

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

CRIMINAL APPEAL NO.681 OF 2018

Amol @ Ratan Pralhadrao Tayade,
Aged : 24 years, Occp: Labourer,
R/o Madhapuri, Tq. Murtizapur,
Dist. Akola.

.... **APPELLANT**
(IN JAIL)

// V E R S U S //

State of Maharashtra,
Through Police Station Officer,
Police Station MIDC, Akola,
Tq. & Distt. Akola, Tq. Patur,
Dist. Akola.

..... **RESPONDENT**

Shri U. J. Deshpande, Advocate for appellant.
Mrs. Mrunal Barabde, Additional Public Prosecutor for respondent-State.

CORAM: V. M. DESHPANDE AND
G. A. SANAP, JJ.
DATED : 03/01/2022.

JUDGMENT : (PER G. A. SANAP, J.)

1. In this appeal, challenge is to the Judgment and order dated 07/09/2017 passed by the learned Additional Sessions Judge, Akola, whereby the learned Additional Sessions Judge convicted the appellant for the offence punishable under Section 4 of the Protection of Children from

Sexual Offences Act, 2012 (For short, "POCSO Act") and under Section 376 (2) (f) of the Indian Penal Code (For short, "IPC") and sentenced the appellant to undergo imprisonment for life and to pay fine of Rs.10,000/- (Rs. Ten Thousand) and in default of fine, to suffer simple imprisonment for 3 months. No separate sentence was awarded under Section 376 (2)(f) of the IPC in view of the mandate of Section 42 of the POSCO Act.

The facts are as follows :

2. In order hide identity of the victim, her name is masked. She would be referred to as victim in the Judgment. The victim lodged a report on 16/04/2016 at MIDC Police Station, Akola. The victim is sister of wife of the accused. It is the case of the prosecution that on the date of commission of offence, the victim was 17 years old. The accused with his wife was residing at village Shivar. The accused brought the victim her mother and other siblings of the victim to his house. They continued to reside at the house of the accused. It is alleged

that one day the mother of the victim had gone out of the house for work. The accused sent his wife Diksha out of the house on some pretext. The accused thereafter, threatened the victim and had sexual intercourse with her. The accused extended threat to the victim that if she disclosed the incident to anyone, she would be killed. The accused, thereafter, repeatedly sexually ravished the victim. In the meantime, they shifted their residence in the tenanted premises belonging to Mr. Wankhede.

3. On 15/04/2016, the victim was not keeping good health. The mother of the victim took her to the nearest hospital. On examination by the Medical Officer, the Medical Officer told the mother of the victim that the victim was 5 months' pregnant. The victim disclosed to her mother that the accused repeatedly committed sexual intercourse with her. It was stated that the accused sexually exploited the victim and therefore, the victim was conceived.

4. On the basis of the report lodged by the informant, the Crime bearing No.31/2016 was registered against the accused. PW-8 Shri Harshal Chaphale conducted the investigation. During the course of the investigation, he collected the evidence of age of the victim. The accused was arrested on 16/04/2016. The victim was sent for medical examination. PW-6 Dr. Vivek Phadke examined the victim. The accused was medically examined by PW-7 Dr. Sudip Singh. The blood samples of the victim and the accused were collected. The blood samples were sent to Chemical Analyzer for analysis. On 31/07/2016, the victim gave birth to a female child. The blood sample of the new born baby was collected and forwarded for DNA examination. The Investigation Officer on completion of investigation, filed charge sheet against the accused. The learned Additional Sessions Judge vide Exh.7 framed the charge against the appellant for offences punishable under Sections 3 and 4 of the POCSO Act and Section 376 (2)(j)(n) of the IPC. The accused pleaded not guilty. The defence of the accused is on false implication in the

crime and the sexual intercourse with the victim was consensual. It is also the defence of the appellant that on the date of so called offence, the victim was over 18 years of age.

5. In order to bring home the guilt against the accused, prosecution examined 8 witnesses. The prosecution has also relied upon the documentary evidence. On appreciation and analysis of the evidence, the learned Additional Sessions Judge held the charge against the accused proved by the prosecution. The learned Additional Sessions Judge accordingly convicted and sentenced the appellant as above.

6. Being aggrieved by the order of conviction and sentence, the appellant has come before this Court in appeal. We have heard Shri U. J. Deshpande, learned Advocate for the appellant and Mrs. Mrunal Barabde, learned Additional Public Prosecutor for the respondent. We have gone through the record and proceedings.

7. The learned Advocate for the appellant submitted that the prosecution has miserably failed to prove that on the date of the crime, the victim was below 18 years of age. The learned Advocate has drawn our attention to the school record of the victim at Exh.26 and Exh.74 and submitted that the birth dates mentioned in these two documents are different. The learned Advocate further submitted that the documents do not prove conclusively the date of birth of the victim. The learned Advocate taking us through the report and the First Information Report submitted that in none of these documents, the birth date of the victim was stated by her. The learned Advocate further submitted that the documents at Exh.26 and Exh.74 cannot be relied upon inasmuch as the same are secondary evidence. The learned Advocate submitted that the primary evidence to prove the birth date of the victim beyond doubt has not been produced. The evidence of the victim and PW-2 Shri Sanjiv Tapre, who is the Headmaster of the school, cannot be relied upon as a

gospel truth to prove the birth date of the victim. In order to seek support to this submission, the learned Advocate placed reliance on the decisions in the cases of Ravi Anandrao Gurpude¹ and Ravinder Singh Gorkhi²

8. The learned Advocate took us through the evidence adduced by the prosecution and submitted that the prosecution has miserably failed to prove that the victim was below 18 years of age on the date of commission of crime. The second plank of the submission of the learned Advocate for the appellant is that the evidence of the victim proved beyond doubt that she was a consenting party to the sexual intercourse. The learned Advocate submitted that no independent witness has been examined to corroborate the evidence of the victim that the appellant against the consent of the victim sexually exploited her. The learned Advocate pointed out from the First Information Report that on the date of First Information Report, the victim was carrying 5 months' pregnancy and submitted that there is no plausible explanation on the part of

1 2017 ALL MR (Cri) 1509

2 (2006) 5 SCC 584

the prosecution for non-disclosure of this offence to any of the family members. The learned Advocate therefore, submitted that the defence of the accused that the report has been lodged by the victim on the instigation of her step-father who was a drunkard is probable and deserves acceptance.

9. As far as the Chemical Analyzer's report and DNA test report are concerned, the learned Advocate submitted that without examining the Chemical Analyzer, the reports of the Chemical Analyzer and DNA test report cannot be given much weightage. The learned Advocate submitted that in order to implicitly rely upon the DNA report, the prosecution must prove that from the time of collection of the samples, till the analysis of the samples, there was no scope and possibility of tampering of the samples. In the submission of the learned Advocate, there are major loopholes in the chain and therefore, the C.A. report / DNA report cannot be used as corroborative piece of evidence against the appellant. In order to substantiate this submission, the learned Advocate has relied

upon the decision in the case of Criminal Appeal No.418 of 2014 passed by this Court (Coram : Z.A. Haq and Amit B. Borkar, JJ.) decided on 02/12/2020 (The State of Maharashtra Vrs. Vishnu Tulshiram Karwate and others).

10. The learned Additional Public Prosecutor submitted that in the School Leaving Certificate at Exh.26, the date of birth is mentioned as 24/05/1999 and in the bonafide certificate at Exh.74, the date of birth is mentioned as 24/05/1998. The learned Additional Public Prosecutor submitted that even if it is assumed for the sake of argument that the victim was born on 24/05/1998, then on the date of commission of offence, she would hardly be 17 years and 5 months' old. The learned Additional Public Prosecutor submitted that the School Leaving Certificate has been proved by examining the Witness No.2 and therefore, the same cannot be discarded. The learned Additional Public Prosecutor submitted that the DNA report is positive. In the DNA report, the Assistant Chemical Analyzer has opined that the appellant

and the victim are concluded to be the biological parents of the girl. In the submission of the learned Additional Public Prosecutor, in view of the evidence of the age of the victim and the DNA report, the appellant by raising any defence cannot run away from the clutches of the law. The learned Additional Public Prosecutor submitted that the contents of the DNA report and the evidence of the Investigating Officer would completely rule out the possibility of tampering with the samples at any stage from the time of collection of the same till its analysis. The learned Additional Public Prosecutor further submitted that the defence of the accused of consensual sex put-forth by the appellant cannot be accepted. The learned Additional Public Prosecutor took us through the evidence of the victim girl and pointed out that the victim girl has categorically stated that she was threatened by the appellant that if she disclosed the incident, then she would be killed. The learned Additional Sessions Judge have had the advantage to note the demeanour of the victim and the accused and based on the same, he has recorded his finding. In the submission of

learned Additional Public Prosecutor, well reasoned judgment passed by the learned Additional Sessions Judge does not warrant interference.

11. In order to appreciate the rival submissions, we have minutely perused the evidence adduced by the prosecution and the Judgment of the Trial Court. Admittedly, the prosecution has not examined the mother of the victim, her sister and brother of the victim. No plausible explanation has been placed on record for non-examination of these important witnesses, in view of the fact that, the accused has taken a defence of consensual sex with the victim. Be that as it may, the learned Additional Sessions Judge found the evidence sufficient to prove the charges. In this case, considering the charge framed against the accused, prosecution was bound to prove beyond doubt that on the date of commission of offence, the victim was not over the 18 years of age. The age of the victim on the date of offence, in view of the charge would be a very important plank of the case of the prosecution. We have

minutely perused the report lodged by the victim. The report is at Exh.20. In this report, the date of birth of the victim was not mentioned. Perusal of the report would further show that it was recorded in presence of the mother of the victim. The report bears the signature of the mother of the victim. The victim has been examined as PW-1. In her evidence, she has stated that she was born on 24/05/1999. In the very next breath, she has stated that during the course of investigation, she had handed over her Aadhar Card to Investigating Officer. She has stated that due to mistake, date of birth in the Aadhar card was mentioned as 24/05/1998. It is therefore, seen that for the first time before the Court, the victim has deposed about her birth date. Perusal of evidence would further show that her statement was recorded before the C.W.C. and the Judicial Magistrate, First Class. In her statement recorded by the C.W.C., the victim has stated that the date of birth is 24/05/1998. It was suggested to the victim in the cross-examination that on the date of incident, she was over 18 years of age. She has denied the suggestion.

12. Since it was incumbent upon the prosecution to prove beyond doubt the birth date of the victim, the prosecution examined PW-2 Shri Sanjiv Tapre. PW-2 Shri Sanjiv Tapre has deposed that since 1994, he has been working as Headmaster of Sau. Anusayabai Sahebrao Tapre Vidyalaya, Unkhed. He has stated that the victim studied in his school. He has further stated that the Investigating Officer had collected the record from the school with regard to the birth date of the victim. He has stated that the school certificate of the victim was issued by him. He has stated that in the school record, the birth date of the victim is recorded as 24/05/1999. It has come on record in his evidence that initially, the victim was admitted in another school and the entry of birth date of the victim in his school record was made on the basis of the previous School Certificate. PW-2 has deposed that the entry at Sr. No.1429 from the school register pertains to the victim. The date of her admission mentioning the entry is 18/08/2010. He has stated that the contents of

certificate are in consonance with the entry in the School Admission Register. The certificate is marked at EXh.26.

13. In order to appreciate the oral evidence of the Witness No.2, we have minutely perused the certificate at Exh,26. Exh.26 is the photocopy of the School Certificate. PW-2 has stated that he had provided the original copy of the School Certificate to the Investigating Officer. The said original certificate has not been produced on record. There is no explanation for non-production of such vital document on record by the Investigating Officer. Perusal of the examination-in-chief of PW-2 would show that before putting exhibit mark to the certificate, the learned Advocate for the appellant had raised the objection. The learned Judge exhibited the certificate subject to the objection of the learned Advocate for the appellant. Perusal of the Judgment would show that this objection has not been considered and decided one way or the other while delivering the Judgment. It is further pertinent to note that even if the original certificate had

been produced, the same would not have been the primary evidence. The primary evidence would be the main entry from the Admission Register and the supporting documents for making the said entry in the School Admission Register. Perusal of the examination-in-chief would show that the learned Trial Judge has simply verified the contents of the relevant entry at Sr.No.1429 from the School Admission Register and returned back the said register to the said witness. In our view, somehow or the other, the mistake committed by the learned Trial Judge. This mistake could have been avoided. It was incumbent upon the prosecution to insist for production of the register and to exhibit the original entry from the same. It was also the duty of the learned Trial Judge to ensure that the contents of original entry are proved and exhibited. It seems that this exercise has been undertaken in a mechanical manner. It cannot be permitted under the law. The rule of fair trial demands that neither the prosecution nor the accused in criminal trial should be taken by surprise. A conclusion in the criminal trial cannot be arrived at on assumptions,

presumptions and surmises. In our considered view, failure to produce and prove the primary evidence would cause prejudice to the accused.

14. It is trite law that each and every circumstance appearing on record against the accused must be put to the accused in his examination under Section 313 of Code of Criminal Procedure and he must be granted an opportunity to explain the same. The evidence, which is not put to the accused in his examination, so as to enable him to offer his explanation, in our view, the same cannot be used against the accused and made the basis of his conviction. In our opinion, the School Certificate Exh.26 is secondary evidence. It has not been proved in the eyes of law. It is not legally admissible evidence. In our view based on this evidence at Exh.26 and the oral evidence of PW-1 and PW-2, the case of the prosecution that birth date of the victim was 24/05/1999 cannot be said to be proved. In our view, therefore, the evidence of the PW-1 and PW-2 coupled with Exh.26 on this point would be

required to be eschewed from consideration.

15. The role of the Investigating Officer while conducting the investigation and the role of the prosecutor while conducting such a serious case is very crucial. They are required to display the required due diligence on their part. It has come on record in the evidence of PW-1 that by mistake in Aadhar Card, birth date was mentioned as 24/05/1998. The photocopy of Aadhar Card was included in the documents filed with the charge sheet by the Investigating Officer. Similarly, the Investigating Officer included photocopy of the bonafide certificate of the victim in the documents filed with the charge sheet. That certificate was issued on 20/05/2015. This fact would indicate that it was issued much prior to the commission of offence. The photocopy of the bonafide certificate was exhibited at the time of evidence of the Investigating Officer - PW-8 i.e. Exh.74. PW-2 was confronted with this bonafide certificate. PW-2 has denied his signature on this document. PW-2 Headmaster of the school

has denied the signature on this document in his evidence. In his examination-in-chief, Investigating Officer has deposed that he obtained the School Certificate Exh.26 during the course of investigation. In the cross-examination of the Investigating Officer, who happened to be the last witness of the prosecution, he was confronted with this bonafide certificate at Exh,74. The certificate was photocopy. The Investigating Officer had included the same in the documents filed with the charge sheet and certified it as true copy. He has categorically admitted in his cross-examination that this certificate was issued by the same school. The Investigating Officer has categorically admitted in his evidence that during the course of investigation, he found that there were two different birth dates of the victim. It was suggested to him that he had manipulated the School Certificates at Exhs.74 and 26. He has denied this suggestion. However, the fact remains that the Investigating Officer himself produced on record two documents indicating two different birth dates of the victim.

16. The learned Additional Public Prosecutor on being confronted with this situation submitted that even if the document at Exh.26 is eschewed from consideration, the document at Exh.74 would prove that the birth date of the victim is 24/05/1998. In the submissions of the learned Additional Public Prosecutor even if 24/05/1998 birth date is taken into consideration, still the age of the victim on the date of commission of the offence would not be over 18 years. We are afraid to accept this submission. It was the duty of the prosecution to prove this document by adducing the primary evidence. There is no explanation about the original certificate of Exh.74. The PW-2 Shri Sanjiv Tapre, Headmaster has specifically stated that the certificate does not bear his signature. This is photocopy of certificate. This certificate if read in juxtaposition with the evidence of the PW-1 and PW-2, would show that it is contrary to the case of the prosecution. If this aspect is looked at from any angle, we are convinced that the said certificate cannot be held to be a proved document to accept the case of the prosecution that on

the date of commission of a crime, the victim was less than 18 years old.

17. There is one more reason for rejecting this submission made by learned Additional Public Prosecutor. In this case, the prosecution has not adduced the evidence to establish that at the time of birth, a baby was fully grown. Considering the issue involved, the prosecution was expected to lead the evidence that at the time of birth, a baby was fully grown. Such evidence if available, would have given some scope to come to any positive conclusion.

18. The Investigating Officer in view of self-contradictory documents with regard to birth date of the victim could have displayed due diligence to collect other scientific evidence to establish the age of the victim. The prosecution on this count also missed the opportunity. The victim was examined by PW-6 Dr. Vivek Phadke. Perusal of his evidence would show that his examination was mainly

concentrated on the aspect of sexual intercourse and injury signs over the body of the victim. He has admitted in his cross-examination that he had referred the victim for x-rays, for her age determination. He has stated that in his notings he did not use the word "Ossification Test". It is a matter of record that as advised, X-rays were taken. However, for the reasons best known to the prosecution, the same have not been proved. It was suggested to the Doctor that the Ossification Test and the X-ray examination revealed that the victim was over 19 years of age and therefore, the same were not intentionally produced. In our opinion, in the absence of plausible explanation, this suggestion if tested on touchstone of the probability would lead credence to the case of the appellant. The Doctor has produced on record MLC papers. In this context, Exh.47 is very relevant. In this document, it is mentioned that the X-ray reports were received on 25/04/2016. It is further stated that she is less than 18 years. If such evidence is in possession of the prosecution, then the failure to produce and prove the same would be an

unexplained aspect in the matter. In our view, same would highly reflect upon the bonafides of the Investigating Officer as well as the Prosecutor. In our view, therefore, the evidence on record is totally silent about the actual birth date of the victim. The evidence produced on record is not legally admissible to accept the case of the prosecution that the victim was either born on 24/05/1999 or on 24/05/1998 and as such, she was not over 18 years of age on the date of offence. The law laid down in the case of Ravinder Singh Gorkhi (supra) and in the case of Ravi Anandrao Gulpude (supra) would squarely apply to this case. In these cases, it is held that in absence of production of original certificate and the primary evidence to prove the certificate, the photocopy or copy of same cannot be relied upon. It is held that even by relying upon Section 35 of the Indian Evidence Act, 1872, such document could not be relied upon.

19. It is the case of the accused that the victim was 19 years old and the sexual intercourse was consensual. We

have already mentioned that the mother of the victim has not been examined. The remaining family members have not been examined. It is undisputed fact that the victim is the sister of wife of the accused. It is further undisputed that during the relevant period, they were residing together under one roof. The finding on this fact would be required because the appellant has admitted that he had sexual intercourse with the victim. His defence is that it was consensual intercourse and therefore, the offence under the POCSO Act as well as under the IPC would not be made out. We have minutely perused the evidence of the victim. On the date of report, the victim was carrying 5 months' pregnancy. She did not disclose this fact either to her mother or to her sister who happens to be the wife of the appellant. On the date of the report i.e. 16/04/2016, the victim was found 5 months' pregnant, it therefore goes without saying that she would have conceived 5 months before the said date. In our view, this long period of intimate relations between the appellant and the victim would clearly indicate that the victim was a consenting party. The

victim in our view would have number of ways and means to free herself from the tentacles of the appellant if she had desire. Her step-father was not residing with them, she could have informed the step-father. The victim has admitted that when her pregnancy became known to the step-father on the say of the father, the report was lodged. Initially, cross-examination of the victim was conducted by the appellant himself. In her cross-examination, she has admitted that the accused had sexual intercourse with her on multiple occasions. Perusal of the cross-examination would show that the appellant was taking care of the victim. She has admitted that the accused never quarrelled with her but he quarrelled with her sister. She has admitted that accused took her on one or two occasions for shopping and marketing. She has admitted that on 14/02/2016, two days prior to the report, the appellant had sexual intercourse with her. In further part of cross-examination, she has admitted that she did not sustain any injury when the accused sexually assaulted her. She has specifically stated that she did not sustain any injury on her

private part / chest or all over the body. The pointed question was asked to her as to why she did not tell her mother that the accused had threatened her and sexually assaulted her. The victim kept mum. The second pointed question was asked as to why she did not immediately lodge the report with the police by informing her father or mother. The witness answered that she cannot give answer to this question. In our view, the evidence of the PW-1 and particularly relevant part of her cross-examination if analyzed and appreciated in proper perspective, it would prove beyond doubt that she consented for sexual intercourse by the appellant. Not only that but also the victim consciously hide this fact for 5 months from other family members. Therefore, in our view on the count of consensual sex, the defence of the accused has been made probable by the evidence of the victim.

20. The prosecution has relied upon the C.A. report and DNA report to seek corroboration to the evidence of the prosecution. Since the appellant has admitted that he had

sexual intercourse with the victim, he thereby concedes the position that he is the biological father of the girl. Though the discussion on this point has become purely academic, in our view, it is necessary to dilute on the same. On this aspect also, there is casualness on the part of the Investigating Officer as well as on the part of the prosecution and the learned Trial Judge. The Chemical Analyzer has not been examined. The Chemical Analyzer who has given the DNA report has also not been examined. It has been consistently held in the judicial pronouncements that the chain of such evidence must be so complete that there should not be any possibility to raise doubt about the tampering of the sample or failure to take proper care by all the handlers of the sample before the samples are analyzed. Before proceeding to deal with the factual aspect, it would be necessary to consider the legal position on the subject. The Hon'ble Supreme Court of India in the case of **Mukesh and another Vrs. State (NCT of Delhi) and others**³ has held that the DNA technology accurately identifies the

3 (2017) 6 SCC 1

criminals. It is held that the DNA technology as a part of forensic science and scientific discipline not only provides guidance to the investigation but also supplies the Court accurate information about the tending features of identification of criminals. It is also held that the DNA report deserves to be accepted unless it is absolutely tainted and for non-acceptance of the same, it is to be established that there has been no quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted. In the case of **The State of Maharashtra Vrs. Vishnu Tulshiram Karwate** (supra), the Division Bench of this Court has observed that non-examination of the Chemical Analyzer, who has analyzed the DNA sample is fatal to the prosecution. Similarly, the examination of the Medical Officer who collected the blood sample needs to be examined to lead credence to the credibility of the DNA report and other evidence. Similarly, there has to be evidence about the packing and sealing of the blood samples by the Medical Officer.

21. In this case, the PW-6 Dr. Vivek Phadke, Medical Officer had examined the victim. In his evidence, he has stated that he has received the requisition Exh.49 from the Investigating Officer for blood sample, pubic hair, vaginal swab and nail clipping of the victim. His evidence is silent about the drawing of the samples, packing and sealing of the samples. No contemporaneous documentary evidence has been placed on record about the drawing, packing and sealing of the samples. He has deposed that he examined the victim on 16/04/2016. The requisition at Exh.49 was received on 19/04/2016 at 10.30 p.m. It, therefore, goes without saying that from 16/04/2016 to 19/04/2016 at about 1.30 p.m., the samples were in the custody of the Medical Officer. There is no evidence as to the place of the storage of the samples and steps taken to preserve the samples.

22. The PW-7 Dr. Sudip Singh examined the appellant. In his evidence, he has stated that he drew the

samples of pubic hair, blood and nail clipping of the accused. He has stated that he sealed the samples and handed over the same to the P.C. Tanaji. He has stated that he examined the appellant on 18/04/2016. Exh.55 indicates that on 18/04/2016, a requisition at Exh.55 was sent to the Medical Officer for examination of the appellant and for drawing his sample. The evidence is silent about the collection of the sample from the Medical Officer and the storage of the samples in the Police Station. It is seen that the samples obtained on 16/04/2016 and 18/04/2016 were lying in the Police Station till 09/05/2016. This fact can be fortified on perusal of Exh.56. The copy of Muddemal Register has not been produced. There is no evidence as to the place where the samples were kept and the precaution taken to preserve the same properly. The evidence of the Medical Officer is silent about the manner of packing and sealing of the samples.

23. The examination report of the blood sample by DNA Expert pertaining to the victim and the accused is at

Exh.71. There is evidence to show that the blood samples were sent to the Chemical Analyzer, Nagpur for analysis. The report shows that the control DNA profiles were obtained from the blood samples at Exh.1 and 2 between 20/04/2016 and 26/05/2016. So, the control DNA profile report of the blood samples of the victim and the appellant was ready on 26/05/2016. After the birth of the baby, the blood sample of the baby was sent to the Chemical Analyzer, Nagpur. It was analyzed between 06/08/2016 and 01/10/2016. The DNA Expert / Chemical Analyzer, Regional Forensic Science Laboratory, Nagpur opined that the victim and the appellant are concluded to be the biological parents of the baby girl.

24. In this case, save and except the carrier no other witness, who had an occasion to handle and deal with the samples at different times and different stages, has been examined. It is common knowledge that in order to obtain the accurate result of the sample, the necessary precaution must be taken by the handlers of the sample to preserve the same. In

order to rule out the possibility of tampering or otherwise, the chain of custody of the sample from the date of receipt of the sample in F.S.L. till the analysis of the sample is required to be maintained. If the chain of custody form or record is maintained, then it could give an idea of the whereabouts of the samples during the relevant period and the persons who have handled the sample during the period. In case of DNA analysis, great care is required to be taken. The prosecution is therefore, required to examine the Chemical Analyzer, who has prepared the DNA report. The chain of custody of samples must be maintained and it must be proved to rule out the possibility of tampering, etc. In this case, such evidence is missing.

25. It is pertinent to note that in the trial where DNA reports are relied upon by the prosecution, great care is required to be taken by the Investigating Officer while collecting the samples and preserving the samples. Similarly, great care is required to be taken by the prosecutor conducting

the trial to ensure the production of the relevant record and leading the evidence to rule out the possibility of tampering of the sample. The Presiding Officer is also required to take care and ensure that the evidence admitted on record is proved according to law. If such care is not taken, then the possibility of miscarriage of justice cannot be ruled out. In this case, record does not indicate that the prosecutor at any time, had made oral or written request to the learned Judge by invoking the provisions of Section 293 of the Code of Criminal Procedure to admit the C.A.reports and DNA reports as an evidence without examining the Chemical Analyzer. Similarly, the record indicates that the learned Judge has not recorded that examination of the Chemical Analyzer would not be necessary and the C.A. reports and DNA reports could be admitted in evidence by invoking the provisions of Section 293 of the Code of Criminal Procedure. On this point, great care was required to be taken. In this case, it is seen that the C.A. reports and DNA reports have been exhibited during the course of recording of evidence of the Investigating Officer -

PW-8. The C.A. reports and DNA reports were admitted in evidence without bothering about the proof of the facts and circumstances of the case required to be established as noted above. It is necessary to state that the learned Presiding Officer cannot afford to remain silent spectator while presiding over the trials of serious nature. In cases where the DNA report is relied upon, great precaution is required to be taken. In this case, if the learned Judge had insisted that he would not admit the DNA report without examining the Chemical Analyzer, the prosecution would have examined the Chemical Analyzer. The examination of the Chemical Analyzer would have enabled the Chemical Analyzer to produce the contemporaneous record to show the movement of the samples, handling of the samples and the persons who had handled the samples from the date of receipt of the samples in the Laboratory till the analysis of the samples. In our view, this approach is not consistent with the principles that all concerned with the criminal trial must ensure that it is a fair trial both to the prosecution and the accused.

26. In this case, in view of the finding on the point of age of the victim and her consent for sexual intercourse, the discussion on the DNA report has become academic. Even if the DNA report is accepted as it is, in our view, the same by itself could not be made the basis of the conviction. In our opinion, in view of the law laid down in the Judgment of the Hon'ble Supreme Court in the case of Mukesh and another (supra), the Presiding Officer is required to display due diligence while conducting the criminal trials where the scientific evidence is required to be produced and proved.

27. In our opinion, on appreciation and analysis of the evidence, we are convinced that the prosecution has failed to prove its case beyond doubt. On the basis of the doubtful circumstances culled out from the evidence, it would be very difficult to accept the case of the prosecution. Therefore, the submissions advanced by the learned Advocate for the appellant deserve acceptance. In view of our observations as above, the submissions advanced by the learned Additional

Public Prosecutor cannot be accepted. In view of the lack of concrete evidence, the accused is entitled for the benefit of doubt, created on the basis of said evidence. The accused is therefore, required to be acquitted. Hence, the following order :-

ORDER

- (i) The appeal is allowed.
- (ii) The Judgment and order of conviction passed by the learned Additional Sessions Judge, Akola dated 07/09/2017 in Sessions Trial No.128/2016 convicting the appellant for the offence punishable under Section 376 (2) (f) of the Indian Penal Code as well as for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is hereby quashed and set aside.
- (iii) The appellant is hereby acquitted for the offence punishable under Section 376 (2) (f) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

(iv) The appellant, who is in jail shall be released forthwith, if he is not required in any other case.

(G. A. SANAP, J.)

(V. M. DESHPANDE, J.)

Choulwar

VITHAL
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CHOULWAR
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