NC: 2023:KHC-K:9388
CRL.A No. 200241 of 2023

IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 21ST DAY OF DECEMBER, 2023

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BEFORE

THE HON'BLE MR. JUSTICE C M JOSHI

CRIMINAL APPEAL NO. 200241 OF 2023

BETWEEN:

SHRISHAIL,

...APPELLANT
(BY SRI KADLOOR SATYANARAYANACHARYA, ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA,
THROUGH HALLIKHED POLICE STATION,
DIST: BIDAR-585414.

2 .

...RESPONDENTS
(BY SMT. ANITA H REDDY, HCGP FOR R1)

THIS CRL.A. IS FILED U/S. 374(2) OF CR.P.C PRAYING TO, SET ASIDE THE JUDGMENT OF CONVICTION DATED 13.06.2023 AND ORDER OF SENTENCE DATED: 14.06.2023, PASSED BY II ADDL.DIST.& SESSIONS JUDGE BIDAR, SITTING

AT BASAVAKALYANA IN SPL.CASE NO.534/2019 AND CONSEQUENTLY ACQUIT THE ACCUSED/APPELLANT OF ALL THE CHARGES, IN THE INTEREST OF JUSTICE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The accused in Spl.Case.No.534/2019 before the II Additional District and Sessions Judge, Bidar, Sitting at Basavakalyan, has filed this appeal under Section 374(2) of Cr.P.C., being aggrieved by the judgment of conviction dated 13.06.2023 and order of sentence dated 14.6.2023, for the offence punishable under Sections 450, 376(3) of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act, 2012').

2. The brief facts of the case are as below:

Case of the prosecution is that PW5 lodged a complaint as per Ex.P18 stating that the accused knowing well that victim-PW4 is a minor, followed her and had developed love affair with her and since 6 months prior to the incident, accused was seducing her and had developed

physical relation on 2-3 occasions under the false promise of marrying her. It was alleged that on 22.08.2019, the PWs.5 and 6, who are the parents of the victim had gone to a marriage and the younger brother of the victim and the grandfather of the victim were in the house. It was alleged that during night, the accused had trespassed into the house of the victim girl taking advantage of the absence of PWs.5 and 6 and slept with her and had sexual intercourse with her on 2-3 times till next day morning. It was alleged that on 23.08.2019, the CW.7-Subhan and CW.8-Gopinath saw the accused coming out of the house of the victim and informed it to the PWs.5 and 6, who on their arrival came to know about the offence committed by the accused on the victim and then, they went to the Police Station and lodged the complaint. The complaint was registered in Cr.No.66/2019 of Hallikhed Police Station and investigation was launched.

3. During investigation, the CW.30 took up the investigation and he subjected the victim girl to the

medical examination and did other formalities. On 26.08.2019, the further investigation was taken up by PW.7, who was working as a CPI at Basavakalayan. He arrested the accused on 27.08.2019, recorded his voluntary statement as per Ex.P37, seized the mattress from the house of the victim (M.O.14), obtained the medical certificate and arranged for recording of the statement of victim under Section 164 of Cr.P.C. and also secured the photographs of the mahazar etc., from the PW.9 and sent the biological samples collected by the Medical Officer to the FSL. He also got prepared the spot sketch and recorded the statements of the witnesses and pending the receipt of the FSL report, a chargesheet was filed against the accused. Subsequently, on 22.10.2019, the District Court had ordered Medical Termination of Pregnancy (MTP for short) and accordingly, the victim and accused were produced before the Magistrate and the blood samples were obtained as required under law under memo as per Ex.P22. On 29.10.2019, the medical termination of the pregnancy was done at Bidar Institute

of Medical Sciences Teaching Hospital, Bidar and the sample of foetus was collected and they were seized under the mahazar as per Ex.P23. Thereafter, he sent the samples for the DNA examination to the FSL. After obtaining the FSL report and also after obtaining the final report from the Medical Officers, the additional Chargesheet was submitted to the Special Court.

4. The Special Court took cognizance of the offences, the copy of the chargesheet papers was furnished to the accused and after hearing, the charge for the offences punishable under Sections 376(3), 450 of IPC and Section 6 of POCSO Act, 2012 were framed and the accused having pleaded not guilty, the case entered into trial. In order to prove the guilt of the accused, the prosecution has examined 13 witnesses as PWs.1 to 13 and Exs.1 to 38 and M.Os.1 to 14 were marked. No documents were marked on behalf of the accused. The statement of the accused under Section 313 of Cr.P.C. was

recorded by the learned Special Judge and after hearing the arguments, the following points were raised by him:

> *"1. Whether the prosecution proves beyond all reasonable doubts that, on 22.08.2019 at about 9.30 p.m the accused trespassed into the house of victim girl with an intention to commit the sexual assault on victim girl during night hours and thereby committed the offense punishable under section 450 of IPC?*
>
> *2. Whether the prosecution proves beyond all reasonable doubts that, on 22.08.2019 at about 9.30 p.m entered into the house of victim girl, committed forcible sexual intercourse on victim girl by stating that, he is loving her and seducing her to marry, knowingly that, victim is minor committed said offences and due to the sexual intercourse the victim girl became pregnant, thereby committed offence punishable U/Sec 376(3) of IPC and section 6 of POCSO Act?*
>
> *3. What order?*

5. The learned Special Judge answered the points in the affirmative, proceeded to convict the accused and sentenced him to undergo Simple Imprisonment for two years and to pay a fine of Rs.500/- for the offence under Section 450 of IPC and Rigorous Imprisonment for 20 years and to pay a fine of Rs.25,000/- for the offence

punishable under Section 376(3) of IPC and also Rigorous Imprisonment for 20 years and to pay a fine of Rs.25,000/- for the offence punishable under Section 6 of the POCSO Act, 2012 with adequate default sentences. He also recommended payment of the compensation of Rs.1,00,000/- to the victim as per Section 33 of the POCSO Act, 2012.

6. Being aggrieved by the said judgment, the accused is before this Court in appeal. It is contended by the accused that as on date of the incident, the accused was a minor and therefore, the trial Court had no jurisdiction to take up the trial as against the accused. It is contended that the appellant was born on 20.06.2003 and had schooling up to VII Standard in Sanstan Higher Primary School, situated at Kanji Village and this vital aspect had not been brought to the knowledge of the trial Court. It was contended that there is necessity to hold an enquiry regarding the age of the appellant by referring the matter to the Juvenile Justice Board for enquiry under

Section 9(4) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'JJ Act'). In this regard, the reliance was placed on the judgment in the case of ***P.YUVAPRAKASH VS STATE REP. BY INSPECTOR OF POLICE***[1]. It is also contended that the trial Court failed to appreciate the evidence in the proper perspective and it erred in relying on the DNA report, in the absence of any substantive evidence, especially from the Victim girl and her parents. It is contended that as per medical report, the pregnancy was detected and revealed that the pregnancy was 11 weeks 2 days old and therefore, the incident goes back to the month of July. It is also contended that adequate opportunity was not granted to the defence counsel to cross-examine the prosecution witnesses and the trial Court committed a grave error in accepting the DNA report as a gospel truth. Therefore, it is contended that the impugned judgment is erroneous and liable to be set aside.

[1] 2023 SCC OnLine SC 846

7. The State has appeared through the learned High Court Government Pleader and the notice issued to the victim was served upon her but she did not appear. The trial Court records have been secured.

8. It is necessary to note that during the pendency of this appeal, this Court by relying on the judgment of the Hon'ble Apex Court in the case of ***NARAYAN CHETANRAM CHAUDHARY VS. STATE OF MAHARASHTRA***[2] (in Crl.Misc.P.No.157334/2018, Review Petition No.1139/2000 and Crl.A.No.256/2000), the Principal District and Sessions Judge Bidar was directed to send a report by deciding the juvenility of the accused/appellant after affording opportunity to the prosecution as well as the defense. Accordingly, the learned Principal District and Sessions Judge, Bidar held an enquiry and has sent his report stating that the date of birth of appellant/accused was 20.06.2003 as per the school records and the deposition of the Assistant Teacher

[2] 2023 SCC OnLine SC 340

and Assistant Head Master of Kudalasangama Higher Primary School, Kanji. In other words, it was reported that as on date of the offence i.e., 22.08.2019, the accused was aged 16 years 2 months 2 days.

9. On the basis of the said report, this Court found that the accused being minor as on date of the alleged offence, he is entitled for bail and therefore, by invoking Section 389 of Cr.P.C., the accused was directed to be released on bail, subject to certain conditions. On admitting the appeal, the records have been secured from the trial Court and the arguments by the learned counsel appearing for the accused and the learned HCGP were heard.

10. Sri.Kadloor Satyanarayanacharya, learned counsel appearing for the accused submitted that the report by the Principal District and Sessions Judge, Bidar shows that the date of birth of the accused was 20.06.2003 and therefore, he was a minor as on date of

the alleged incident and as such, the accused could not have been tried by a Regular Court. It is submitted that the Investigating Officer had not made any efforts to ascertain the age of the accused and without making any such enquiry, a chargesheet was laid against the accused. It is submitted that the accused has undergone maximum sentence that could be imposed by the Juvenile Justice Board and therefore, there is no necessity of sending back the matter for the trial to the Juvenile Justice Board. It is submitted that it would not only harm the interest of the accused as a child but also it would agonize the victim and her parents by making them to again appear before the Juvenile Justice Board. It is submitted that though the juvenile could not have been sent to jail, due to lack of ascertainment of the age of the accused, he had suffered incarceration in jail for nearly four years. He fairly submitted that no defense was taken before the trial Court regarding the juvenility.

11. Regarding merits, he submitted that none of the prosecution witnesses including the victim have supported the prosecution case and the trial Court has solely relied on the scientific evidence i.e., DNA report. It is submitted that though on the shorts of victim blood stains were found, the blood group was not tested. It is submitted that none of the biological samples of the victim showed any presence of spermatozoa and therefore, the alleged sexual intercourse between the accused and the victim was not proved. He further submitted that the victim was tested on 11.10.2019 by way of scanning and it was found that she was pregnant by 11 weeks 02 days i.e., 79 days. If this is considered, then the date of the alleged offence would date back to somewhere in the month of July-2019. Therefore, it no way coincides with the alleged incident dated 22.08.2019. It is also submitted that the chain of custody of the biological sample of the victim and the chain of custody of the foetus has not been established. He submits that the Doctor who had performed the medical termination of the pregnancy was

not examined and the fact of collection of the samples of the placenta and the foetus has not been proved. It is only the Investigating Officer who had seized the alleged samples of the placenta/foetus under a mahazar but neither of these mahazar witnesses nor the Medical Officer who performed the MTP and collected the samples were examined by the prosecution. Therefore, the reliance placed on the DNA report by the trial Court is not sustainable under law. It is further submitted that the substantial evidence would be that of the victim and when the victim has not supported the case of the prosecution, the conclusions reached by the trial Court is totally erroneous. In this regard, he relied on the judgment in the case of ***P.YUVAPRAKASH*** (Supra), wherein, the provisions of Section 34 of the POCSO Act, 2012 was discussed in length and it was held that the Courts have to take recourse to the steps indicated in Section 94 of the JJ Act in order to ascertain the age. He also relied on the judgment in the case of ***PRAKASH NISHAN @ KEWAT***

ZINAK NISHAD VS. STATE OF MAHARASHTRA[3] rendered by the Apex Court in Crl.A.Nos.1636-1637/2023 dated 19.05.2023 to contend that the DNA evidence by way of a report though was present, its reliability is not infallible.

12. *Per contra*, the learned HCGP for State has submitted that the age of the accused could have been established before the trial Court by the accused. It is submitted that the trial Court has considered the evidence available on record and no fault can be found in respect of the total reliance being placed on the DNA report. She submitted that the reliance on the DNA report cannot be found fault with in view of the fact that it was not objected to. It is submitted that the evidence on record sufficiently proves the guilt of the accused.

13. In the light of the above submissions by both the sides, the points that arise for consideration of this Court are:

[3] 2023 SCC OnLine SC 666

i) *Whether the accused was a minor as on the date of commission of the offence?*

ii) *Whether the prosecution had proved the guilt of the accused for the offences under Section 376(3) of IPC, 450 of IPC and Section 6 of the POCSO Act, 2012 beyond reasonable doubt?*

iii) *Whether the impugned judgment of the trial Court is sustainable under law?*

Re. Point No.1:

14. The first aspect to be considered is regarding the juvenility of the accused. A careful perusal of the records would show that the defense of juvenility of the accused was never raised before the trial Court during trial. However, a perusal of the order sheet of the trial Court shows that such a contention was raised once on 28.10.2019. The Investigation Officer was directed to submit that age proof of the accused. It was based on an application filed by the mother of the accused before the trial Court. Thereafter, it appears that IO had filed a report. On 05.11.2019, the learned counsel for the accused filed a memo not pressing the petition to transfer

the case to the Juvenile Justice Board. Therefore, in view of the memo filed, the request of the mother of the accused to transfer the petition to the Juvenile Justice Board was rejected. It is pertinent to note that the records reveal that certain documents styled as the school records were produced by the Investigating Officer and also that a person claiming to be the Head Master of the School had reported that the records in that school i.e., Government Higher Primary School, Joladapka were not reliable. Therefore, an attempt was made to establish the juvenility of the accused but it was not pursued either by the Investigating Officer or by the accused. It was necessary that the Court should have enquired into to the said matter to ascertain the age of the accused.

15. Be that as it may, on being asked by this Court to submit a report, the Principal District and Sessions Judge, Bidar has submitted his report. The said report discloses that he had summoned one Sri.Rajappa S/o Madhav Rao, who was Assistant Teacher of

Kudalasangama Higher Primary School, Kanji Taluk Bhalki directing him to produce the school records. Accordingly, the said witness-Rajappa produced the application form for admission submitted by one of the parent of the accused dated 08.06.2008. In the said application form for admission, the date of birth of the accused Shrishail S/o Ambanna and Sharadabai was shown to be 20.06.2003. The witness also produced the school register and at Sl.No.20, the name of the accused is shown and the date of birth is recorded as 20.06.2003. It also shows that he passed VII Standard and he was issued the school leaving certificate for further studies on 04.06.2015. This has been considered by the learned Principal District and Sessions Judge and he submitted a report that the date of the accused Shrishail is 20.06.2003 as reflected in the admission extracts and he was a minor as on the date of the incident.

16. The Apex Court in the case of ***RAJU V. STATE OF HARYANA***[4], observed as below:

> *"25. We are also conscious of the limitation envisaged under Section 7-A of the 2000 Act that the evidence adduced with respect to the age of the accused cannot be in the form of mere affidavits. Due to this reason, the reliance of the learned Registrar upon affidavits to conclude that the name used in the certificates placed on record (i.e. Raj Kumar) is the full name of the appellant and the name Raju is merely an alias is not tenable in our view. However, we find that there is sufficient evidence on record in the form of the appearance of the name of the father of the appellant on the certificate dated 24-3-2012 issued by the Dayanand Arya Middle School, Sohna, to indicate that the name Raj Kumar appearing on such certificate was the full name of the appellant.*
>
> *xxx*
>
> *27 The criminal appeal hereby stands allowed and the order of the High Court affirming the conviction and sentence of the appellant under Section 376(2)(g) IPC is set aside. Seeing that the appellant has already spent 6 years in imprisonment, whereas the maximum period for which a juvenile may be sent to a special home is only 3 years as per Section 15(1)(g) of the 2000 Act, and since the appellant has already been enlarged on bail by virtue of the order of the Court dated 9-5-2014, he need not be taken into custody. His bail bonds stand*

[4] (2019) 14 SCC 401

discharged and all proceedings against him, so far as they relate to the present case, stand terminated."

17. The Apex Court in the case of ***RISHIPAL SINGH SOLANKI V. STATE OF U.P.***[5], has laid down the procedure to ascertain the age of the accused whenever the defence of juvenility is taken as below:

"33. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

33.1. A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

33.2. An application claiming juvenility could be made either before the court or the JJ Board.

33.2.1. When the issue of juvenility arises before a court, it would be under sub-sections (2) and (3) of Section 9 of the JJ Act, 2015 but when a person is brought before a committee or JJ Board, Section 94 of the JJ Act, 2015 applies.

33.2.2. If an application is filed before the court claiming juvenility, the provision of sub-section (2) of

[5] (2022) 8 SCC 602

Section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of Section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

33.2.3. When an application claiming juvenility is made under Section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a court, then the procedure contemplated under Section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the criminal court concerned, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide Section 9 of the JJ Act, 2015).

33.3. That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the court to discharge the initial burden. However, the documents mentioned in Rules 12(3)(a)(i), (ii) and (iii) of the JJ Rules, 2007 made under the JJ Act, 2000 or

sub-section (2) of Section 94 of the JJ Act, 2015, shall be sufficient for prima facie satisfaction of the court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

33.4. The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

33.5. That the procedure of an inquiry by a court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the criminal court concerned. In case of an inquiry, the court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of Section 94 of the 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7. This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.

33.11. Ossification test cannot be the sole criterion for age determination and a mechanical view regarding

the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015".

18. In the case on hand, the learned Principal District and Sessions Judge has summoned the relevant documents from the school, examined the Headmaster and then recorded his finding. Therefore, it is evident that the date of birth of accused/appellant is 20.06.2003 and the incident having occurred on 22.08.2019, he was aged 16 years 2 months 2 days. Hence, there cannot be any doubt that the accused was a juvenile as on date of the commission of the offence. Accordingly, point No.1 is answered in the affirmative.

Re. Point No.2:

19. The case of the prosecution as it unfolds from chargesheet papers is that the accused and the victim were acquainted from sometime and the accused used to follow her and seduce her. When the parents of the victim

i.e., PWs.5 & 6 were out of their house for a marriage, the accused had entered into the house of the victim and stayed during the night, committed the offence and on next morning i.e., 23.08.2019, he was found by the PWs.10 and 11, who in turn had reported the same to PWs.5 and 6. They returned and then enquired the victim and on coming to know about the offence committed by the accused, lodged a complaint to the Hallikhed Police Station. During investigation, the accused was arrested and on the basis of his voluntary statement, as per Ex.P37, he lead the Police to the house of the PW.4 and produced the mattress at MO14, which was seized in the presence of PW8 and 12 under the mahazar as per Ex.P27.

20. It is also the case of the prosecution that on 11.10.2019, the pregnancy of the victim-PW.4 was detected and it was reported to PW.3-Vinodh Kumar of the District Child Protection Unit, who took steps for the MTP. As per the order of the District and Sessions Court, MTP was performed and the foetus as well as the placenta were

seized and were sent for DNA examination. Blood samples of the accused and the victim were also collected in the presence of the Magistrate and they were also sent for DNA profiling. It is the case of prosecution that DNA report showed that the accused was the biological father of the foetus and therefore, there is sufficient material to establish that the accused had committed the offence. It is also the case of the prosecution that the PW.4-Victim had given a statement under Section 164 of Cr.P.C. before the Magistrate under Section 161 of Cr.P.C. as well as before the Investigating Officer. The statement of PW.5 was videographed by PW.9 and it is produced at Ex.P25 along with a certificate under Section 65B of the Evidence Act.

21. It is relevant to note that the PW.4-Victim and her parents-PWs.5 and 6 and the panchas-PWs.8 and 12 have not supported the case of the prosecution, so also, the PWs.10 and 11, who allegedly saw the accused in the house of the victim on the morning of 23.08.2019, have also turned hostile to the prosecution. The prosecution

relies on the statements of the victim under Section 164 of Cr.P.C. and the video statement of PW.5. The statement of the victim shows that it was the victim, who had called the accused to her house and they had a consensual sex. She states that though the accused wanted to leave the house at 6.00 am, it was delayed since there were many people in the nearby, he left at 8.00 am but he was spotted by PWs.7 and 8.

22. It is settled principle of law that the statement made under Sections 161 or 164 of Cr.P.C. cannot be treated as substantial evidence. The statement made by witnesses before the trial Court is of pivotal importance as it is subjected to cross-examination as well as recorded in the presence of the accused. Therefore, those statements are not of any relevance. When the PWs.4, 5, 6, 8, 10, 11 and 12 have turned hostile to the prosecution, it is only the scientific evidence which could be of importance to prove the guilt of the accused. The trial Court has heavily

relied upon the scientific evidence and placed reliance on the judgment in the case of ***SHARADA VS DHARMAPAL***[6].

23. It is relevant to note that the expert who conducted the scientific tests was not examined before the trial Court. The DNA report produced at Ex.P24 was issued by Dr.Prashanth R.G. of FSL, Bengaluru. The said report was marked through the Investigating Officer. It is also relevant to note that the said report mention about subjecting the samples said to contain foetus collected from the victim-PW.4 by the Medical Officer. Therefore, the source of the sample collected from the PW.4-Victim at the time of MTP has to be established by the prosecution. Obviously, the Senior Scientific Officer who gave the report as per Ex.P24, has not been examined by the prosecution. So also, the Medical Officer who collected the sample of the foetus from PW.4 was not examined before the Trial Court. It is only the evidence of the Investigating Officer which would show that the foetus was collected by

[6] (2003) 4 SCC 493

the Medical Officer and it was received by him from one Dr.Prathibha Patil after the MTP in the presence of Ashish and Prakash, who were shown as CWs.36 and 37 in the additional chargesheet. Neither the Medical Officer who collected the foetus after MTP nor the panchas in whose presence the sample was seized by the Investigating Officer are examined before the Trial Court. The PW.4-Victim has denied that the foetus was collected by the Medical Officer.

24. The chain of custody of any sample which is subject matter of scientific evidence plays a vital role in accepting the scientific evidence. In a recent judgment in the case of ***PRAKASH NISHAN @ KEWAT ZINAK NISHAD*** (Supra)***,*** the Apex Court holds as below:

> *"63. The document also lays emphasis on the 'chain of custody' being maintained. Chain of custody implies that right from the time of taking of the sample, to the time its role in the investigation and processes subsequent, is complete, each person handling said piece of evidence must duly be acknowledged in the documentation, so as to ensure that the integrity is uncompromised. It is recommended that a document be duly maintained cataloguing the custody. A chain of custody document in other words is a document, "which should include*

> *name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim's or suspect's name and the brief description of the item."*
>
> **64.** *Indisputably*, these "without any delay" and "chain of custody" aspects which are indispensable to the vitality of such evidence, were not complied with. In such a situation, this court cannot hold the DNA Report Ext.85 to be so dependable as to send someone to the gallows on this basis. We have carefully perused FSL as well as DNA report forming part of the record."
> (emphasis supplied by me)

25. When the source of the sample was not established before the Court and when the PWs.4, 5 and 6 denied that any such sample was collected, no importance can be attributed to the scientific report. It is one thing to say that the scientific evidence is accurate and reliable. It cannot be overlooked that the sample which was supplied for the scientific analysis should also be established with acceptable and reliable evidence. As noted supra, in the case on hand, there is absolutely no material that was placed before the trial Court proving the sample/foetus collected from the victim at the time of MTP was used for the DNA analysis/profiling. Therefore, the sole reliance placed by the trial Court on the scientific evidence is

clearly flawed. The trial Court simply believed the Ex.P24-DNA report to be true without looking to the source of the sample used for such test. In order to establish the paternity and maternity of the foetus, the biological samples of the accused and the PW.4 were also essential. Reliability of the collection of the sample of accused and PW.4 alone would not be of any help to the prosecution. Hence, the DNA report at Ex.P24 could not be relied. In that view of the matter, the scientific evidence was not sacrosanct to place reliance regarding the offence committed by the accused when the chain of custody was lacking.

26. The other circumstances, which are available on record show that on 23.08.2019, when the PW.4 was subjected to medical examination, there were no signs of pregnancy. However, when she was examined on 11.10.2019, it was found that she was pregnant by 11 weeks 02 days. It would date back to July-2019. Though it is a circumstance which is not of much importance as the

victim could have come to know about the pregnancy only after three or four weeks, such circumstances cannot be brushed aside.

27. As noted supra, the ocular evidence and the scientific evidence are contradictory to each other. The victim, her parents, neighbours who saw the accused and victim together; and the witnesses who were present at the time of recovery at the instance of the accused have not supported the case of the prosecution. It is settled principle of law that the scientific evidence can only be used as corroborative material for the ocular evidence adduced before the Court. The scientific evidence is susceptible for manipulations, such as, incorrect sample/data being fed for analysis. Therefore, relying on the scientific evidence alone for the purpose of proving the guilt of the accused would be disastrous. It is also to be noted that the conflict between the oral testimony and the scientific material itself would be an indication that two

views are possible. The one which is favourable to the accused has to be accepted.

28. For aforesaid reasons, the Point No.2 has to be answered in the Negative.

Re. Point No.3:

29. The trial Court in the impugned judgment has not bestowed its attention on the requirement of the sanctity of the sample collected by the Medical Officer. None of the witnesses shown in the additional chargesheet were examined. The collection of the foetus was obviously subsequent to 11.10.2019. The order of the District Court permitting the MTP and direction to the Medical Officer to collect the foetus for test and analysis was also not examined. The sample was susceptible for contamination and manipulation. Therefore, it is evident that the trial Court believed the Ex.P24 as a gospel truth without ascertaining the sanctity of the sample which was used for DNA analysis. When stringent punishment is prescribed, the standard of evidence should also be higher.

30. The trial Court also did not notice or felt that an enquiry should be held about the age of the accused. Whenever, an accused is produced for the first time before the Magistrate/Special Court, there would be an oral enquiry about the ill-treatment by Police, intimation to the family members of the accused, reason for arrest, place of arrest, age and ailments, if any. The Apex Court in the case of ***D.K. BASU V. STATE OF W.B.***[7], lays down the guidelines to be followed at the time of the arrest. If such an enquiry was done by the learned Special Court, definitely, it could have noticed the age also. Even otherwise, if there is any doubt regarding the age of the accused, the IO could have been directed to ascertain the age of the accused. Unfortunately, an application was filed by the mother of the accused and the IO submitted a report and later, the application was not pressed by the mother of the accused. The trial Court did not felt it necessary to probe this aspect. Evidently, the trial continued against a minor.

[7] (1997) 1 SCC 416

31. Learned counsel appearing for the appellant/accused submit that in the enthusiasm to provide justice to the minor victim, the justice to the minor accused should not be put to jeopardy. The provisions of the POCSO Act are gender neutral. Therefore, incarceration of the minor accused since the date of his arrest on 27.08.2019 till the date on which this Court granted bail under Section 389 of Cr.P.C. (On 14.12.2023) was unwarranted and cannot be compensated. The impressions on the mind of the minor would be disastrous not only for the minor but also for the society. In this background, he made a fervent submission to sensitize the trial Court judges about the need to exercise the power of inquiring the accused about his age etc.

32. There is no doubt that a Magistrate or Special Court has to make certain preliminary enquiry with the accused when produced for the first time in a criminal case during the crime stage. These enquiries are not mere

formalities but they have a vital importance in ascertaining an accused to be a juvenile, mentally fit and the requirements of law are fulfilled. A child, whether an offender or not, is a child and has to be treated as a child. Therefore, the following measures are desirable:

a) The Learned Magistrate/presiding officer of the Special Court must satisfy that the accused is not a minor.

b) Whenever accused of the age of 18 to 22 years are produced, the IO or the accused may be directed to produce the documentary proof of his age.

c) At the time of first production of accused, an oral enquiry about the age, apart from ill-treatment by Police, intimation to the family members of the accused, reason for arrest, place of arrest, and ailments if any be made and recorded in the order of remand.

d) An early ascertainment of the juvenility of the accused would be of great importance in reforming the child.

Conclusions:

33. In view of the aforesaid discussion, the accused being minor could not have been tried by the Special Court. Also, there is lack of evidence to prove the guilt of the accused. Moreover, the accused has been in judicial custody since the date of his arrest, i.e., 27-8-2019 till this Court granted bail on 14-12-2023, which is more than 3 years 3 months. The maximum detention in special homes permissible under JJ Act is 3 years. Hence, appeal deserves to be allowed. Hence, the following:

ORDER

i) The appeal is allowed and the impugned judgment of conviction and order of sentence passed by the II Additional District and Sessions Judge, Bidar, Sitting at

Basavakalyan in Spl.Case.No.534/2019 is set aside;

ii) The accused is acquitted of the offences punishable under Sections 450, 376(3) of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012.

iii) Registry is directed to place this judgment before the Hon'ble Chief Justice with a request to circulate to all the Judicial Officers in the State.

Sd/-
JUDGE

NR/-
List No.: 1 Sl No.: 1