

IN THE HIGH COURT OF KARNATAKA, AT DHARWAD

DATED THIS THE 10TH DAY OF FEBRUARY, 2026

BEFORE

R

THE HON'BLE MR JUSTICE MOHAMMAD NAWAZ

AND

THE HON'BLE MRS JUSTICE GEETHA K.B.

CRIMINAL APPEAL NO.100029 OF 2021 (C)

BETWEEN

ADAVAYYA
S/O. SHANKARAYYA PUJER,
AGE: 32 YEARS,
OCC: PIGMI AGENT,
R/O. KADARAVALLI VILLAGE,
TQ: KITTUR,
DIST: BELAGAVI-591115.

...APPELLANT

(BY SRI. K.L. PATIL, ADVOCATE)

AND

1. THE STATE OF KARNATAKA,
THROUGH KITTUR POLICE STATION,
DIST: BELAGAVI-591115,
NOW REP. BY S.P.P.,
HIGH COURT OF KARNATAKA,
DHARWAD BENCH-580001.

2. MAHADEVI
W/O. IRAPPA DIBBAD,
AGE: 40 YEARS,
OCC: HOUSEHOLD WORK,

R/O. KADARVALLI,
DHARENNAVAR ONI,
TQ: KITTUR,
DIST: BELAGAVI-591115.

IMPLEADED VIDE ORDER DATED 28/07/2025

...RESPONDENTS

(BY SRI. M.B. GUNDAWADE, ADDITIONAL SPP FOR R1;
SMT. SURABHI R. KULKARNI, AMICUS CURIAE FOR R2)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374 (2) OF CR.P.C. PRAYING TO CALL FOR RECORDS IN S.C.NO.377/2018 ON THE FILE OF THE SPL. COURT FOR POCSO AND SC/ST (POA) AND III ADDITIONAL DISTRICT AND SESSIONS JUDGE, BELAGAVI; ALLOW THIS APPEAL AND SET-ASIDE THE JUDGMENT AND ORDER OF CONVICTION DATED 05/02/2021 AND ORDER OF SENTENCE DATED 06/02/2021 IN SESSIONS CASE NO.377/2018 ON THE FILE OF THE III ADDITIONAL DISTRICT AND SESSIONS JUDGE, BELAGAVI AND THEREBY ACQUIT THE APPELLANT/ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTION 376(2)(H), (I), (N) OF IPC AND SECTION 4, 5(J), (II), (L), 6 OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 IN THE INTEREST OF JUSTICE AND EQUITY AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 14.01.2026 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, DELIVERED THE FOLLOWING:

CAV JUDGMENT

(PER: THE HON'BLE MRS JUSTICE GEETHA K.B.)

In this appeal, Judgment and Order dated 05.02.2021 and 06.02.2021 respectively passed by the learned III Additional District and Sessions Judge, Belagavi in S.C.No.377/2018, convicting and sentencing the appellant for offences punishable under Sections 376(2)(h)(i)(n) of the Indian Penal Code, 1860 (for short, hereinafter referred to as 'IPC') and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 [for short, hereinafter referred to as 'POCSO Act'] is under challenge.

2. Parties would be referred with their ranks, as they were before the Trial Court for sake of convenience and clarity.

3. The case of prosecution in nutshell is that accused was usually going to the house of victim girl often whenever her parents were not in the house and even though she was minor, he developed intimacy with her. He

used to say that, he would marry her and only with the intention to have sexual intercourse with her on 25.10.2017, accused had been to the house of victim and told her that, he would marry her and had forcible sexual intercourse with her and caused penetrative sexual assault on her in the hall of her house situated at Dharennavar Street, Kadaravalli Village. He did the said act continuously not only on 25.10.2017, but also subsequently and because of that, she became pregnant and gave birth to a male child on 01.09.2018 and thereby accused has committed the Offences punishable under Sections 376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the POCSO Act.

4. The criminal law was set into motion, when the victim lodged the complaint on 29.08.2018 and afterwards, she gave birth to a male child on 01.09.2018.

5. After completion of investigation, the Investigation Officer filed charge-sheet against accused alleging the offences punishable under Sections

376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the POCSO Act.

6. After taking cognizance, the learned Sessions Judge framed the charge against accused/appellant for the offences punishable under Sections 376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the POCSO Act.

7. On behalf of prosecution, 14 witnesses were examined as PWs.1 to 14, got marked Exs.P1 to P.82 and got marked MO.1 and closed its side before the Special Court. Afterwards, statement of accused under Section 313 Cr.P.C. was recorded wherein, the accused has denied all the incriminating substances alleged against him and he has not let any defence evidence.

8. After recording the statement under Section 313 Cr.P.C. and hearing arguments of both sides, the Trial Court by passing the judgment of conviction dated 05.02.2021 and order of sentence dated 06.02.2021 has convicted the accused for the offences punishable under Sections 376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read

with Section 6 of the POCSO Act and sentenced him to undergo imprisonment for life and to pay fine of ₹10,000/- in lieu of payment of fine amount to undergo default sentence.

9. Aggrieved by the said judgment of conviction and order of sentence, appellant/accused has preferred the present appeal.

10. Learned counsel for appellant Sri. K.L. Patil would submit that there is an inordinate delay in lodging the complaint. Even though, the alleged incident had taken place on 25.10.2017, the complaint was lodged on 29.08.2018 i.e., after lapse of about 8 months. The victim was not minor as on the date of alleged incident because no admissible document is produced to prove that she was a minor as on the date of alleged incident. In the cross-examination, the victim has deposed that she studied up to S.S.L.C. and she is having Birth Certificate and she can produce the same. However, no such birth certificate or her S.S.L.C. marks card are produced to prove that she was minor as on the date of alleged incident. Only the certificate

issued by the school headmaster based on admission register is produced as per Ex.P.19. Even though, said document was marked with consent, it is the burden of prosecution to establish that the victim was minor at that point of time. The age of complainant is not established, as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (For short, hereinafter referred to as 'the J.J. Act'). Furthermore, the D.N.A. test of victim, her child and accused was conducted, wherein it was held that, accused is not the biological father of the child. The marriage of victim was already engaged with another person and he was having access to enter the house of victim. Further, there was enmity between the family of complainant and accused. Under these circumstances, the learned Sessions Judge ought to have acquitted the accused by giving benefit of doubt to accused, because the case of prosecution is not established beyond reasonable doubt.

11. In support of his contention, the learned counsel for the appellant would rely upon the following citations:

- i) ***Nirmal Premkumar and another vs. State, represented by Inspector of Police¹.***
- ii) ***Shekhar and Another vs. State, represented by the Inspector of Police².***
- iii) ***P. Yuvaprakash vs. State, represented by the Inspector of Police³.***

12. Learned counsel for respondent-Additional S.P.P./State would submit that there is ample material to prove the guilt against accused. Evidence of prosecutrix-victim cannot be brushed aside. Nothing was elicited in her cross-examination to disbelieve her version. Only because the D.N.A. report is negative, it cannot be held that accused has not committed the offences alleged against him. In this regard, he relied upon the judgment of learned Bombay High Court in the case of ***Dashrath vs. State of Maharashtra and Another⁴*** and also relied upon the

¹ Criminal Appeal No.1098/2024

² (2011) 7 SCC 715

³ Criminal Appeal No.1898/2023

⁴ 2021 SCC OnLine Bom 2921

judgment of ***Sunil vs. State of Madhya Pradesh***⁵. Thus, contended that the conviction passed by the learned Special Judge is in accordance with law and it is based on proper appreciation of evidence and hence, prayed for dismissal of appeal.

13. Smt.Surabhi Kulkarni advocate appointed as *amicus curiae* for victim, assisted the Court properly and she relied on ***Sunil*** and ***Dashrath*** (supra) judgments, and would submit that the Birth Certificate of victim was not at all disputed by the appellant before Trial Court and only for the first time in the appeal at the time of arguments, the accused is disputing the Birth Certificate. According to said document, the victim was minor and if it was disputed before the Trial Court, there would be an occasion for the prosecution to examine the Headmaster who has issued that document and would have produced the register, based on which, said document was issued. In view of giving consent to mark said document, it was not done. Now, in the appeal, appellant is estopped from denying the date of

⁵ (2017) 4 SCC 393

birth of the victim. She would further submit that Ex.P.19 is issued by a competent school authority and thus, admissible in evidence.

14. She would further submit that formal proof of Ex.P.19 is not required, as per Section 294 of Cr.P.C. and in this regard, she relied on the judgment of Hon'ble Apex Court in the case of ***Shyam Narayan Ram vs. State of U.P. and Another***⁶.

15. She would further submit that even though the D.N.A. report is not helpful, the evidence of victim-prosecutrix is to be accepted. Considering these aspects, the learned Special Judge has properly convicted the accused and sentenced to undergo imprisonment. Hence, prayed for dismissal of appeal. The learned *amicus curiae* would further submit that the victim is entitled for compensation under Victim Compensation Scheme.

16. Having heard the arguments of both sides and verifying the appeal papers and Trial Court records, the points that arise for consideration are:

⁶ 2024 SCC OnLine SC 2988

- i) Whether the prosecution has proved beyond reasonable doubt that the victim was minor as on the date of alleged incident?
- ii) Whether the delay in filing the complaint is fatal to the case of prosecution?
- iii) Whether the judgment of conviction and order of sentence passed by the Trial Court and reasons assigned for it, are justifiable?
- iv) What order?

17. Finding on Point Nos.1 and 2 is in **Affirmative** and Point No.3 is in **Negative** for the following reasons:

18. It is the case of prosecution that, victim was aged about 15 years at the time of alleged incident dated 25.10.2017, and her date of birth is 20.06.2002.

19. Ex.P.19 is the certificate issued by the Headmaster of Higher Primary School, Kadaravalli Taluk, Kittur wherein it is stated that the victim was admitted to the said school as per the admission register No.4225/16 and her admission date was 09.06.2008. Her date of birth mentioned in that document is 20.06.2002 at Nesaragi and

she studied in said school up to 7th standard and left the school on 03.06.2015.

20. This document was marked with consent. That means the author of the document need not be examined. In POCSO cases, the date of birth of the victim is to be established as per Section 94 of the J.J. Act.

21. As per Section 94 of the J.J. Act, the presumption and determination of age is relevant. It reads as follows;

"14. In view of Section 34(1) of the Pocso Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

"94. Presumption and determination of age.—(1) *Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding

whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the examination Board concerned, if available; and in the absence thereof;*
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:*

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

The three documents in order of which the Juvenile Justice Act requires consideration is that the court concerned has to determine the age by considering the following documents:

(i) The date of birth certificate from the school, or the matriculation or equivalent certificate from the examination Board concerned, if available; and in the absence thereof;

(ii) The birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

16. The Co-Ordinate Bench of this Court in the case of ***Haji Kareem vs. The State of Karnataka***⁷ held at paragraph No.40 as follows:

*"40. The Hon'ble Apex Court in **Mahadeo Vs. State of Maharashtra**, reported in **(2013) 14 SCC 637** has observed that rules applicable for*

⁷ Crl.A.No.200128/2017 dated 23.09.2021

determination of the age under the Juvenile Justice Act, 2000 would be relevant to determine the age of victims in the context of sexual assault as well. Under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the Court may consider the following to determine the age of the victim.

- i) The matriculation or equivalent certificates, if available; and in the absence whereof;*
- ii) The date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
- iii) The birth certificate given by a corporation or a municipality or a panchayat.*

In the absence of these three records, the Courts may look at the medical opinion regarding the age of the victim.”

22. The Co-Ordinate Bench of this Court in the case of **Mr. Rajesh S/o Erappa vs. The State of Karnataka**⁸ held at paragraph No.27 as follows:

*“27. It is useful to refer to the relevant portion of the Judgment of the Hon’ble Apex Court in the case of **Jarnail Singh Vs. State of Haryana**, reported in **(2013)7 Supreme Court Cases 263**. Para 22 of the said Judgment is extracted hereunder:*

⁸ Crl.A.No.1423/2018 dated 16.12.2021

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

"12. Procedure to be followed in determination of age.-(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) x x x x x

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) x x x x x

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) x x x x x .”

At para 23 of the said Judgment, the Hon'ble Apex Court has held that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provision should be the basis for determining the age, even of a child who is a victim of crime."

23. In the instant case, the date of Birth Certificate from the school or the matriculation or equivalent certificate from the Examination Board concerned is not produced. As discussed above, the certificate issued in this case is a Certificate stating the school admission register number and mentioning the date of birth of the victim.

24. Admittedly, the accused has not disputed the age of victim. Furthermore, Ex.P.16 is the medico-legal examination report of sexual violence issued by P.W.13. Ex.P.16 is marked with consent. In this document, the doctor by examining the teeth of the victim has mentioned the approximate dental age as 14-16 years.

25. The reading of Exs.P.19 & P.16 marked with consent shows that as the school admission register of the victim was not produced and her birth certificate from the

concerned municipality was not available, as an abundant caution, the Investigation Officer has obtained the medical opinion from the doctor.

26. As discussed above, both these documents are marked with consent. That means, accused accepts the contents of those documents.

27. The above discussion clearly and categorically establishes that the victim was minor as on the date of alleged incident.

28. With this background, the oral evidence is to be analyzed.

29. The Prosecutrix in her evidence has deposed that, she was studying in 10th standard and on 25/12/2017 she came from school at 02.30 p.m. She was not well and she was alone in her house; her parents had been to landed properties. At that time, accused entered her house and made her to believe that he would marry her and he is loving her and he intended to have physical contact with her, but she refused to do so, stating that her parents would abuse her and told him to go back, but he assured

that nothing will happen and had physical contact with her and went back to his house. Further, accused used to come to her house to talk with her parents and was talking with her with love and had physical contact with her several times.

30. According to the evidence of P.W.2, prosecutrix was taken to Mukunda Hospital at Parishwada about 6 months prior to prosecutrix gave birth to the child.

31. According to P.W.3, when her daughter was carrying for four months, she came to know that victim was pregnant and accused is the cause for it.

32. Even though, P.Ws.1 to 3 were aware about the incident at least about four months after the alleged incident, they have not made any efforts to lodge the complaint against accused. On the other hand they have lodged the complaint on 29.08.2018 and on 01.09.2018 the victim gave birth to a child. No acceptable reason is given for lodging the complaint so belatedly. The say of mother of victim that she was not aware about the pregnancy of her daughter cannot be believed. It is highly improbable

that pregnancy could be hidden by the victim till 2 days prior to she gave birth to the child.

33. The cross-examination of victim and her parents reveals that there is enmity between their family and accused since one year prior to the alleged incident. She admitted that there was a quarrel between the accused and her sisters and since then accused was not talking to them properly. The same is elicited even in the cross-examination of PW3, victims mother.

34. The father of victim in his cross-examination has deposed that there was proposal of marriage of victim with his nephew and he was coming to their house till his daughter was studying in 9th standard and then he stopped coming to their house without any quarrel or without any incident.

35. The victim in her cross-examination has admitted that about 8 months prior to lodging of complaint in this case she was engaged to one Adrushtappa, the son of her maternal aunt and he used to visit her house with her aunt. She has deposed that during Sankranti festival in January,

one day said Adrushtappa stayed in their house. He was coming to their house on Deepawali and Panchami. After Sankranti, till registration of the case, he did not visit their house.

36. The above evidence of P.Ws.1 and 2 established the access of another person to the house of victim. This is more relevant in the case on hand because D.N.A. profile of the child of victim has not tallied with the D.N.A. profile of accused. According to D.N.A report as per Ex.P.21, victim is the biological mother of the child and accused is not the biological father of the male baby of child of victim. Detailed reasons are also given for such conclusion. Thus, according to D.N.A. report, accused is not the cause for pregnancy of the victim.

37. In the judgment of High Court of Bombay ***Dashrath*** cited (supra) relied by learned S.P.P. and amicus curie at paragraph Nos.21, 22 and 23 it is held as follows:

"21. The samples of the appellant and the victim were sent to Forensic Lab, Aurangabad by letter dated 28-06-2018 (Exh.52). Forensic Lab, Aurangabad on analysis sent its report (Exh.57) to the Investigating Officer wherein it

was opined that the victim is concluded to be biological mother of the child born to her. It is also opined that the appellant is excluded to be biological father of the child born to the victim. On the basis of DNA report the learned counsel for the appellant has vehemently submits that the prosecution has failed to establish the paternity of child of the victim. He also submits that there is no clinching evidence against the appellant that he committed rape due to which the victim gave birth to female child. He further submits that the appellant is excluded to be a biological father of the child born to the victim. He also submits that by accepting the DNA report the trial court should have acquitted the appellant from the charges leveled against him. To substantiate his point, he relied on the ratio laid down in the case of State of Gujrat v. Jayantibhai Somabhai Khant in Criminal Appeal Nos. 224 of 2012 along with 863 of 2012, wherein the Division Bench of Gujrat High Court held as under;

36. We are not unmindful of a decision of this Court in the case of Premjibhai Bachubhai Khasiya v. State of Gujarat, 2009 Cri LJ 2888 wherein a Division Bench of this Court observed that if the DNA report is the sole piece of evidence, even if it is positive, cannot conclusively fix the identity of the miscreant, but if the report is negative, it would conclusively exonerate the accused from the involvement or charge. It was observed that science of DNA is at a developing stage and it would be risky to act

solely on a positive DNA report. This decision was rendered more than four and a half years back. Science and Technology has made much advancement, and world over DNA analysis technology is being relied upon with greater confidence and assurance. We do not think that the Indian Courts need to view the technology with distrust. Of course, subject to the laboratory following the usual protocols, DNA result can be of immense value to the investigators, prosecutors as well as courts in either including or excluding a person from involvement in a particular act. The said decision of this Court must be viewed in the background of the facts in which it was rendered. It was a case where the accused were charged with offence under sections 363, 366, 376 read with section 114 of the Penal Code, 1860. All important witnesses including the prosecutrix herself had turned hostile and did not support the prosecution. Despite which, the trial Court handed down conviction primarily on the basis of DNA report which opined that the DNA profiling of the foetus matched with that of the appellant original prime accused. It was in this background while reversing the conviction; the above noted observations were made. It can thus be seen that mere establishment of the identity of the father of the foetus in any case would not be sufficient

to record conviction of the accused for rape and gangrape under section 363, 366 and 376 of the Penal Code, 1860. The said decision, in our opinion, therefore, cannot be seen as either rejecting the reliability of the DNA technology or laying down any proposition that in every case the DNA result must be corroborated by independent evidence before the same could be relied upon."

22. On the other hand learned APP submits that DNA report is just corroborating piece of evidence to the testimony of the victim. Even though the DNA report is negative, it can be ignored and evidence of victim can be relied upon. To substantiate his point he relied on the ratio laid down in the case of Sunil v. State of Madhya Pradesh reported in (2017) 4 SCC 393 dated 08-04-2016 wherein, the Apex Court held as under:

3. At the very outset, we deal with the arguments advanced on behalf of the appellant that in the present case the report of DNA testing of the samples of blood and spermatozoa under Section 53-A of the Criminal Procedure Code, 1973 has not been proved by the prosecution. The prosecution has, therefore, failed to prove its case beyond doubt. Reliance in this regard has

been placed on the decision of this court in Krishan Kumar Malik v. State of Haryana.

4. From the provisions of Section 53-A of the Code and the decision of this court in Krishan Kumar it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53-A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered.

23. In the case of State of Gujrat v. Jayantibhai Somabhai Khant in criminal appeal No. 224 of 2012 the prosecutrix and her parents did not support the case of prosecution. But, the accused was convicted on the basis of DNA report. In view of the said facts, it was held therein that mere establishment of identity of father of foetus in any case would not sufficient to record the conviction of the accused for rape and gangrape under Section 363, 366 and 376 of the Penal

Code, 1860. But, in the present case, the victim and informant have supported the case of the prosecution. Evidence of victim was supported by the medical evidence. Therefore, in view of the ratio laid down in the case of Sunil (supra) it can be said that the other material brought on record by the prosecution can be considered. Though, the DNA report exonerated the appellant, but there is sufficient evidence on record to hold that the appellant had committed rape on victim. It is pertinent to note here that the marriage of the victim was solemnized on 10-06-2018 the victim had gone for cohabitation with her husband at her matrimonial home. On the next day the husband of the victim noticed that the victim was carrying pregnancy. Therefore, she was sent to parental house on 23-06-2018 and on the same day, in pursuance of information given by the victim, her mother lodged the FIR. The prosecution has proved that the victim is a child within the meaning of Section 2(d) of the POCSO Act. Her evidence is unblemished. Therefore, there is no need to discard it."

38. In the aforesaid judgment of Bombay High Court relying upon the judgment of Hon'ble Apex Court-Sunil cited (supra) the Court came to aforesaid conclusion.

39. In the case of **Sunil** cited (supra) the Hon'ble Apex Court at paragraph Nos.4 and 5 held as follows:

"4. From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53-A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.

5. Reading the order of the learned trial court, we find that the trial court has laboriously and systematically itemised twelve different circumstances which the prosecution has been able to establish against the accused on the basis of evidence tendered inter alia by PW 1 (Kamal), PW 2 (Santosh), PW 3 (Mukesh) PW 4 (Shyamlabai), PW 8 (Dr Saurabh Borasi) and PW 11 (DVS Nagar)."

40. On this aspect, the learned counsel for accused relied on the Co-Ordinate Bench of this Court in the case of **Azhar @ Azharuddin @ MD. Azharuddin vs. The State**

by Women Police Station in Crl.A.No.404/2019, decided on 05.05.2020 held in paragraph Nos.42 and 43 as follows:

"42. Relying on a decision reported in **Khali Ram vs. State of H.P.**⁹ the learned counsel contends that in a criminal trial, it is for the prosecution to prove the different ingredients of the offence and unless it discharges that onus, it cannot succeed. He contends that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Relying on the said decision, he submits that the guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record.

43. The learned counsel for the appellant, relying on a decision in the case of **Peter Fernandes vs. State**¹⁰ has contended that paternity test is inconclusive and there are inconsistencies in the evidence of the prosecutrix. Hence, conviction of the accused cannot be based on such evidence."

41. On careful perusal of principles noted in all the above said citations, we are of the opinion that merely because D.N.A. report is negative and is in favour of

⁹ AIR 1973 SC 2773

¹⁰ 1997 Cr.LJ 954 (Bombay)

accused, the case of prosecution cannot be thrown away. However, the other circumstances of the case are also to be looked into to decide the case on hand.

42. When prosecutrix was examined by the doctor, she has stated her last menstruation date as January-2018. But she has stated at the time of complaint that the first date of incident of plea had taken place on 25.10.2017 and subsequently also, several times accused had physical relationship with her. It is to be noted here that, the subsequent dates of incident were not stated by her anywhere. Further, how the alleged first date of incident was stated by the victim is not explained, because the complaint was lodged about 8 months after the alleged incident. Victim was having regular menstrual cycle, and when it was stopped, at least within 2-3 months, it would have been observed by the victim and her mother. However, till completion of 8 months' pregnancy, no effort is made to lodge the complaint. Hence, the say of victim and her parents that they were not aware about it cannot be accepted.

43. As discussed earlier, admittedly there was access to other person to the house of victim other than accused; admittedly there was enmity between accused and the family of victim and thus, his access to the house of victim is not established as per law. There is inordinate delay in lodging the complaint, which is also not explained. In such circumstances, assumes importance, which is DNA report not in favour of prosecution. Hence, in the absence of cogent evidence against accused, relying on the evidence of prosecutrix and her parents, the conviction cannot be recorded against accused.

44. However, the learned Sessions Judge has not examined these aspects meticulously and only relying on the examination-in-chief of victim, her parents came to the wrong conclusion that the prosecution has proved the guilt against accused and convicted him.

45. Having independently assessed the evidence of the prosecution witnesses and having carefully examined the material on record, we are of the considered view that

the prosecution has failed to establish the guilt of the accused for the charged offences beyond reasonable doubt.

46. We appreciate the efforts of *amicus curie* Smt.Surabhi Kulakarni in assisting the Court.

47. Hence, the following:

ORDER

- i) Appeal is ***allowed***.
- ii) The impugned Judgment and Order dated 05.02.2021 and 06.02.2021 respectively passed by the learned III Additional District and Sessions Judge, Belagavi in S.C.No.377/2018, convicting and sentencing the appellant for offences punishable under Sections 376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the POCSO are hereby set aside.
- iii) The appellant/accused is acquitted of the offences punishable under Sections 376(2)(h)(i)(n) of IPC and Sections 4, 5(j)(ii) and 5(l) read with Section 6 of the

POCSO. His bail bond shall continue for six months.

- iv) Learned Amicus Curiae, Smt.Surabhi Kulkarni is entitled for honorarium of Rs.10,000/-, which shall be paid by the High Court Legal Services Committee, Dharwad.
- v) The victim is entitled for compensation under Victim Compensation Scheme. Hence, the DLSA is hereby directed to provide appropriate compensation to the victim, if any such application is filed by her, by making due enquiry.

**Sd/-
(MOHAMMAD NAWAZ)
JUDGE**

**Sd/-
(GEETHA K.B.)
JUDGE**

SSP
CT-MCK