

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4504 OF 2024

Rupesh Tukaram Kondhalkar

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

.....

- Ms. Sana Shaikh a/w. Ms. Maya Updeshe, Ms. Nisha Lakariya, Mr. Vipul Ghate, Mr. Pratik Thadani and Ms. Ruha Shaikh, Advocates for Applicant.
- Ms. Mahalakshmi Ganapathy, APP for Respondent No.1.
- Ms. Priyanka Brahmdev Chavan, Advocate for Respondent No.2 appointed through legal aid.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 23, 2025

JUDGEMENT:

1. Heard Ms. Shaikh, learned Advocate for Applicant; Ms. Ganapathy, learned APP for Respondent No.1 and Ms. Chavan, learned Advocate for Respondent No.2 appointed through legal aid.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short '**Cr.P.C.**') seeking Bail in connection with C.R. No.309 of 2022 registered with Koparkhairane Police Station for offences punishable under Sections 376 (3) of the Indian Penal Code, 1860 (for short '**IPC**') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short '**POCSO Act**').

3. The First Informant is the mother of victim. The date of First Information Report (for short '**FIR**') is 03.07.2022. The tenure of the

incident alleged in the FIR is from 26.01.2022 to 02.02.2022. In the FIR, First Informant has stated that on 26.01.2022 her daughter namely prosecutrix who was living in village – Abhipuri, Taluka – Bhore, District – Pune was visiting her maternal aunt's residence at Mankhurd, Mumbai for two – three days, when Applicant who is cousin brother of prosecutrix from her paternal side arrived there and invited her to visit his house at Koparkhairane, Navi Mumbai and prosecutrix obliged him by going with him.

4. Applicant was staying in Koparkhairane alongwith his wife, his sister (21 years). At that time his niece (12 years) was visiting his house and she was also staying there. When Applicant took prosecutrix to his home, i.e. on 26.01.2022 his wife was not present as she was visiting her parents but his younger sister and niece were both present. It is stated that on the night of 26.01.2022, Applicant, his sister, niece and prosecutrix all had dinner together and went to sleep in Applicant's house. Spot panchanama of Applicant's house shows that it is 12' X 10' room with a kitchen. It is stated that Applicant slept on the sofa in one corner whereas the three women slept on the ground in the room. It is alleged that sometime in the night, Applicant came and slept next to prosecutrix and against her wish forcibly outraged her modesty and assaulted her. It is stated in the FIR that prosecutrix did not disclose the incident to anyone since Applicant was related to her.

5. Thereafter it is alleged that on the following day i.e. 27.01.2022, after Applicant's sister left for work in the morning, sometime in the afternoon, Applicant asked his 12 year old niece to go out and fetch something from outside and after she left, Applicant once again forced himself on prosecutrix and assaulted her. It is stated that prosecutrix did not disclose this incident either to any person since Applicant was her cousin brother and related to her.

6. Thereafter it is stated that sometime in the first week of July, prosecutrix experienced pain in her stomach pursuant to which she got herself checked and was pregnant. Statement of prosecutrix was recorded in Sassoon Hospital, Pune at the time of her health checkup on 02.07.2022. Hence FIR came to be lodged on 03.07.2022.

7. Ms. Shaikh would fairly inform the Court that pursuant to abortion of foetus sample of femur bone of foetus was sent for Deoxyribonucleic Acid (for short '**DNA**') analysis alongwith samples of prosecutrix and Applicant on 09.07.2022. She would place on record DNA Report dated 05.01.2023. The DNA Report when *prima facie* perused opines that Applicant and prosecutrix are concluded to be biological parents of the femur bone of foetus of prosecutrix.

7.1. Ms. Shaikh has made one pivotal submission for consideration at the bail stage. She would submit that DNA Report is in the nature of opinion and it would be fatal for Court to rely upon

the DNA report at inception stage without Applicant given a chance to contest and challenge the same. She would submit that if the same is accepted by Court at inception stage without the DNA Report being proved in accordance with law it would amount to pre-trial judgment and punishment meted out to Applicant. She would persuade the Court to consider the decision of this Court in the case of *Niraj Uttam Kate Vs. The State of Maharashtra and Anr.*¹ wherein this Court has discussed the reliance to be placed on DNA Report at the time of consideration of Bail Application before trial.

7.2. That apart, she would submit that Applicant is incarcerated in prison for the past 2 years 8 months 25 days pending trial, investigation is complete and charge-sheet has been filed. She would submit that charge is not framed and hence there is no absolute certainty that trial would commence or for that matter shall even get completed in the near foreseeable future. Hence on ground of long incarceration of Applicant in prison pending trial, she would persuade the Court to grant bail to Applicant.

7.3. On the aspect of merits of the case, she would submit that Court needs to take into account two factors. Firstly the stoic silence of prosecutrix from January-2022 to July-2022 after occurrence of the alleged two incidents. Secondly and most importantly that it is highly unlikely that the first alleged incident in the night of 26.01.2022 could

¹ Bail Application No.511 of 2025 decided on 08.04.2025.

have taken place primarily because it is alleged that in the middle of the night when prosecutrix was sleeping next to Applicant's sister and niece, the Applicant forced himself on her against her wish and her reluctance and assaulted her. She would submit that statement of the sister which is recorded does not support the prosecution case. Further statement of the niece is not even recorded so as to corroborate either the first or the second alleged incident.

7.4. That apart she would submit that the second incident alleged on the following day in the afternoon is also replete with suspect because prosecution has not recorded statement of the 12 year old niece so as to ascertain whether she was indeed sent out in the afternoon by Applicant to fetch something which prosecution has alleged. On the basis of the aforesaid *prima facie* submissions she would persuade the Court to grant bail to Applicant.

8. *PER CONTRA*, Ms. Ganapathy, learned APP for Respondent No.1 and Ms. Chavan, learned Advocate for Respondent No.2 appointed through legal aid would vehemently submit that there is presumption attached to the word of prosecutrix – victim who has filed the complaint. They both in tandem would submit that unless the statement made by prosecutrix is *prima facie* proven to be otherwise, the same needs to be believed and accepted by Court. They would submit that all defences of Applicant, *inter alia*, with respect to the

twin incidents in question can be considered at the time of trial by the Trial Court.

8.1. They would submit that *prima facie* substantial reliance will have to be placed on the positive DNA Analysis Report in order to *prima facie* come to the conclusion that alleged incidents occurred and perpetrator of the incidents was none other than Applicant before Court. Hence they would submit that once *prima facie* fact of the incident stands established in view of the positive DNA Analysis test Report, Applicant has no escape and he deserves to be kept behind bars.

8.2. Further they would persuade the Court to reject Bail Application on the ground that if Applicant is released from prison, he would indeed be a threat to the prosecutrix since he is closely related to the prosecutrix and that apart he would be in an influential position to tamper with the evidence as also witnesses in the prosecution case. Hence they would persuade the Court to reject the Bail Application of Applicant for grant of bail.

8.3. Ms. Chavan, learned appointed Advocate would additionally persuade the Court to consider the judgment delivered in the case of *Niraj Uttam Kate* (1st *supra*) wherein the Court has referred to the decision of the Division Bench of this Court (Aurangabad Bench) in the case of *Nivrutti S/o Nagorao Hange Vs. The State of Maharashtra and*

Anr.² in Criminal Appeal No.889 of 2023. She would submit that in the said decision DNA Report was not accepted despite being positive because of the possibility of sample contamination due to significant delay which affected the prosecution case. Further she would submit that the said case was decided after trial and evidence, whereas the present case is at the pre-trial stage and hence *prima facie* if the DNA Report is positive, then *prima facie* case is made out by the prosecution. She would submit that DNA evidence is a scientifically reliable and robust tool in criminal investigation, particularly in cases of sexual assault and paternity determination. According to her in the present case the DNA Report is positive and once that is so the argument of the learned Advocate for Applicant that the Report needs to be proved further is unsubstantiated. Hence she would persuade the Court to reject the Bail Application.

9. I have heard Ms. Shaikh, learned Advocate for Applicant; Ms. Ganapathy, learned APP for Respondent No.1 and Ms. Chavan, learned Advocate for Respondent No.2 appointed through legal aid and with their able assistance perused the record of the case. Submissions made by them have received due consideration of the Court.

10. *Prima facie* it is seen that case of prosecution / prosecutrix is based upon two incidents alleged on 26.01.2022 and 27.01.2022. There is discrepancy in referring to the said dates in the medico-legal

² Criminal Appeal No.889 of 2023 decided on 01.10.2024.

examination of prosecutrix which was conducted on 02.07.2022. In that medical examination, prosecutrix which has stated the alleged dates of the two episodes to be sometime in February – 2022.

11. Be that as it may, that apart the medical report is inconclusive considering lapse of time save and except it states that sample of the femur bone of the foetus was sent for DNA Analysis. Hence the case of prosecution completely hinges on the positive DNA Report which has been placed on record and the Court is persuaded to accept the same at the bail stage and reject Bail Application of Applicant. Arguments are advanced on merits as also long incarceration pending trial and consideration of the DNA Report.

12. Applicant was arrested on 22.07.2022. He is incarceration for the past 2 years 8 months 25 days pending trial.

13. Ms. Shaikh has placed reliance on the following decisions in support of her submissions to contend that grant of bail is discretionary and Court will have to *prima facie* consider all circumstances, including long incarceration of Applicant, pending trial for grant of bail.

- (i) *Bankhmih Nongrum Vs. State of Meghalaya*³;
- (ii) *Veer Bhadur @ Vishal Vs. State of Himachal Pradesh*⁴;
- (iii) *Pankaj Banduji Durge Vs. State of Maharashtra through*

³ AIR Online 2023 MEG 79 (Bail Application No.6 of 2023 decided on 03.05.2023).

⁴ 2021 (2) Sim LC 883 (Cr.MP(M) No.404 of 2021 decided on 24.03.2021).

P.S.O., P.S. Gondpipri, Dist. Chandrapur⁵; and

(iv) *Yogesh Uttam Thorat Vs. The State of Maharashtra and Anr⁶.*

13.1. *Prima facie* it is seen that none of the aforesaid four decisions relate to consideration of the DNA Report at the bail stage. The aforesaid four decisions relate to the discretionary power of the Court while considering Bail Application and they refer to the issue of presumption of guilt under the POCSO Act as also other factual issues stated therein. *Prima facie* it is seen that the said decisions relate to the object of grant of bail and the principles that are required to be kept in mind for grant of bail while deciding a bail Application.

14. Ms. Chavan in the course of her submissions has referred to and relied upon the decision of the Supreme Court in the case of *Satpal Singh Vs. State of Haryana⁷*. The said decision relates to delay in filing the FIR after the occurrence of the incident. There is no doubt that delay in such a case will not be fatal to the case of the prosecution considering the fact that delay in reporting crimes of sexual assault especially involving minors are not uncommon due to societal stigma, fear and the trauma faced by the victims and their families. *Prima facie*, the delay in this case will also not be fatal to the prosecution case considering the facts of the case herein.

14.1. The prosecution side has also persuaded the Court to

⁵ 2020 ALL MR (Cri) 816 (ABA No.889 of 2019 decided on 04.01.2020).

⁶ Bail Application No.1188 of 2024 decided on 05.04.2024.

⁷ 2010 AIR SCW 4951.

consider the presumption under Section 29 of the POCSO Act to contend that unless the contrary is proved, the said presumption will have to be accepted by the Court even at the bail stage.

15. This Court is not oblivious of the fact that there is a statutory presumption under Section 29 of the POCSO Act. However it does not mean that the prosecution version has to be accepted as gospel truth in every case. Presumption does not mean that the Court cannot take into consideration *prima facie* facts of the particular case which are evident from the face of record.

16. Court is of the opinion that presumption would come into play only when prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegation against the accused and to claim that the case projected by it is true. The Court will have to be on guard to see that the application of presumption without adverting to the essential facts shall not lead to injustice. The presumption under Section 29 of the POCSO Act is not absolute. Attention in this regard is invited to the decision of High Court of Kerala in the case of *Joy Vs. State of Kerala Represented through the Public Prosecutor*⁸. The relevant paragraphs are reproduced thus:-

"9. Mere delay in reporting the matter to the authorities concerned, especially sexual assault on a minor girl, is immaterial and it would not be fatal to the prosecution case.

⁸ 2019 SCC OnLine 783.

However, in the instant case, it is not the delay alone that is significant. The significant fact is that the complaint was given to the authorities concerned only two weeks after the mother received the lawyer notice from the petitioner claiming a huge amount as professional fees. This raises suspicion on the prosecution case against the petitioner. When the victim had disclosed the matter to her mother in July, 2018, one would have expected the mother to report the matter to the authorities concerned much earlier than 22.09.2018. The fact that she reported the matter only after receiving a lawyer notice from the petitioner assumes significance.

10. This court is not oblivious to Section 29 of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178 : AIR 2017 SC 630).

11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without advertent to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened. As held by the Apex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : AIR 2011 SC 312, frivolity in prosecution should always be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No

inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention."

17. Attention is drawn to the decision of High Court of Kerala in the case of ***XXXXXX Vs. State of Kerala Represented through the Public Prosecutor and Ors***⁹. The relevant paragraphs are reproduced thus:-

"19. Before parting with the judgment, we will also deal with the appellant's contention based on Section 29 of the POCSO Act. Section 29 is extracted herein below:

"29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

20. It is the submission of the learned counsel for the appellant based on Section 29 of the Act that reverse burden is cast on the accused to prove that they have not committed the offences under Sections 3, 5, 7 and 9 of the Act, the only precondition being that the accused is prosecuted for committing or abetting or attempting to commit any of the offences above referred. According to the learned counsel, the accused persons herein failed to discharge the reverse burden and therefore, they are liable to be convicted for the offences alleged. We cannot accept the above contention of the learned counsel. The argument, if accepted on its face value, is pregnant with the peril of accepting every prosecution charge, where offences under Sections 3, 5, 7 and 9 of the Act are canvassed, irrespective of its merits. Section 29 only creates an exception to the ordinary rule of innocence available to the accused in a criminal trial and puts the onus on the accused to rebut the presumption and establish his innocence. However, this presumption will operate only if the foundation to the prosecution case is laid by leading legally admissible evidence. The statutory presumption under Section 29 cannot be understood to mean that in every case when a person is prosecuted for the specified offences, the prosecution version should be taken as gospel truth. The presumption will not mitigate the primary duty of the prosecution to establish the foundational facts constituting the offence, which duty is static on the shoulders of the prosecution. Once the same is done, the burden shifts to the accused by virtue of Section 29 of the

⁹ CRA(V) No. 19 of 2020 decided on 24.02.2022.

Act to prove that he had not committed or abetted or attempted to commit the offence, as the case may be. Our conclusions afore referred are in accord with the following judgments of the Hon'ble Supreme Court, where presumption under various statutes have been analysed and interpreted: (1) **K.Veerawami v. Union of India** [(1991) 3 SCC 655], (2) **State of Maharashtra v. Wasudeo Ramachandra Kaidalwar** [(1981) 3 SCC 199], (3) **Noor Aga v. State of Punjab** [(2008) 16 SCC 417], (4) **Kumar Exports v. Sharma Carpets** [(2009) 2 SCC 513], (5) **Abdul Rashid Ibrahim Mansuri v. State of Gujarat** [(2000) 2 SCC 513], (6) **Chandran & Others v. State of Kerala and Others** [AIR 2011 SC 1594], (7) **Naresh Kumar v. State of Himachal Pradesh** [AIR 2017 SC 3859] and (8) **Gangadhar @ Gangaram v. State of Madhya Pradesh** [AIR 2020 SC 3656]. These decisions were taken note of and discussed by a learned Single Judge of this Court in **Justin @ Renjith & Another v. Union of India** [ILR 2020 (4) Ker 679]. To the same effect is the judgment of another learned Single Judge of this Court in **David v. State of Kerala** [2020 (4) KHC 717 : 2020 Cr.LJ 3995]. We, therefore, reject the said contention of the appellant on the legal premise. On factual premise also, we find that the accused persons have rebutted the presumption under Section 29 by virtue of the evidence and circumstances already discussed, which were given due weightage in confirming the impugned judgment.

18. The main submission of prosecution and learned Advocate appointed for Respondent No.2 is based upon the consideration to be ascribed by the Court to the DNA report so as to accept the conclusion stated therein that Applicant is the person responsible for the twin incidents and what the prosecutrix has stated is true. In the statement recorded by prosecutrix, she has stated that Applicant used force during the first episode. This particular assault took place right next to the sister and niece of Applicant who were sleeping next to prosecutrix. *Prima facie* a serious discrepancy is noted in the statement made by the prosecutrix – victim. According to prosecutrix she stayed at Applicant's house for only two days namely 26.01.2022 and 27.01.2022 when the alleged incidents took place. According to

prosecutrix, she came alongwith Applicant and his friend to his house on 26.01.2022 from her maternal aunt's house in Koparkhairane. As against this, statements of Applicant's sister, wife and niece are recorded and they are recorded and they are appended at page Nos.44, 45 and 48 of the Application which *prima facie* state that prosecutrix had come to stay at Applicant's house and was staying there for several days during the last week of January and first week of February. They have stated that Applicant's wife had gone to Mahad for some family work relating to marriage of Applicant's brother on 26.01.2022 and 27.01.2022. Applicant's sister and niece were however present in the house at all times. It is prosecution case that on 27.01.2022 Applicant's sister left for her usual work in the morning and in the afternoon Applicant asked his niece to go run an errand outside. The statements of both i.e. Applicant's sister and niece do not support the alleged case of prosecutrix. Hence, from that perspective, case of prosecutrix about the twin incidents as alleged to have happened are *prima facie* hard to believe.

19. In so far DNA Report is concerned and the weightage to be required to be given to the DNA Report at the interim stage of bail when the DNA Report has been placed on record and not proved in accordance with law, in the case of *Niraj Uttam Kate* (1st *supra*), this Court while dealing with an identical proposition for considering positive DNA Report at the bail stage after referring to various citations

of the Supreme Court and High Court noted as follows:-

“13. That apart, medical report is *prima facie* inconclusive since the prosecution is relying upon the DNA report appended at page No.84 of the Application. It is seen that DNA was extracted from the blood of the Applicant and matched with the blood of the prosecutrix and blood of the male child delivered by the prosecutrix. DNA report states that the analysis was started on 08.04.2021 and completed on 30.06.2021 and after examination the opinion records that Applicant and prosecutrix are concluded to be the biological parents of the male child delivered by the prosecutrix.

14. *Prima facie* it is seen that the samples of the blood for conducting the DNA analysis report were collected on 11.09.2020. The date of the DNA report is 25.10.2021. It is seen that blood samples were sent on 15.09.2020 and the report was received after more than one year. The report *prima facie* states that analysis started on 08.04.2021 and it was completed on 30.06.2021. The aforesaid dates *prima facie* speak for themselves. DNA test has been conducted by employing the PCR amplification technique wherein 15 different genetic alleles are analyzed and the loci are matched with the maternal alleles present in the male child with the obligate paternal alleles on 15 counts. The PCR amplification technique is a powerful tool used in forensic science and other fields wherein the DNA strands are amplified for the purpose of effecting a match between various samples which are analyzed.

15. *Prima facie* it is seen that if DNA is not properly collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a Court of law. This is because extremely small samples of DNA can be used as evidence but whenever PCR test is done, greater attention to contamination issues is necessary while locating, collecting and preserving which can be contaminated when the DNA from another source gets mixed with DNA relevant to the case.

16. In an earlier judgment, *R Vs. Dohoney & Adams*¹ the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

17. In the case of *Dharam Deo Yadav Vs. State of UP* ² this Court discussed the reliability of DNA evidence in a criminal trial and held as follows:-

“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.....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.”

18. Thereafter several decisions of the Supreme Court, namely in the case of **Pantangi Balarama Venkata Ganesh Vs. State of Andhra Pradesh** ³; **Santosh Kumar Singh Vs. State through CBI** ⁴; **Inspector of Police, Tamil Nadu Vs. John David** ⁵; **Krishnan Kumar Malik Vs. State of Haryana** ⁶; **Surendra Koli Vs. State of Uttar Pradesh and Ors.** ⁷; **Sandip Vs. State of Uttar Pradesh** ⁸; **Rajkumar Vs. State of Madhya Pradesh** ⁹; and **Mukesh and Ors. Vs. State of NCT and Delhi and Ors.** ¹⁰ have dealt with the increasing importance of DNA evidence. The Supreme Court has also emphasized the need for assuring quality control, about the samples, as well as the technique for test in **Anil Anthony Arikswamy Joseph Vs. State of Maharashtra** ¹¹. The relevant paragraph No.17 is reproduced below for reference:-

“17. 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.”

19. Thereafter Supreme Court in one recent decision in the case of **Pattu Rajan Vs. The State of Tamil Nadu** ¹², considered the value and weight to be attached to a DNA report:-

“33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight

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

20. Thereafter the Supreme Court in the case of **Manoj and Ors. Vs. State of Madhya Pradesh**¹³ in paragraph No.41 after considering the aforesaid observations regarding reliance to be placed on DNA reports, in the past, where the guilt of an accused was sought to be established has held that notably the reliance DNA test result was to corroborate. The Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case.

21. Though the learned Prosecutor in the present case would persuade the Court to consider some of the decisions of this Court passed in Bail Applications wherein this Court has rejected the bail, the said decisions are orders passed in Bail Applications. I have perused the said decisions in the case of **Sanjay Tulsidas Waghat Vs. State of Maharashtra**¹⁴, **Bashir Dilawar Shiakh Vs. State of Maharashtra**¹⁵, **Samadhan Kashinath Borkar Vs. State of Maharashtra**¹⁶ and **Santosh Dhondiram Kende Vs. State of Maharashtra**¹⁷. However prima facie it is seen that none of the said decisions discuss reliance to be placed and relying upon DNA report at the bail stage and state that DNA report cannot be ignored apart from the statement of the victim implicating the accused person and hence bail was rejected in the said cases.

22. There is another decision of the learned Single Judge of this Court in Bail Application in the case of **Parmeshwar Manik Golhar Vs. State of Maharashtra**¹⁸ which prima facie states that in a case where there a possibility of consensual sexual relations even though the DNA report is positive and the age of the Applicant being very young (20 years old) having no criminal history, the case of the Applicant can be considered for grant of bail. This decision incidentally is in favour the Applicant.

23. Next, I would like to draw attention to the decision of the Supreme Court in the case of **Prakash Nishad @ Kewat Zinak Nishad Vs. State of Maharashtra**¹⁹. The Supreme Court held that even though the accuracy of the DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Next, Supreme Court held that it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.

The Supreme Court has therefore relied upon DNA report, in the past where the guilt of an accused was sought to be established. However, notably the reliance was to corroborate. The Supreme Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence. It also held that being an opinion the probative value of such evidence has to vary from case to case. The Supreme Court in this case held that the DNA evidence by way of a report was present, its reliability is not infallible, especially not so in light of the fact that the uncompromised nature of such evidence cannot be established and other that cogent evidence as can be seen is absent almost in its entirety. Paragraph Nos.64 and 65 of the said decision are relevant and reproduced as under:-

64. *Even otherwise, on the value of DNA evidence, we may refer to an observation made by this Court, in Pattu Rajan v. State of T.N., as under:*

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

(Emphasis supplied)

65. *Referring to the above case, a three-Judge bench in Manoj V. State of M.P. , through S. Ravindra Bhat J., observed:*

“158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case.”

(emphasis in original)

24. I would like to draw attention to the Division Bench of Calcutta High Court in the case of ***In the matter of: Muskan Tamang***²⁰. That case where the FIR was lodged 7 and ½ months after the alleged date of occurrence, DNA sample of the Appellant was collected and sent for chemical examination 37 days after the date of its collection and it was examined 1 and ½ months thereafter. The division Bench of the Calcutta High Court referred to the judgment of the Supreme Court in the case of ***Rahul Vs. State of Delhi Ministry of Home Affairs***²¹ wherein the Supreme Court had held, inter alia, as follows:-

“Collection and Preservation of Evidence

If 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. 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 face and then touches area that may contain 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.”

24.1. The Division Bench of the Calcutta High Court held that the delay was unexplained. It further held the Scientific Officer who authored the report and conducted the examination was never produced as witness. As such, not only such DNA report was not properly proved, the Appellant was deprived of the opportunity to cross-examine such Scientific Officer in order to elucidate certain facts which are in favour of the Appellant. In that view of the matter, the Division Bench of the Calcutta High Court granted bail to the Appellant and suspended his sentence by imposing conditions. The facts of the case before the learned Division Bench of the Calcutta High Court are more or less identical to the present case.

25. Attention is also drawn to another decision of the Division Bench of this Court (Aurangabad Bench) in the case of ***Nivrutti S/o. Nagorao Hange Vs. The State of Maharashtra and Anr.***²². In that case the Court analysed the DNA report chart and also commented upon the long delay in respect of the result of the DNA having not been explained.”

20. Applying the citations referred to hereinabove to the present case since we are at the bail stage which is a pre-trial stage, *prima facie* considering the DNA Report, it is seen that date of receipt of sample by

the Forensic Laboratory as stated therein is 08.07.2022. Thus reference for DNA Test Analysis was made on 08.07.2022. Reading of the DNA Report shows that Analysis commenced on 20.12.2022 and it was completed on 27.12.2022. Report was thereafter made on 05.01.2023. The aforesaid delay in conducting the DNA Test Analysis is *prima facie* evident from the dates after the three (3) samples were collected for DNA testing and this delay is *prima facie* unexplained.

21. Be that as it may, since we are at the interim stage of bail considering several citations of Supreme Court and various High Courts in the decision of ***Niraj Uttam Kate*** (*1st supra*), I am of the opinion that reliance placed by prosecution on the DNA Report at this stage if accepted by the Court would be fatal to Applicant's case as it would entail returning a final decision before trial unless the DNA Report is proved in evidence and Applicant is given an opportunity to rebut the said report after it is proved in accordance with law.

22. *Prima facie* it is seen that both parties are very close relatives. There is a stoic silence observed by the Court *prima facie* between the alleged dates of occurrence of the two incidents and until July – 2022 which is a substantial period of almost more than six months. Also there is *prima facie* discrepancy regarding the number of days that prosecutrix actually stayed at the Applicant's house.

23. That apart, in so far DNA Report is concerned, which is the

fulcrum of the argument of prosecution in the present case, it is in the nature of an opinion which when given needs to be proved in evidence in accordance with law which can only be done at the stage of Trial.

24. The reason why I say so is primarily because the result of DNA typing as summarized on the basis of DNA samples of the prosecutrix and Applicant matching with the DNA of femur bone of the fetus when *prima facie* seen for the 15 different genetic systems / alleles which are analysed under the Polymerase Chain Reaction (for short 'PCR') would *prima facie* show that there may some discrepancy with respect to some of the loci when the genotype results are juxtaposed and seen.

25. Hence in that view of the matter, Applicant needs to be given an opportunity to cross-examine the author of the said report after it is proved, in evidence, as also considering the citations of the Supreme Court which are referred to in the decision of *Niraj Uttam Kate* (1st *supra*) long incarceration pending trial and no certainty when the trial would commence and conclude in the near foreseeable future, Applicant can be enlarged on bail.

26. In view of the above *prima facie* observations, Bail Application is allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 15,000/- with

one or two sureties in the like amount;

- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) Applicant shall attend the trial Court on first Saturday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Saturday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vii) Applicant shall not influence with any of the witnesses

or tamper with the evidence in any manner;

(viii) Applicant shall not make any attempts to re-associate with the victim girl in any manner either through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing till the trial is concluded; and

(ix) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

27. It is clarified that the observations made in this order are limited for the purpose of granting Bail only. They shall not be construed as observations on merit. The trial shall be adjudicated on the strength of evidence led by parties and strictly on its own merits being uninfluenced with any of the *prima facie* observations made hereinabove in this order.

28. Ms. Chavan's efforts and assistance to the Court in the present case are duly appreciated by the Court. Fees of the learned Advocate Ms. Chavan, learned Advocate appointed through Legal Aid to represent and espouse the cause of Respondent No.2 shall be released by the Registry of this Court within a period of one week from the date of presentation of a server copy of this order on compliance.

29. Bail Application No.4504 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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by HARSHADA
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