustainable in law for the reason that the POCSO Act is brought into force w.e.f. 14th November, 2012. Whereas the incident was committed much prior to provisions of POCSO Act brought into force. It is pointed out that the prosecutrix gave birth to female child on 28.3.2013. The complainant has deposed that the act of forcible intercourse was

committed one and half year prior to lodging of complaint. The complaint was lodged on 25.7.2013. In this background, it is contended that the offence being committed much prior to provisions of POCSO Act brought in to force, the conviction of the appellant for the offence under Section 5(j)(ii), 5(1) and 5(n) punishable under Section 6 of the POCSO Act is not sustainable in law and liable to be set aside. He has further submitted that there is no cogent and convincing evidence to sustain the conviction under Section 376 of IPC and judgment nad order passed by trial Court is based upon improper appreciation of evidence. It is contended that the reasons and findings recorded by trial are perverse and liable to be set aside.

7. On the other hand, learned APP appearing for the State has supported the judgment and order passed by the trial Court. She submitted that the FIR was lodged on 25.7.2013. On the date of setting the law in motion, the provisions of POCSO Act were in force. Moreover, the act of forcible sexual intercourse was committed

repeatedly and that too, even after the provisions of POCSO Act brought in to force and therefore, the conviction of the appellant under the provisions of of the POCSO Act is sustainable in law. She further submitted that there is cogent and convincing evidence to sustain the conviction. prosecutrix has stood by the case of the prosecution and categorically deposed that the accused had committed forcible sexual intercourse by causing threat to kill her. She further submits that at the time of commission of offence, prosecutrix was 13 years of age and therefore, consent of the prosecutrix was immaterial.

8. In order to appreciate the submissions advanced, I have carefully scrutinized the oral and documentary evidence adduced by the prosecution.

9. If, we consider the overall case of prosecution, then the prosecution has approached with the case that the prosecutrix was sexually exploited and subjected to forcible sexual intercourse by the present appellant, who happens to be related with victim and another boy

namely Bablu Gaikwad, a juvenile, as when they found her alone in her house by causing threat to kill her. The case of the prosecution is that the prosecutrix was subjected to repeated sexual intercourse by two different persons at different point of time. It is not the case of the prosecution that appellant – accused and the a child in conflict with law together committed sexual intercourse with the prosecutrix. Since the juvenile is separately tried, the scope of scrutiny of the evidence confines to appreciation of evidence to the extent of appellant – accused to examine as to whether prosecution has proved guilt of appellant beyond reasonable doubt.

10. The conviction is mainly based upon the testimony of the victim (P.W.4). Her testimony is at Exh.28. At the time of incident, she was studying in 7th standard and used to go to school at 7.30 a.m. and returning home at 4.30 p.m. Her parents used to go for labour work. They used to leave home at 9 a.m. and normally, coming back around 6 p.m. She deposed that after returning from school, she used to remain alone in her home. while she

used to remain alone in her home, the appellant used to visit her house and committing forcible sexual intercourse with her. He used to tell her not to disclose about his act to her parents; otherwise, he would kill her. He used to show her knife and also used to caught hold her hands. He used to put handkerchief in her mouth and she become unconscious. Due to threats given, she had not disclosed the incident to her parents. So also for the reason that her brother was expired. She further deposed that her neighbour i.e. Sachin Gaikwad i.e. a child in conflict with law also used to visit her house and commit sexual intercourse with her by giving threats. He too, caused threats that if she disclosed the incident to her parents, just like her brother, he too kill her. He too used to insert handkerchief in her mouth and caught hold her hands and due to that she became unconscious. She further deposed that LIC papers relating to her brother were with Sachin. On that count also, he used to force her to submit to his demand to have sexual intercourse with her. She further deposed that as there was pain in her abdomen, she was taken to

civil hospital. In the sonography test it was revealed that she was carrying four months pregnancy. Later on, she gave birth to female child at her residence on the day of Rangpanchami. As froth was oozing from her mouth, she was taken to hospital. She further deposed that she was lying admitted for about one month and thereafter, her mother lodged complaint with the police.

11. The prosecutrix was subjected to cross-examination. In cross-examination, prosecutrix has admitted that Sachin i.e. the juvenile was friend of her deceased brother Bablu and doing LIC business. The work of LIC was given to him. She admitted that her brother died about three years back. After death of her brother, her mother was admitted in hospital and she was suffering mentally. She admitted that due to illness of her mother, she was required to leave school and attend her mother in the hospital. She admitted that her father was habituated to liquor and used to stay at home. She has further deposed that since the date of sexual intercourse till her delivery, she has not disclosed

the said fact to anyone. She has deposed that she had stated before the police that the accused used to show knife and put handkerchief in her mouth and she used to become unconscious. But, failed to offer explanation as to why said fact missing in her statement recorded by the police. She has admitted that for first time she has disclosed before the Court that she was lying admitted in the hospital for one month after she delivered child. In further cross-examination, the prosecutrix has admitted that she was knowing the person Anandrao Gondle who was the President of Tanta Mukti Samiti in her village. She has deposed that when she was pregnant, police had called her as well as her mother and grand-parents and accused Rajratan and his father. However, she denied the suggestion that at that time, police had obtained her signature and it was given in writing that marriage of accused was performed with her. She denied the suggestion that the accused married with her before the statue of Dr.Ambedkar and thereafter, she went to cohabit with the accused at his house. She denied the suggestion that after delivery, she went to house of

maternal uncle i.e. father of appellant and stayed there for two months and thereafter her mother taken her back.

12. Thus, if we consider the testimony of prosecutrix, then she has deposed that the appellant – accused as well as one Bablu @ Sachin Gaikwad repeatedly committed forcible sexual intercourse by causing threats to her. The fact deposed by the prosecutrix that the appellant – accused used to show her knife and put handkerchief in her mouth, proved to be by way of improvement. It is further established that the fact regarding the prosecutrix was carrying pregnancy of four months was detected when the mother of the prosecutrix was lying admitted in the hospital and that too, after conducting sonography test. She gave birth to female child on the day of Rangpanchami and delivery had taken place at her residence. Due to complication after giving birth to child, prosecutrix was taken to hospital where she remained admitted as indoor patient for one month. As per the evidence on record, the prosecutrix

had given birth to female child on 24.3.2013. She was admitted in hospital on 25.3.2013. The complaint was lodged on 25.7.2013. If, we consider the overall testimony of the prosecutrix then, the fact deposed by her as to commission of act of forcible sexual intercourse are vague. She has not given particulars of such incidents.

13. Besides the prosecutrix, prosecution has examined Purnima (P.W.1) mother of the prosecutrix, who lodged complainant. Her testimony is at Exh.15. She deposed that the prosecutrix is her elder daughter. Her son Bablu died about two and half years prior to recording of her evidence. She further deposed that the accused Bablu Gaikwad – a child in conflict with law was residing adjacent to her house. Her son died in accident. Due to illness she was admitted in Civil Hospital, Nanded. During her stay in hospital, prosecutrix and her younger daughter Manisha used to stay at the residence of her brother .e. father of appellant – accused. While she was admitted in the hospital, the prosecutrix met her and

complained that she had clots in her abdomen. Therefore, she underwent sonography in Civil Hospital. It was revealed that her daughter was carrying four months pregnancy. She told her that Raju son of her brother i.e. appellant used to come to her house and commit sexual intercourse with her. She further disclosed that their neighbour Bablu Gaikwad i.e. a child in conflict with law also used to commit forcible sexual intercourse with her. They used to commit sexual intercourse with her by giving threats. She further deposed that the appellant – accused threatened her that if she discloses the fact to anyone, he would kill her mother. She disclosed all such facts to her brother i.e. father of the appellant – accused and told him that her daughter is taking name of his son. However, he asked her to get abort pregnancy of her daughter and also caused threats to kill if she approaches to the police and lodges complaint. She deposed that at the time of detection of pregnancy, age of her daughter was 11 years and she delivered female child after the pregnancy of seven months. She further deposed that her delivery had

taken place in the hospital at Nanded. She further deposed that she got prepared the complaint and lodged the complaint vide Exh.16. She has deposed that due to illness and fear of her brother, she could not lodge complaint immediately. In cross-examination, she admitted that the appellant – accused is elder son of her brother Sahebrao. She admitted that her brother Maruti and sister Narmada are also staying at Balirampur. She deposed that house of Sahebrao is situated at half an hour distance by walk from her house. She further admitted that house of Sahebrao is surrounded by number of houses in the locality. Mahatma Phule School is located at Balirampur. She admitted that population of her village is 15000 to 16000. It takes half an hour to reach by auto-rickshaw to Balirampur from CIDCO. She deposed that she got the complaint typed on the day earlier to the date of filing complaint to police station. She has admitted that besides her husband, there were four to five persons accompanied her while getting the complaint typed. She admitted that Akash Gaikwad is her distant relative. He was present at the time of

lodging complaint. She admitted that there is Tanta Mukti office in her village and Amol Godbole was the President of Tanta Mukti Samiti. She denied that she had given application to Tanta Mukti and Mahila Samiti. She admitted that Rural police station is at a distance of half an hour from her house. She deposed that she is unable to tell the date of birth of her daughter. She denied the suggestion that the marriage of the appellant was performed with her daughter i.e. prosecutrix. She deposed that she had not asked her parents to perform marriage of her daughter with appellant. She denied the suggestion that marriage of her daughter was performed with appellant and she cohabited with him at his residence. She has also denied the suggestion that to save her family being defamed, marriage was performed. She denied the suggestion that false complaint was lodged after due discussion with her husband.

14. Thus, if we consider the testimony of the complainant (P.W.1) and the complaint lodged vide Exh.16, then so far as the act of sexual intercourse

committed with the prosecutrix is concerned, she has deposed on the basis of disclosure made to her by the prosecutrix. The prosecutrix carrying pregnancy was revealed to her while prosecutrix was carrying pregnancy of four months. As per the fact deposed by the witness, the prosecutrix gave birth to female child after the pregnancy of seven months. As per the complaint lodged, the prosecutrix gave birth to female child on 28th March, 2013. The son of the complainant died on 8.10.2012. It is mentioned in the complaint that the act of commission of forcible sexual intercourse with her daughter was continuously going on for one to one and half years prior to lodging of the complaint. Thus, if we consider the testimony of the complainant, then it can be safely inferred that about three months prior to delivering baby by the prosecutrix, the complainant came to know about her pregnancy and the names of person responsible for causing pregnancy to her daughter. Taking into consideration the date of delivery as 28.3.2013, it can be safely inferred that the disclosure about the pregnancy and the person responsible for

causing pregnancy was made to the complainant some time in the month of December, 2012. It can also be inferred that the complainant had a talk with father of the appellant immediately after disclosure made by the prosecutrix. In this background, if we consider overall facts of the case, then in the month of November / December, 2012, the prosecutrix was carrying pregnancy of four months, she conceived pregnancy some time in the month of July/August, 2012. Thus, there is delay of more than seven months in lodging the complaint.

15. Besides the complainant and prosecutrix, the prosecution has examined Bhimrao Paikrao (P.W.8) the father of the prosecutrix whose testimony is at Exh.38. He deposed that while his wife was admitted in the hospital, her daughter became ill. As froth was oozing from her mouth, he took her to hospital. Thereafter, her daughter disclosed that the appellant and Sachin, the a child in conflict with law committed rape on her. He further deposed that her daughter gave birth to female child. Thereafter, report came to be lodged. He has

denied the suggestion that marriage of prosecutrix was performed with appellant and thereafter, she stayed at the house of appellant. He has denied the suggestion that marriage of prosecutrix had taken place with appellant in presence of his in-laws.

16. If, we consider the impugned judgment and order passed by the trial Court, then the conviction of appellant is mainly based upon the testimony of the prosecutrix. There is no corroborative evidence to corroborate the testimony of the prosecutrix. The report of the Chemical Analyzer is of no avail to corroborate testimony of prosecutrix. The report of DNA excludes the appellant as a biological father of the female child given birth by the prosecutrix. Therefore, the question which poses for consideration is, whether the conviction which is mainly based upon the sole testimony of the prosecutrix, is sustainable in law? It is quite settled position in law that in rape case, the Court of law can very well act upon sole testimony of prosecutrix and same can form basis to convict accused without insisting

corroboration, if the testimony of prosecutrix inspires full confidence and can be acted safely upon to base conviction. In the case of ***State of Maharashtra v. Chandraprakash Kewalchand Jain and Anr.***¹, the Court has laid down broad principles to be followed in appreciation of evidence of prosecutrix in rape case. In para 16, the Apex Court has observed, as under:

“16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance

1 AIR 1990 SC 658;

to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation."

17. In the case of ***Kali Ram v. State of H.P.***², in para

² AIR 1973 SC 2773;

25, the Apex Court has observed, as under:

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the, guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of State of Punjab v. Jagir Singh, Cri.Appeal No.7 of 1972, D/- 6-8-1973 = (reported in AIR 1973 SC 2407), a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged

with the commission of a crime, the court has to judge, the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy, on grounds which are fanciful or in the nature of conjectures.”

18. It is the contention of the learned Counsel for the appellant that there is unexplained delay of about more than seven to eight months in lodging the complaint. While dealing with the aspect of the delay, the trial Court has observed that though there is delay of one year in lodging complaint, the prosecution has sufficiently explained the delay in lodging the complaint. It is observed that the complainant had lost her son. She was not keeping well for long time. Due to this reason, no much weightage can be given as to delay in lodging F.I.R. If, we consider the testimony of complainant i.e. Purnima (P.W.1), then she has deposed that she was unwell and due to fear of her brother, she could not lodge complaint. Whereas in the complaint lodged vide Exh.16 the complainant has stated that as her son died

on 8.10.202, she was under mental stress and therefore, could not lodge complaint. Thus, there is no consistency as to explanation put forth as to the delay caused in lodging complaint. In the complaint filed it is nowhere mentioned that due to fear from her brother i.e. father of appellant, she could not file complaint. Son of the complaint alleged to have died on 8.10.2011. As discussed, the fact regarding pregnancy of the prosecutrix was known to the complainant about three to four months prior to prosecutrix gave birth to female child on 28.3.2013. Thus, the fact regarding pregnancy and alleged disclosure by the prosecutrix to her parents ought to have been made much prior to December, 2012. Whereas the complaint was lodged on 25.7.2013. Thus, there is absolutely no explanation as to delay in lodging the complaint.

19. If, we consider the testimony of the prosecutrix, then she has deposed that when she was pregnant, it was informed to police. So also the application was given to police. She has further deposed that when she was

pregnant, police have called her as well as her mother, grand-parents, appellant – accused and his father. Thus, if we consider the fact deposed by the prosecutrix that police had called her as well as the accused and their respective parents when the prosecutrix was pregnant, then it can be inferred that much prior to giving birth to female child on 28.3.2013 and lodging of complaint on 25.7.2013, the prosecutrix had approached police. In this view, it raises serious doubt as to the explanation put forth as to delay in lodging complaint. It is pertinent to note that the complaint filed vide Exh.16 is a written complaint got prepared by the complainant one day prior to lodging of complaint. If, we look into the contents of the complaint, then it reflects that the complaint has been drafted by some one well versed with the provisions of law which include provisions of POCSO Act. In the face of complaint (Exh.16), it can be inferred that the complaint was lodged after due deliberations and consultation with some one having knowledge of law. The complainant is an illiterate woman. She was not able to read, write and even to endorse her signature on

the complaint. In this view the possibility cannot be ruled out that the complaint was lodged after due deliberations.

20. In this view, the delay of more than seven months in lodging complaint becomes significant and it is highly unsafe to base conviction on the basis of sole testimony of the prosecutrix. Prompt lodging of F.I.R. rules out the possibility of concoction as well as exaggeration. Whereas, a delayed report not only gets bereft of the advantage of spontaneity, but danger creeps into the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation and causes a serious doubt on its veracity.

21. Thus, in view of the enormous delay of more than 6 to 7 months in lodging complaint and complaint being found to be lodged after due deliberation and consultation with some one having knowledge of law, the evidence of the prosecutrix needs to be closely scrutinized. The reasons and findings recorded by the

trial Court in reaching to the conclusion that the prosecution has properly explained the delay in lodging FIR appears to be not in consonance with the evidence on record. The trial Court has failed to take into account that there is no consistency in the cause assigned as to delay in lodging complaint. There is no evidence to accept that the complainant was continuously acting under threats of her brother. In fact, the prosecutrix has deposed that when she was pregnant, police had called herself as well as her parents and accused and his father. This admission brought through the cross-examination is sufficient to infer that 3 to 4 months prior to lodging of complaint the complainant, the prosecutrix and her father were called by police, but they have not lodged any complaint. Therefore, the explanation put forth as to the delay appears to be afterthought and not satisfactory.

22. If, we consider the testimony of the prosecutrix (P.W.4), then it is highly unsafe to base conviction on the basis of sole testimony of the prosecutrix. The facts

deposed by the prosecutrix relating to alleged forcible sexual intercourse with her are too vague. She has vaguely stated that accused used to come to her house and commit forcible sexual intercourse. The fact deposed by her that the accused used to cause threats by knife and inserting handkerchief in her mouth proved to be by way of material improvement. It is pertinent to note that the prosecutrix has not only alleged that the appellant – accused used to repeatedly commit forcible sexual intercourse, she has made similar allegations against Sachin – a child in conflict with law, who was residing close to her house. She has deposed that said accused also used to visit her house and commit forcible sexual intercourse with her by causing threat to her. If, we examine the entire case of the prosecution and the testimony of the prosecutrix in the light of other evidence then there is no corroboration to her testimony.

23. It is the case of the prosecution that due to repeated sexual intercourse with prosecutrix by the appellant and accused Sachin, she became pregnant and

gave birth to female child. According to prosecution the blood sample of the prosecutrix, her baby, the appellant – accused as well as Sachin - the child in conflict with law were obtained for the purpose of DNA test by adopting proper method and sent to Forensic Laboratory at Mumbai. The request letter for providing DNA kit is produced at Exh.45. Prosecution has examined Dr. Avinash Puri (P.W.7), who has categorically deposed that blood sample of the prosecutrix, her baby, appellant – accused and Sachin were collected in a DNA kit and the same were sealed and handed over to NPC B.No.2006. Identification form in a prescribed proforma obtained by the Medical Officer in respect of accused Sachin is at Exh.37. Prosecution has examined Dr.Dattatraya Pawar (P.W.2) who has deposed that as per the requisition letter received from P.S. Nanded Gramin, he had collected the blood sample for DNA test of Rani Bhimrao Paikrao i.e. the prosecutrix, her baby and one Rajratan @ Raju i.e. appellant – accused by adopting the procedure prescribed for obtaining the sample for the purpose of DNA test. The samples were properly sealed with their

photographs on the identification forms and signature of prosecutrix and appellant – accused too obtained on said form. He further deposed that identification form in respect of baby of the prosecutrix was signed by the prosecutrix as a guardian. The identification forms with photographs duly attested and declaration are at Exh.20, 21 and 22.

24. If, we consider the testimony of Dr.Dattatraya Pawar (P.W.2) and Dr. Avinash Puri (P.W.7) who obtained sample for DNA test, then there is no challenge to their testimonies. The report of DNA test conducted and issued by Directorate of Forensic Science Laboratory, State of Maharashtra, in respect of DNA samples sent for the purpose of opinion is at Exh.58. It is mentioned in the report (Exh.58) that the parcels were found with seals intact. It is mentioned that on analysis of DNA extracted from the blood sample of Rani Bhimrao Paikrao i.e. prosecutrix (ex.1) matched with her baby (ex.2). Sachin @ Bablu excluded to be the biological father of (ex.2) baby of Rani Bhimrao Paikrao, Rajratan @ Raju

Sahebrao Nawghade is excluded to be the biological father of (ex.2) baby of Rani Bhimrao Paikrao. Thus, though Rani Bhimrao Paikrao i.e. prosecutrix found to be biological mother of her baby, the appellant - accused as well as Sachin – a child in conflict with law were not found to be biological father of the baby given birth by the prosecutrix. The opinion given by the Assistant Chemical Analyzer to Govt. Forensic Science Laboratory, Mumbai reads, as under:

“Opinion:

1. Sachin @ Babalu Digambar Gaikwad is excluded to be the biological father of ex.2 baby of Rani Bhimrao Paikrao.
2. **Rajratna @ Raju Sahebrao Nawghade is excluded to be the biological father of ex.2 baby of Rani Bhimrao Paikrao.**
3. Rani Bhimrao Paikrao is concluded to be the biological mother of ex.2 baby of Rani Bhimrao Paikrao.”

25. Thus, if we consider the overall case of the prosecution in the light of testimony of the prosecutrix, that she conceived pregnancy and gave birth to the female child on account of repeated sexual intercourse

by the appellant – accused, then the DNA report provides no corroboration to her testimony. On the contrary, it raises serious doubt as to testimony of prosecutrix. The DNA report (Exh.58) also raises serious doubt as to truthfulness of overall case of prosecution against the appellant – accused.

26. It is pertinent to note that the entire foundation of the case of the prosecution is based upon the allegation that the appellant – accused repeatedly committed forcible sexual intercourse with the prosecutrix and caused her pregnant. The fact regarding the pregnancy was detected during Ultra sonography test conducted. Prosecutrix was found to be carrying four months pregnancy. On disclosure of the fact that prosecutrix was carrying pregnancy, the enquiry was made to her by her mother i.e. Purnima (P.W.1). She disclosed that appellant – accused and Sachin – a child in conflict with law had repeatedly committed sexual intercourse with her and caused her pregnant. Thus, if we examine the veracity of the testimony of the prosecutrix in the light of

DNA report, then it rules out possibility of pregnancy being caused to prosecutrix by appellant. It also rules out the pregnancy being carried from accused Sachin i.e. a child in conflict with law. In this view, the possibility of prosecutrix being in physical relationship with some one else than appellant and Sachin cannot be ruled out. In this background the possibility of appellant – accused being falsely roped in can not be ruled out in the facts and circumstances of the case.

27. While dealing with report of DNA test (Exh.58), learned Sessions Judge has observed in para 49 of the judgment, as under:

“49. In this case, admittedly the blood samples of victim, accused and the child for DNA test were taken and the report of DNA is not disclosing about the paternity of this accused. It is argued on behalf of the prosecution that merely because the DNA report is negative as against this accused, it cannot be said that it is fatal to the prosecution. After all DNA report is the opinion evidence and therefore, it cannot be treated as conclusive proof. For that the reliance is placed upon the Judgment of Bombay High Court in Manik Sitaram Jibhkate Vs. State of Maharashtra in Criminal Appeal No.65/1997 decided on 21.07.2011 wherein the

Hon'ble Lordship has observed that the expert is not the evidence of a fact. Even it is well settled that the expert opinion as to result of DNA test is ultimate opinion and does not have the value of conclusive proof thereof. This aspect therefore, is of no consequence either in favour of prosecution or in favour of defence.”

28. Perusal of the above reasoning reflects that the trial Court has refused to act upon the report of DNA test, as it has no value of conclusive proof. No doubt, the DNA report is an opinion and not conclusive proof. But, the scientific opinion cannot be brushed aside in such manner. The DNA test was conducted to assess the paternity of the child given birth by the prosecutrix. If the report would have been positive it would have been helpful to prosecution to use it as a corroborative piece of evidence to support the testimony of the prosecutrix as well as overall case of the prosecution. If the report is negative and excludes the appellant as a biological father of the child given birth by the prosecutrix, then such report cannot be brushed aside by observing that the report is of no consequence either in favour of prosecution or the defence. The view taken by the Court

in this behalf appears to be perverse and not sustainable in law. Certainly the report of DNA is helpful to the defence to raise a doubt as to truthfulness of overall case of prosecution as well as discredit the testimony of the prosecutrix. As discussed, the prosecution has approached with the case that the accused had committed repeated sexual intercourse, which resulted into causing pregnancy to the prosecutrix and giving birth to female child. The prosecutrix has categorically deposed that she became pregnant due to forcible sexual intercourse committed by the appellant – accused with her. In the light of DNA report, certainly it raises serious doubt as to version of the prosecutrix as well as the truthfulness of overall case of prosecution against the appellant.

29. It is quite well settled in law that the report of DNA test is admissible evidence as it is based upon perfect science. The Court of law cannot substitute its own opinion for that of an expert more particularly, in science such as DNA profiling. Only for the reason that the

report of expert is an opinion, cannot be a ground to ignore the same. It is pertinent to note that in the instant case there is no evidence brought on record to ignore the DNA report. Since the DNA report being admissible evidence, the accused can certainly use it to establish his innocence. In the instant case, the Court has simply brushed aside the report of DNA test by observing that same is expert's opinion and not conclusive proof. In this view, the trial Court has committed a gross error in appreciating the evidence. The Apex Court in the case of **Santosh Kumar Singh vs. State through CBI**³ wherein, the Apex Court has held that the Court cannot substitute its own opinion for that of an expert in absence of anything adverse pointed out to reject such opinion.

30. In the case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and Anr.**⁴, the Apex Court has observed that the DNA test is an accurate test and

3 (2010)9 SCC 747;

4 (2014)C2 SCC 576;

certainly can be taken into consideration to decide the fact in issue. In paras 13 and 17, the Apex Court has observed, as under:

“13. Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of Kamti Devi (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child.”

“17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford

legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.”

31. In the case of **Anil alias Anthony Arikswamy Joseph vs. State of Maharashtra**⁵, the Court has examined the aspect of reliability of DNA test and same can be used to corroborate the testimony of the witness. In paras 18 and 19 the Court has observed, as under:

“18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.

⁵ (2014) 4 SCC 69;

19. PW5, Dr. Varsha Rathod, stated that since 1994 she was working as Assistant Chemical Analyzer and has analyzed thousands of samples including DNA test. She has stated that she had conducted two tests, one STR and second YSTR. Both the tests are scientifically proven and the competence of the doctor who conducted the test is also not questioned. Consequently, the DNA test report could be safely accepted, which shows that the deceased boy was subjected to unnatural sex and offence under Section 377 has been clearly made out.”

32. In the case of ***Dharam Deo Yadav vs. State of Uttar Pradesh***⁶, the Apex Court has examined the reliability as well as admissibility of DNA report in criminal investigation. In paras 30 and 36 the Apex Court has observed, as under:

“30. Criminal Judicial System in this country is at cross-roads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have

⁶ (2014) 5 SCC 509;

become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.”

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true

source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.”

33. Thus, as discussed in the foregoing paras, the report of DNA test being scientific report based upon scientific test conducted in the matter, such report of the expert is admissible in evidence.

34. In the instant case, nothing has been brought on record, which makes the report of DNA test inadmissible or to ignore the same. The report of DNA test has certainly helped the accused to dislodge the case of the prosecution and prove that that he is not the biological father of the child given birth by the prosecutrix. It also help the accused to raise doubt as to overall case of the prosecution and creditability as to testimony of the prosecutrix. In this view, the view taken by the trial

Court that the report of DNA test is irrelevant and of no use, cannot be accepted. On the contrary the report of DNA test excludes the appellant as biological father of the child given birth by the prosecutrix raises serious doubt as to the testimony of the prosecutrix. It raise doubt as to truthfulness of the fact deposed by her relating to the incident and act attributed to the appellant – accused.

35. If, we consider the evidence as to the age of the prosecutrix, then there is no cogent, convincing and reliable evidence to prove the exact age of the prosecutrix. Although, mother of the prosecutrix i.e. Purnima (P.W.1) has deposed that when her daughter found pregnant, she was aged about eleven years but, she has not stated anything about the date of birth of the prosecutrix. In the cross-examination, she has admitted that at the time of lodging complaint, she has not mentioned in the complaint that age of her daughter was eleven years when she became pregnant. She has expressed inability to tell the date of birth of her son as

well as daughter i.e. prosecutrix. If we look into the complaint lodged by the complainant Purnima (P.W.1) at Exh.16, then the age of the prosecutrix stated by her before the Court not in consonance with the age mentioned in the complaint (Exh.16). In the complaint, the complainant has mentioned the age of the prosecutrix as 13 years. She has stated that the act of committing sexual intercourse with her daughter was going on for a period of more than one and half year prior to lodging of complaint.

36. If, we consider the testimony of the prosecutrix, then she has not stated anything about her age as well as date of birth.

37. Prosecution has examined Dr. Surbhi Bajpai (P.W.3). She has deposed that on 27.7.2013, the prosecutrix was brought to her to examine as per requisition letter (Exh.24). Her opinion was sought as to age of prosecutrix. She has deposed that for the purpose of ascertaining the age of prosecutrix, she referred her to

obtain X-ray of wrist and elbow. She has not stated anything about the age ascertained by her. She has deposed that the age of the prosecutrix mentioned in the case paper was noted by her as per the say of the patient. She has categorically deposed that she is unable to state the exact age of the victim. If, we peruse the report (Exh.27), then report confines to medical examination of prosecutrix to opine as to whether she has undergone delivery or not. No report as to determination of age of prosecutrix was produced nor any witness has been examined by prosecution. Thus, though prosecutrix was referred for determining her age, the prosecution has failed to produce the opinion obtained in that behalf.

38. In order to prove the date of birth of the prosecutrix, the prosecution has examined Sudhakar Pawale (P.W.11) Head Master of Mahatma Phule Primary School. He has deposed that as per school record, the prosecutrix was admitted in their school in the year 2006. The mother of the prosecutrix had come to school

to get her admitted in the school. In the Register of admission, maintained by the school, the date of birth of the prosecutrix is recorded as 10th October, 2000. In cross-examination, the witness has admitted that neither any birth certificate nor any supporting evidence was produced at the time of admission of prosecutrix. Although, in the examination-in-chief, the witness has deposed that at the time of admission, the woman who came for admitting prosecutrix in the school, brought one diary wherein the date of birth was mentioned and the date in the application for admission was recorded on the basis of said diary, but no copy of such diary was obtained. Thus, the testimony of Sudhakar (P.W.11) spell out to that in the school admission register, date of birth of the prosecutrix was recorded on 10.10.2000 on the basis of oral say of the person who approached for admission of the prosecutrix. Thus, the date of birth of the prosecutrix recorded in school admission register is not supported with any document showing the date of birth of the prosecutrix. In this view, there is no cogent, convincing and reliable evidence to conclusively establish

the age of prosecutrix and particularly to establish that she was minor.

39. Although the Head Master of the school i.e. Sudhakar (P.W.11) examined by the prosecution deposed that mother of the prosecutrix had come to admit her in the school but, the mother of the prosecutrix had not stated anything about the date of birth of the prosecutrix. On the contrary she has expressed her inability to tell the date of birth of prosecutrix. It is quite settled position in law that date of birth recorded in the school admission register cannot be treated as primary evidence. In the case of **Birad Mal Singhvi Vs. Anand Purohit**⁷, in para 15 the Apex Court has observed, as under :

“15. To render a document admissible u/s 35, 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

⁷ 1988 (Supp.1) SCC 604;

*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 date of birth made in the school register is relevant and admissible u/s 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 person in the absence of material on which the age was recorded. ”***

It has been further observed that :

“ *It has been consistently held that date of birth mentioned in the scholars register or secondary school certificate has no probative value either the parents are examined or the person on whose information the entry may have been made, is examined. ”*

40. In the case of **Satpal Singh Vs. State of Haryana**⁸, in para 27 of the said Judgment, the Apex Court observed, as under:

“27. Thus, the law on the issue can be summarized that the entry made in the official record by an official or person authorized in performance of an official duty is admissible u/s 35 of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.”

41. Thus, in view of the evidence as discussed, the conclusion drawn by the learned Sessions Judge that the

⁸ 2010 CRI.L.J. 4283;

prosecutrix was minor in age are erroneous and not in consonance with the evidence adduced by the prosecution.

42. If, we consider the judgment and order passed by the trial Court, then the conviction of the appellant is mainly based upon the testimony of the prosecutrix. As discussed, it is quite settled position in law that in an offence of sexual assault, the conviction may be based upon sole testimony of the prosecutrix provided her testimony is found to be fully reliable and worth to form basis to prove the guilt against the accused beyond reasonable doubt. If, we consider the case in hand, then except testimony of the prosecutrix, there is no corroborative evidence to prove that the appellant – accused has committed forcible sexual intercourse with the prosecutrix. The entire case of prosecution rests upon the oral testimony of the prosecutrix. The fact that the prosecutrix delivered female child after seven months of pregnancy itself not sufficient to prove the guilt of appellant. Although the prosecutrix has deposed that

pregnancy was caused to her by appellant – accused, but the DNA report (Exh.58) has contradicted her version. The report has excluded the appellant as biological father of the female child given birth by prosecutrix. There is no corroborative evidence to corroborate testimony of the prosecutrix. The only evidence tried to be adduced to provide corroboration is the DNA report. However, the DNA report has not provided corroboration to the testimony of the prosecutrix. On the contrary, it has contradicted the case of the prosecution and raised serious doubt as to overall credibility of the testimony of the prosecutrix. As discussed, the evidence of the prosecution as to the alleged act of commission of rape is too vague. There is unexplained delay of more than seven months in lodging report. The report lodged found to be lodged after due deliberation and discussion, that too, with a person well versed with law. There is no consistency amongst the facts deposed by prosecutrix, her mother and father – the material witnesses examined by the prosecution.

43. Thus, on close analysis of the evidence, I am of the view that in the instant case, it is not safe to base the conviction on the basis of sole testimony of the prosecutrix without seeking corroboration. In absence of corroboration, it is highly unsafe to base conviction on the basis of such testimony. As discussed in the case of **State of Maharashtra v. Chandraprakash Kewalchand Jain and Anr.** (supra), though there is no rule of law that the testimony of the prosecutrix requires corroboration but, for any reason, court found it unsafe to place implicit reliance on the testimony of prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. It is further observed that the nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. Thus, in view of the peculiar facts of the case wherein the prosecutrix has attributed repeated sexual intercourse by two different accused at two different time and the pregnancy caused to her found to be by a person other than whom she attributed the

authorship of pregnancy itself sufficient to insist to seek corroboration to the testimony of prosecutrix to lend assurance as to the truthfulness of fact deposed by her. Except words of prosecutrix, there is no evidence to corroborate her oral testimony. The evidence which is gathered by the prosecution in the form of DNA report in fact, raises serious doubt as to truthfulness of fact deposed by prosecutrix relating to incident and complicity of appellant in commission of offence.

44. The conviction of the appellant under Section 5(j) (ii), 5(1) and 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act is also not sustainable for the reason that the provisions of POCSO Act are brought into effect w.e.f. 14.11.2012. As per the complaint lodged by the complainant on 25.7.2013, it is alleged that the act in question was committed one and half year prior to lodging of complaint. The prosecutrix has given birth to female child on 28.3.2013. As per the fact deposed by the complainant, the prosecutrix delivered the child after

pregnancy of seven months. As per the evidence brought on record by the prosecution, the fact regarding the pregnancy was detected when the prosecutrix was carrying pregnancy of four months. If, we go by the evidence of the prosecutrix, then the disclosure about pregnancy of four months ought to have been made some time on and before the month of December, 2012. If, we take it that the disclosure was made in the month of December, 2012, then the alleged act of physical relationship amounting to rape and leading to conception certainly occurred four months prior to November / December, 2012. In this view, by no stretch of imagination, it can be inferred that the act amounting to offence punishable under the POCSO Act was committed on and after the commencement of said Act. Only for the reason that the FIR was lodged after commencement of POCSO Act, and the law was set in motion, the accused cannot be charged for offences under the POCSO Act. In this view, the conviction of appellant is not sustainable for offences punishable under the provisions of POCSO Act.

45. Thus, in view of the conclusion to which I have reached that the sole testimony of the prosecutrix is not sufficient to base the conviction of the appellant and the evidence is not sufficient to prove guilt of appellant for offences u/s 376(1) of IPC as well as POCSO Act, the conviction of the appellant deserves to be set aside. In the facts and circumstances of the case, the appellant deserves to be given benefit of doubt. I am, therefore, inclined to allow the appeal.

46. In the result, following order is passed:

: ORDER :

(i) The appeal is allowed;

(ii) The judgment and order dated 22.04.2016 passed in Special Case (POCSO) No.10/2013 by the Sessions Judge, Nanded convicting the appellant for the offence punishable under Section 376(1) of IPC and sentencing him to suffer R.I. for ten years and to pay a fine of Rs.1000/-, in default of payment of fine, to undergo R.I. for three months and also convicting him for the offence under

Section 5(j)(ii), 5(1) and 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act and sentencing him to collectively undergo R.I. for ten years and to pay a fine of Rs.1000/-, in default of payment of fine, to suffer R.I. for three months, is set aside;

(iii) The appellant – accused is acquitted of the offences punishable u/s 376(1) of IPC and Section 5(j)(ii), 5(1) and 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act;

(iv) The appellant – accused be set at liberty, if not required in any other case;

(v) Appeal is disposed of in above terms.

[V.L. ACHLIYA, J]

Kadam.