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Mahesh Bhimraj Jadhav
Age about 27 years,
Occupation – Service, Indian Inhabitant
Residing at – Navratna Chawl,
Behind Bodaria Hospital,
D.B. Pawar Chowk,
Ramabai Ambedkar Nagar,
Ghatkopar (E), Mumbai – 400 077.
(Presently Appellant is in Yerwada
Jail at Pune)

Versus

1. The State of Maharashtra
(At the instance of Pant Nagar
Police Station, Mumbai in
C.R. No.109/2014)
2. XYZ
Age 25, Occupation : Not known
Through Pant Nagar Police Station

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Mr. Aliabbas Delhiwala, Appointed Advocate for Appellant.

Mr. A.R. Kapadnis, A.P.P, for Respondent No.1-State.

Mr. Vaibhav Gaikwad, Appointed Advocate for Respondent No.2.

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SHAILAJA SHRIKANT Digitally signed by SHAILAJA SHRIKANT HALKUDE

JUDGMENT:

1. By this appeal, the appellant challenges the judgment and order passed by the Designated Court under the Protection of Children from the Sexual Offences Act, 2012, Greater Bombay (for short “POCSO Act”) dated 12th March, 2019 passed in POCSO Special Case No.457 of 2014 by which he has been convicted of the offence punishable under section 376 of the Indian Penal Code (for short “I.P.C”) r/w section 6 of the POCSO Act and sentenced to suffer rigorous imprisonment for 10 years with fine of 20,000/-, in default, to suffer rigorous imprisonment for three months.

2. Prosecution case is as follows.

3. The prosecutrix who was aged about 17 years got acquainted with the appellant in March, 2013 and they became friends. She was in the 10th standard at the relevant time. Their friendship ultimately turned into love. The prosecutrix and the appellant used to meet frequently when the prosecutrix used to attend her computer classes.

4. In the month of November, 2013, the appellant invited the prosecutrix for celebration of his birthday at *Titwala*. When the prosecutrix reached *Titwala*, appellant asked her to accompany him in a restaurant. The prosecutrix realized that it was a hotel with lodging facility. It is the case of the prosecution that the appellant thereafter forced the prosecutrix to remove her clothes and thereafter committed sexual intercourse with her. The prosecutrix could not resist as she was scared. Even she could not oppose the act of the appellant. The appellant, however, convinced and promised her that he would marry her. He, thereafter, again committed sexual intercourse with her.

5. After a few hours, both returned to their respective places, however, their meetings continued at her computer class. It is further alleged that the appellant became so possessive of the prosecutrix that he did not allow her to talk with her other friends. The prosecutrix was disappointed with such behaviour of the appellant and, therefore, stopped talking with him since January, 2014. The appellant, however, tried to establish contact with the prosecutrix.

6. In the month of February, 2014, the prosecutrix missed her menstrual cycle. When her mother asked about it, being scared, she could not disclose the fact. She was brought to *Rajawadi* Hospital by her mother on 19th March, 2014. After undergoing medical examination and sonography, it revealed that she was carrying a foetus of 4 and ½ months in her womb.

7. The First Information Report (**Exhibit 7**) came to be lodged on the same day. Information was given to P.W.10 – Vishnu Gopal Talekar (retired P.S.I) who rushed to the Hospital with W.P.S.I Suvarna Sonawane. Statement of the prosecutrix was recorded. A crime was registered bearing Crime No.109 of 2014 against the appellant under section 376 of the I.P.C, 4, 5 (j) (ii) and 6 of the POCSO Act. The foetus was aborted on 23rd March, 2014. The appellant came to be arrested on 19th March, 2014 itself. The Investigating Officer recorded the statement of the witnesses, drew spot *panchanama* (**Exhibit 17**) in respect of the room of the lodge where the appellant alleged to have raped the prosecutrix, collected samples of abortus as well as blood samples of the prosecutrix and the appellant. Samples were forwarded to the Forensic Science Laboratory for D.N.A analysis. Birth certificate of the prosecutrix

was collected which revealed that her date of birth was 1st April, 1997. After investigation, a charge-sheet was filed in the Court of Special Judge under the POCSO Act. A charge was framed under sections 4 and 6 of the POCSO Act and 376 of the I.P.C. The appellant pleaded not guilty and claimed to be tried. 13 witnesses have been examined. The learned Special Judge, after going through the evidence and hearing the respective sides, by the impugned judgment and order convicted and sentenced the appellant as above.

8. I heard Mr. Delhiwala, learned Counsel for the appellant at a considerable length as well as the learned A.P.P.

9. A brief note has been tendered by Mr. Delhiwala wherein he tried to demonstrate as to how the prosecution has miserably failed to establish the charge against the appellant beyond reasonable doubts. He gave a comparative chart depicting the evidence of the prosecutrix during trial *vis-a-vis* her statement under section 164 of the Cr. P.C recorded by the Judicial Magistrate First Class, Mazgaon, Mumbai. The learned Counsel has mainly argued on the aspect that the prosecution has failed to establish that the victim was minor at the time of the alleged offence and, secondly, even if

evidence in the form of DNA report (**Exhibit 50**) indicates that the appellant and the prosecutrix are biological parents of the DNA of abortus of the prosecutrix, yet, according to Mr. Delhiwala, in the absence of proper procedure being followed by the Investigating Agency as to how the samples were collected, who carried the samples, where samples were preserved in the Forensic Science Laboratory, it cannot be said that the prosecution has proved that the abortus of the prosecutrix is due to the act committed by the appellant.

10. Learned Counsel in his elaborate argument attempted to bring on record the previous conduct of the prosecutrix who had multiple affairs. She was married with one Alex Behra who had been tried by the prosecution wherein the prosecutrix in her evidence before the trial Court admitted her relations as well as marriage with the said Alex Behra. According to the learned Counsel, there are several contradictions and omissions on record from which testimony of the prosecutrix as well as the prosecution witnesses cannot be said to be of sterling nature and gives rise to several doubts of which benefit is required to be given to the appellant, who according to Mr. Delhiwala, had undergone a substantial part of the sentence. In

order to buttress his points as regard evidentiary value of the DNA report, he has pressed into service a judgment of the Hon'ble Supreme Court in the case of **Rahul Vs. State of Delhi, Ministry of Home Affairs and another, (2023) 1 Supreme Court Cases 83**. The Counsel has also invited my attention to the inconsistencies in the evidence of the prosecutrix as regards the date, time and place of alleged incident.

11. Per contra, the learned A.P.P took me through the evidence of the prosecutrix as well as medical experts and the person who had proved DNA report by contending that the prosecution has not only established age of the prosecutrix as below 18 but also established the fact that the appellant is the biological father of the abortus. Learned A.P.P would argue that there are no suggestions given to the prosecutrix by the defence that she was major on 14th November, 2011 when she had affair with the said Alex Behra with whom the prosecutrix admitted her marriage. He has also invited my attention to the school leaving certificate of the prosecutrix which depicts her date of birth as "1th April, 1997". According to him, there is no reason to doubt the genuineness of the school leaving certificate of the prosecutrix which has been duly proved by

the prosecution. As far as evidence in the form of DNA is concerned, Mr. Kapadnis has placed reliance on a judgment in the case of **Mukesh and another Vs. State (NCT OF DELHI) and others, (2017) 6 Supreme Court Cases, 1.**

12. Two vital aspects are required to be seen in this appeal viz: whether the prosecution has proved age of the prosecutrix, meaning thereby, whether she was below 18 years at the time of the alleged incident and secondly, whether D.N.A report which indicates that the appellant and the prosecutrix are biological parents of the abortus, can be accepted as a conclusive proof? In support of it's case, prosecution examined as many as 13 witnesses.

13. It would be interesting to scan the evidence of the prosecutrix who deposed as P.W.1. At the relevant time, the prosecutrix was studying in 11th standard at Maheshwari Vidyalaya, Maniklala, Ghatkopar (West). Since there was summer vacation, she was doing a job of Compounder in the Hospital of one Dr. D.D. Bodare. Appellant was residing in front of the Hospital. The appellant used to follow and was trying to talk with her. However, she was reluctant. When she joined *Anubhav* Computer Class, after taking

admission in the College, the appellant continued following her. Ultimately, it seems that friendship developed between the appellant and the prosecutrix and thereafter it turned into love affair.

14. Coming to the alleged incident, it is testified by the prosecutrix that in the month of November, 2013, the appellant informed the prosecutrix that since he wanted to celebrate his birthday, she has to participate in the said celebration. The appellant took her to *Titwala* in a hotel. He booked a room. The appellant thereafter tried to touch her and convinced her that he was going to marry her and then forcibly committed rape upon her. The prosecutrix calmed herself down and wept. The appellant again raped her. After some time, both of them left the said hotel and returned to their homes. Her evidence further reveals that in the month of January, 2014, she missed her period and, therefore, her mother, who was disturbed, asked her about it. As she was scared, she did not disclose about the incident to her mother. When her mother took her to *Rajawadi* Hospital on 19th March, 2014, after sonography, it was found that the prosecutrix was carrying a foetus of 4 and ½ months. The foetus was terminated at the Hospital. On the same day, Police from *Pantnagar* Police Station recorded her

statement and an First Information Report came to be registered which is at Exhibit 7. It is surprising that if the incident of rape alleged to have committed by the appellant in the month of November, 2013, how the foetus was found to be 4 and ½ months on 19th March, 2014 i.e merely after 3 months? P.W.6- Dr. Meena Uday Saujani testified that the prosecutrix was examined by one Dr. Nadima Sayyed at *Rajawadi* Hospital. Though P.W.6 – Dr. Meena Saujani is a Doctor, she did not do anything except accompanying Dr. Nadima Sayyed who had not only examined the prosecutrix but also conducted M.T.P on 23rd March, 2014 with the consent of the prosecutrix. It was Dr. Nadima Sayyed who had collected blood of abortus, soft tissues as well as blood samples of the prosecutrix for forwarding the same to the Forensic Science Laboratory. According to the evidence of this witness, the prosecutrix had 18.3 weeks gestation. Prosecution did not examine Dr. Nadima Sayyed for the reasons best known to it. She would have been the best person to give evidence as regards the gestation period of the prosecutrix. This is significant in the light of several admissions given by the prosecutrix herself in her cross which renders her testimony unworthy of credit on the aspect of not only her date of birth but also on the aspect that the appellant was responsible for impregnating her.

15. In her cross-examination by the defence, the prosecutrix has given several vital admissions which would again render her testimony unworthy of credit as it would be very difficult to accept her entire version as truthful in respect of the alleged incident. She admits that her mother lodged a report with *Pantnagar* Police Station on 14th November, 2011 against one Alex Behra for kidnapping and rape. Alex Behra was charge-sheeted and tried for various offences at the Sessions Court, Mumbai. The prosecutrix, as a witness, deposed before Court Room No.31 of that Court. She unequivocally admits that she was in love with Alex Behra and had married with him. They resided as husband and wife. Alex Behra was thereafter acquitted by the Sessions Court of the charges framed against him. She admits that there is no documentary evidence tendered by her for obtaining divorce of her marriage with Alex Behra.

16. The prosecutrix has further admitted her second affair and marriage with one Sajan Randive. She admits photograph at **Exhibit 12** as regards her marriage with said Sajan Randive. She also admits that after her marriage with Sajan Randive, she conceived, however, foetus was aborted. She did not obtain

consent of Sajan Randive before aborting the foetus. She did not disclose the date of abortion.

17. Prosecutrix's last marriage was with one Kanocharan Panda on 18th February, 2018. The prosecutrix volunteered that at the time of her affair with Alex Behra, she was 16 years. She also categorically admits about giving false evidence of her marriage with Alex Behra though she was never married to him. She also admits that after her marriage with Kanocharan Panda, she ran away from his house as he was not maintaining her but subjected to beating and harassment. If the prosecutrix was 16 years of age when her mother lodged a report on 15th December, 2010, how come she was below 18 years in November, 2013 when the appellant alleged to have raped her by taking her to a lodge at *Titwala* on the pretext of his birthday? In her evidence, she testified that the appellant took her to a lodge at *Titwala* in November, 2013, however, no specific date has been stated. Interestingly, during her cross-examination, she admits that the appellant took her to *Titwala* on 27th June, 2013 and not in November, 2013. Evidence of this witness, therefore, is highly unacceptable and unbelievable. This particular aspect creates a reasonable doubt as

regards the age of the prosecutrix. She, therefore, cannot be said to be a witness of truth whose evidence is required to be discarded in totality.

18. There are few more crucial aspects as regards her evidence. As already stated, she testified about the alleged act of rape in the month of November, 2013 when she met the appellant near Ghatkopar Railway Station. In her statement under section 164 of the Code of the Cr. P.C, she had stated that the appellant asked her friend Geeta to get her to the party and, it was Geeta who took her to *Titwala*. The appellant was already present in the Hotel. At the instance of the appellant, she stayed with him in the Hotel where the alleged incident occurred. The prosecution has not examined friend of the prosecutrix namely Geeta who could have been the best witness to depose as to whether she had, at the instance of the appellant, took the prosecutrix to *Titwala* or whether it was the appellant who had enticed her at the relevant time. Withholding the evidence of Geeta would lead to drawing an adverse inference against the prosecution.

19. While giving medical history to Dr. Nadima Sayyed, the prosecutrix had stated that it was a sexual intercourse which had occurred at the home of the appellant in November, 2013, which is in sharp contrast of what has been stated hereinbefore that she was raped in a lodge at *Titwala*.

20. As regards her date of birth, surprisingly, the learned Additional Sessions Judge, after the cross-examination of the prosecutrix again recorded her examination-in-chief on the point of her birth certificate which procedure is unknown to law. It seems that learned Counsel for the appellant did not object such course being followed by the learned Additional Sessions Judge. Be that as it may. It seems that no age proof was annexed along with the charge-sheet by the prosecution. No explanation appears to have been given as to why it was produced by the prosecutrix at the time of recording her evidence, that too, after completing the cross-examination. Nevertheless, it has come on record in further examination-in-chief that date of birth of the prosecutrix is 1st April, 1997. Learned Counsel for the appellant in the cross-examination simply suggested that it is a forged birth certificate. It was suggested to the prosecutrix that before the earlier session trial

in the Sessions Court, she had already deposed about completing 18 years of age at the time of her marriage with Alex Behra. However, the prosecutrix had denied the said suggestion. By merely deposing about her date of birth and producing a certificate to that effect cannot be accepted as a conclusive proof of her age in view of the fact that the prosecution has neither examined author of the said certificate nor there is any authenticate and acceptable evidence to indicate that the said certificate was in fact issued when the prosecutrix was born. A bare look at the said certificate (Exhibit 13), reveal that name of the prosecutrix is suffixed with “*Kumari*” which is nowhere clarified by the prosecution as to whether it is in respect of prosecutrix herself and not in respect of another girl. Even the name of the mother of the prosecutrix is different than what has been brought on record by the prosecution, in the sense, name is wrongly spelled. There is no evidence on record as regards authenticity of the entries at Exhibit 13. There is nothing to indicate on whose information such entries stood recorded and what was the source of information. Had there been evidence of her parents, this aspect could have been clarified.

21. Learned Counsel for the appellant has, therefore, placed implicit reliance on a precedent of the Hon'ble Supreme Court in the case of **Madan Mohan Singh and others Vs. Rajni Kant and another (2010) 9 Supreme Court Cases, 209**. In this judgment it is held that the entries made in the official record by an official or person authorized in performance of official duties may be admissible under Section 35 of the Evidence Act but the Court has a right to examine their probative value. Authenticity of the entries would depend on whose information such entries stood recorded and what was the source of information. Similar view has been expressed by the Hon'ble Supreme Court in the case of **Murugan alias Settu Vs. State of Tamil Nadu, (2011) 6 Supreme Court Cases 111** wherein it has been held that identity of the person connected with birth register entries must be established by independent evidence. *Sans* any independent evidence in order to establish the entries in **Exhibit 13** coupled with the several admissions of the prosecutrix, it would not be safe to accept **Exhibit 13** as a conclusive proof of age of the prosecutrix at the time of the alleged incident which has also not been proved by the prosecution. Spot *panchanama* - **Exhibit 17** as well F.I.R **Exhibit 7** is also not free from doubt, in the sense, there is an interpolation so far as the date of

offence is concerned. “November, 2013” appears to have been inserted subsequently by scrubbing the earlier date which has not been explained by the prosecution anywhere, at least through the evidence of P.W.10- Vishnu Talekar. Spot *panchanama* – **Exhibit 17** clearly reveals that the prosecutrix was taken to Shri Ganesh Lodge at Titwala on 27th June, 2014. However, again figure “4” in the year 2014 has been overwritten as “2013” which has not been explained by the prosecution. These are all very serious discrepancies in the prosecution case which definitely would go to its root.

22. P.W.2- Kamal Shrichand Budhrani is the owner of Shri Ganesh Lodge at *Titwala, Kalyan*. He had produced register and relevant entries dated 27th June, 2013. The sum and substance of his evidence is that the appellant and the prosecutrix had visited his Hotel on 27th June, 2013. As already stated, it was the evidence of the prosecutrix that she was taken to the said Lodge in November, 2013. P.W.2 – Kamal Budhrani could not identify the appellant during trial. However, his evidence indicates that the boy who accompanied the prosecutrix on that day was allotted Room No.315 on the third floor. The said boy had tendered copy of his PAN Card as well as given his Mobile number 9819960149.

Evidence of this witness can be accepted with a pinch of salt for the simple reason that he is a stock Police witness who admits in his cross-examination that he deposed 50 to 60 times in various Courts at Alibag, Kalyan, Thane and Mumbai. His evidence is full of omissions, in the sense, he had, for the first time deposed in the Court that the appellant and the prosecutrix had been to his lodge, secondly, both had booked a room as they wanted to take rest after taking *Darshan* in the temple. He had, further, for the first time testified that his brother Amar took entry in the hotel register. As regards handing over copy of PAN Card as well as mobile number of the appellant is also proved to be an omission. Thus, evidence of this witness is not at all helpful to the prosecution in proving the fact that the appellant and the prosecutrix had visited Shri Ganesh Lodge at *Titwala*. There is no evidence even on the aspect as to whether he is really the owner of the said hotel. This witness had not even been summoned to give evidence in the Court as he admits that he appeared in the Court because he received a phone call from the Police. The evidence of this witness is, therefore, worthless.

23. P.W4 – Dr. Satchidanand Shivlingappa Payannavar was attached to *Rajawadi* Hospital as a Medical Officer at the relevant

time. He collected blood samples of the appellant for DNA test. According to this witness, Police Naik – Jagtap Buckle No.960083 brought tubes for collecting blood samples. It is not clear what kind of tubes were brought by this Police Naik and from where. The prosecution did not examine Police Naik Jagtap. There is no evidence that the tubes were brought by Police Naik Jagtap from the Forensic Science Laboratory. It is not the evidence of P.W. 4 – Dr. Satchidanand Shivlingappa that Police Naik Jagtap had brought a kit containing the tubes. This is important in the light of the fact that the prosecution has sought to rely upon the DNA evidence for establishing paternity of the abortus. Non examination of Police Naik Jagtap would indeed fatal to the prosecution. Evidence of P.W.4 – Dr. Satchindanand Shivalingappa reveals that he had handed over the said two tubes to the MRO Department to seal it, meaning thereby, this witness had not sealed the blood samples. He admits that a form which was to be filled in at the relevant time and which bears the seal and signature of the Officer is at **Exhibit 20**. The original format was given to the Police which is marked as **Exhibit 21**. According to this witness, blood of the appellant was collected for DNA profiling. Indoor paper which is marked as **Exhibit 22** indicates date as “25.03.2014” instead of “26.03.2014”. The

witness testified that it was a mistake. As already stated, for want of evidence of Police Naik Jagtap, it is difficult to ascertain what kind of tubes were brought by him and from where. Secondly, there is no evidence that he had in fact carried collected blood samples to the Forensic Science Laboratory. The mistake, according to this witness, in mentioning date as “25.03.2014” instead of “26.03.2014” had not been intimated by him either to the Forensic Science Laboratory or to the Investigating Officer. The evidence of this witness is also not aboveboard. This is because even P.W.5 – Dr. Kiran Sambhaji Kalyankar who was on duty at the same Hospital had already on 20th March, 2014 examined the appellant and had also collected the blood samples. If the appellant was already produced before P.W. 5 – Dr. Kiran Kalyankar on 20th March, 2014, why was he again produced before P.W.4 – Dr. Satchidanand Shivlingappa within 5 days i.e on 25th March, 2014? Why his blood samples were taken again by P.W.4 – Dr. Satchindanand Shivalingappa if they are already taken by Dr. Kiran Kalyankar on 20th March, 2014. The prosecution has not explained twice collection of blood of the appellant within a span of five days. P.W.5 – Dr. Kiran Kalyankar testified that he collected the blood samples for grouping and the same was sent to the Forensic Science

Laboratory under seal and covering letter which is at **Exhibit 31**. According to P.W.5 – Dr. Kiran Kalyankar, he could not collect blood samples for DNA as required DNA kit was not brought by the Police.

24. During his cross-examination, P.W.5 – Dr. Kiran Kalyankar admits that entire form which was to be filled up by the Medical officer has not been completely filled up by him. Name of the appellant as well as the sections under which he was charged were written by his clerk. He even could not remember as to whether column which indicates that the consent of the appellant was taken before his examination was written by him or by someone else. The witness volunteered that it might be written by his Clerk. As such, there is some scope for doubt as to whether P.W.4 – Dr. Satchidanand Shivanligappa had properly collected and sealed the blood samples and whether the same were forwarded to the Forensic Science Laboratory in a kit provided by the Laboratory or whether blood samples collected by P.W.5 – Kiran Kalyankar were forwarded for the purpose of ascertaining the DNA profile?

25. Now, coming to the evidence of P.W.6 - Dr. Meena Uday Saujani. She was attached to *Rajawadi* Hospital at the relevant time when the prosecutrix was brought by Police Buckle No.01462 of *Pantnagar* Police Station. It is unclear whether the said Police was a male or female. The sum and substance of the evidence of this witness is that the prosecutrix was examined by Dr. Nadima Sayyed to whom all the details were narrated by the prosecutrix. The role of this witness, as it appears from her evidence is that she was just present at the time of examination of the prosecutrix. Though she testified that the prosecutrix was pregnant with 18.3 weeks gestation and also to the fact that the foetus was aborted on 23rd March, 2014 after which sample of the foetus, soft tissues and blood of the abortus were collected, yet all this procedure was not conducted by this witness and, therefore, her evidence cannot be accepted and relied upon in the absence of evidence of Dr. Nadima Sayyed. The best evidence could have been of Dr. Nadima Sayyed who has not been examined. There is even no evidence that she was not subjected to the process of the Court. P.W.6 – Dr. Meena Saujani testified that Dr. Pradhya and Dr. Motwani had terminated pregnancy of the prosecutrix (MTP) on 23rd March, 2014. Even those two Doctors have not been examined by the prosecution.

However, a photostat copy of the MTP report is proved at Exhibit 35.

26. It is pertinent to note that the soft tissues and blood of the abortus were transferred in a DNA kit and handed over to the Police after sealing it. It is not clear from the evidence of this witness as to who collected soft tissues and transferred the same in a DNA kit and handed over to the Police. This is also an important fact which is missing from the evidence of this witness. She even has not deposed that samples were collected by Dr. Nadima Sayyed and handed over to the Police. There is no evidence as to whom samples were given for sending it to Forensic Science Laboratory. There is even no evidence as to who filled the form of the prosecutrix when her samples were collected for DNA profile.

27. There is no doubt that P.W.12 – Shrikant Hanumant Lade who was attached to Forensic Science Laboratory Kalina as an Assistant Chemical Analyzer had conducted D.N.A profile test after receipt of the D.N.A profile of the appellant as well as the prosecutrix. He had concluded that the appellant and the prosecutrix were biological parents of the D.N.A of Exhibit 2

(abortus) of the prosecutrix. Coming back to the evidence of P.W.6 – Dr. Meena Saujani. As already stated above, her evidence would be hardly of any assistance to the prosecution in light of the fact that prosecution did not examine Dr. Nadima Sayyed, Dr. Pradhnya and Dr. Motwani. There is no evidence that Dr. Nadima Sayyed had left this country. Learned Counsel for the appellant submitted that the prosecution had not produced sonography report and, therefore, no evidence could have been given in respect of contents of the said report in the absence of sonography report on record.

28. P.W.7- Santosh Sitaram Chouhan was attached to Pantnagar Police Station as Police Naik. What he testified is that he carried two small plastic containers to the Forensic Science Laboratory, Kalina as per the direction of P.W.13 – Kalpna Pawar who was senior Police Inspector at the relevant time. A forwarding letter dated 24th March, 2014 (Exhibit 38) is proved by this witness. However, the said letter does not depict his name as to whether he was authorized to carry the samples. There is no mention in Exhibit 38 as to whose blood samples were forwarded to the Forensic Science Laboratory by senior Police Inspector through

Santosh Chouhan. The Clerk of the Forensic Science Laboratory has put his endorsement acknowledging receipt of two sealed plastic containers, however, it is difficult to understand what has been forwarded to the Forensic Science Laboratory by P.W.13 – Kalpana Pawar through this witness. Even P.W.8- Balkrishna Laxman Patade who was attached to J.J. Marg Police Station testified that on 19th April, 2014, he carried almost 20 to 25 samples to the Forensic Science Laboratory. It is difficult to understand as to why this witness has been examined by the prosecution who was neither attached to Pantnagar Police Station nor he was concerned with the present case. In his cross-examination, he admits that he did not know the persons whose blood samples he had deposited in the Forensic Science Laboratory. His statement was also not recorded by the Investigating Officer for carrying samples. He also admits that he had no concern with *Pantnagar* Police Station at the relevant time.

29. Coming back to the evidence of P.W.12- Shrikant Lade upon whose evidence prosecution has tried to lay emphasis in order to establish the charge against the appellant. His evidence mainly indicates as to how he had extracted DNA from abortus of the

prosecutrix and how the same was amplified by PCR (Polymerase Chain Reaction). It is needless to go into the procedural aspects and the technicalities as to how the D.N.A came to be extracted from the blood sample of the prosecutrix and the abortus of the prosecutrix. He opined that the appellant in Forensic Science Laboratory ML case No. DNA 474/14 and the prosecutrix are concluded to be the biological parents of DNA of Exh.2 (abortus) of the prosecutrix. As already stated hereinabove, the evidence as regards collection of blood samples of the appellant, prosecutrix and the abortus as well as career has not been properly proved by the prosecution. In view of the ratio laid down by the Hon'ble Supreme Court in the case of **Rahul Vs. State of Delhi, Ministry of Home Affairs and another, (2023) 1 Supreme Court Cases, 36,** it is settled law that the DNA evidence is in the nature of opinion evidence as envisaged under section 45 of the Evidence Act and like any other opinion evidence, its probative value varies from case to case. It has been held that;

“If the DNA evidence is not properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. It is because extremely small samples of DNA can be used as evidence, greater attention to

contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the fact and then touches area that may contained the DNA to be tested. The exhibits having biological specimen, which can establish link among victim (s), suspect (s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA profiling.”

30. It is not clear from the evidence of witnesses as to how long the samples remained in the *Malkhana* of the Police Station. Possibility of tampering of the samples can not be ruled out. Even forwarding of samples in tubes has not been clearly proved by the prosecution as to whether the samples were forwarded in a kit provided by the Forensic Science Laboratory. In case of **Rahul** (supra), the Hon’ble Supreme Court referred 153rd report of Law Commission of India which is extracted below;

“DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not “match”, then this will prove a lack of identity between the known

person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA “profile” or “fingerprint” is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000: This is described as the “random occurrence ratio” (Phipson 1999, 15th Edn., para 14.32).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law”.

Thus, DNA may be more useful for the purpose of investigation but not for raising any presumption of identity in a court of law.

31. Thus, having taken into consideration the totality of the facts, circumstances and evidence on record, it is difficult to hold that the prosecution has proved its case beyond all reasonable doubts since it has failed in establishing age of the prosecutrix. Learned trial Judge has not properly appreciated the evidence by ignoring several inconsistencies, contradictions and omissions on record. Even the date of the incident has not been established by the prosecution. For the aforesaid reasons, a benefit of doubt needs to be given to the

appellant. Consequently, following order is passed.

: ORDER :

[a] The Appeal is allowed.

[b] The judgment and order dated 12th March, 2019 passed by the Designated Judge under Protection of Children from Sexual Offences Act, 2012 in POCSO Special Case No.457 of 2014 is quashed and set aside and the appellant is acquitted of the offence punishable under section 6 of the POCSO Act.

[c] The appellant be released forthwith, if not required in any other case.

[d] Amount of fine, if paid, be refunded to the appellant.

32. Appeal stands disposed of.

33. In view of disposal of the appeal, Interim Application, stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]