IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 889 OF 2023

Nivrutti S/o Nagorao Hange,
Age: 43 years, Occu: Labourar,
At Present R/o Prakashnagar,
Lane No.3, Kukundwadi,
Permanent R/o Hangewadi, Post Kingaon,
Tq. Ahmedpur, District Latur .... Appellant

VERSUS

1. The State of Maharashtra
Through Police Officer,
Kukundwadi Police Station,
Aurangabad

2. X.Y.Z. .... Respondents

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Appearance :-

Mr. Deoda Mohit Lalit and Mr. Pavan M. Salunke, Advocate for the Appellant
Mr. Govind A. Kulkarni, APP for the Respondent No.1 / State
Ms. Vinaya Dharurkar, Advocate for Respondent No.2 [Appointed]

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CORAM : R. G. AVACHAT &
NEERAJ P. DHOTE, JJ.

Reserved On : 22/08/2024
Pronounced On : 25/09/2024

JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. This Criminal Appeal, filed under Section 374[2] of the Criminal Procedure Code, 1973 [hereinafter referred to as 'Cr.PC'] challenges the Appellant's conviction and sentence awarded by the learned Additional Sessions Judge, Aurangabad, vide Judgment and Order dated 03/03/2022, in Special [POCSO] Case No.43/2016, as under :-

"(i) The accused – Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the commission of offence under Section 3(a) punishable under section 4, and the offences under Sections 5(j) (ii), 5(l), 5(n), 5(p) punishable under Section 6 of the POCSO Act.

(ii) The accused – Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the charge of commission of offence punishable under Section 376 (2)(i) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life, which shall mean imprisonment for the remainder of his natural life and to pay fine Rs.3000/-; in default of payment of fine the accused to undergo simple imprisonment for six months.

(iii) The accused – Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the charge of commission of offence punishable under Section 376(2) of the Indian Penal Code and sentenced to suffer an imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fine Rs.3000/-; in default of payment of fine the accused to undergo simple imprisonment for six months.

(iv) All the substantive sentences shall run concurrently."

2. The Prosecution's case as revealed from the Police Report is as under :-

[I] The Prosecutrix, hail from Village Martandwadi, Taluka Palam, District Parbhani. For education purpose she had come to reside at Aurangabad with her eldest married sister, from the year 2009. The Appellant was her brother-in-law [husband of sister]. At the relevant time, she was taking education in 8th standard. Her sister was a working woman and her sister had school going children. The Appellant, taking disadvantage of the situation, committed sexual intercourse with the Prosecutrix. The Appellant threatened the Prosecutrix with the consequence that, he will discontinue her education and kill her sister. Due to the threat, the Prosecutrix did not disclose the repeated sexual intercourse by the Appellant on her. After some months, the Prosecutrix had stomach ache and vomiting, therefore, her sister took her for medical examination.

Sonography was advised by the Doctor. The medical examination revealed that the Prosecutrix was pregnant. On inquiry by the sister, the Prosecutrix disclosed her the sexual act by the Appellant on her. The Prosecutrix was admitted to the Hospital. She aborted naturally a non-viable foetus. On the statement of the Prosecutrix, the criminal law was set in motion and Crime bearing No.275/2013 came to be registered against the Appellant for the offences punishable under Sections 3(a), 4, 5(j)(2), 5(l), 5(n), 5(p), 5(q) and 6 of the Protection of Children From Sexual Offences Act, 2012 [hereinafter referred to as 'the POCSO Act']

[II] The Investigating Machinery recorded supplementary statement of the Prosecutrix, statements of the witnesses, conducted the Spot Panchnama, collected the medical papers, referred the Prosecutrix for radio-logical test, collected the documents relating to her age from the school, got the blood samples of Prosecutrix and samples of foetus collected and referred for Chemical Analysis. Since the Appellant was not traceable, Charge-sheet came to be submitted on 18/02/2016 under Section 299 of Cr.PC. Subsequently, the Appellant came to be arrested on 11/04/2017. The Appellant was medically examined. His blood samples were collected and the same were referred for Chemical Analysis. Supplementary Charge-sheet came to be filed against the Appellant. The reports from the Chemical Analyser were received which were submitted before the trial Court.

3. After committal, the learned Additional Sessions Judge framed the Charge against the Appellant at Exhibit – 178, to which, the Appellant did not plead guilty and claimed to be tried. To prove the Charge, the Prosecution examined in all

seventeen [17] witnesses and brought on record the relevant documents. On completion of the Prosecution's evidence, the learned Trial Court recorded the statement of Appellant under Section 313[1][b] of Cr.PC. The Appellant denied the case and evidence of Prosecution. After hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

4. Heard the learned Advocates Mr. Deoda Mohit Lalit and Mr. Pavan M. Salunke for the Appellant, learned APP Mr. Kulkarni for Respondent No.1 - State, assisted by learned Advocate Ms. Vinaya Dharurkar for Respondent No.2. Scrutinized the evidence.

5. It is submitted by the learned Advocate for the Appellant that the Prosecutrix did not support the case of Prosecution. There is ambiguity regarding the date of birth of Prosecutrix. There was delay in registering the FIR. The requirement of Section 164-A of Cr.PC was not complied. The Prosecution failed to establish the chain of custody of samples of foetus and blood samples. There was delay in result of DNA analysis. Therefore, the evidence in the nature of DNA report cannot form the basis to convict the Appellant. There are discrepancies in the reports of DNA analysis. The learned Trial Court recorded the conviction only on the basis of DNA report, which is unsustainable in the eye of law and the Appeal be allowed. The Judgments cited are considered in later part of this Judgment.

6. It is submitted by the learned APP that though the Prosecutrix did not support the Prosecution, the medical evidence supports the Charge. The Prosecutrix was minor and her age was proved. Since the Prosecutrix was minor, there

was no question of her consent. The sister of Prosecutrix supported the Prosecution. The Appellant was absconding. There was proper handling of the DNA in sealed condition. The DNA report concluded that the Appellant and Prosecutrix were the biological parents of the baby [foetus]. The learned Trial Court has properly appreciated the evidence on record and passed the impugned Judgment and Order. Hence, the Appeal be dismissed. The Judgments cited are considered in later part of this Judgment.

7. The learned Advocate for the Prosecutrix [assisting the Prosecution] adopted the submissions made by the learned APP and additionally submitted that the conduct of the Appellant becomes relevant by virtue of Section 8 of the Indian Evidence Act, 1872 [hereinafter referred to as 'the Evidence Act']. The sister of Prosecutrix deposed in respect of the age of Prosecutrix and the school record was brought in evidence to establish her date of birth. The DNA report was conclusive in nature. Hence, the Appeal be dismissed.

8. From the evidence available on record, following aspects are not in dispute ;

[i] The Prosecutrix was the younger sister of PW – 2 [Meena Nivrutti Hange] ;

[ii] The Appellant / Accused is the husband of PW – 2 [Meena Nivrutti Hange] ;

[iii] The Prosecutrix was residing in the house of Appellant and PW – 2 [Meena Nivrutti Hange] for her education ;

[iv] The Prosecutrix got pregnant for which she was hospitalized and she aborted ;

9. The Charge and the conviction is for sexual offences against a child. The term child as defined under Section 2(1)(d) of the POCSO Act means any person below the age of eighteen [18] years. Thus, it becomes necessary for the Prosecution to prove that, the Prosecutrix was a child. The learned Trial Court has dealt with the evidence on record and held the Prosecutrix to be a child at the relevant time. The learned Trial Court considered and accepted the medical record of Radiologist for determination of age, which is brought on record in the evidence of PW-15 (Asha Pandurang Bhange). The Radiologist is not examined, thus, the said record is kept out of consideration.

10. Though the Prosecutrix, who is examined as PW – 1, deposed her date of birth as 25/05/1999, it would be hearsay in nature. The Prosecution examined the Teacher of Zilla Parishad Primary School, Martandwadi, District Parbhani as PW – 9 [Dilip Motiram Bhingole], where the Prosecutrix was studying. He appeared before the learned Trial Court pursuant to the witness summons in respect of the date of birth of Prosecutrix. The original register was brought by him. The Prosecutrix had taken admission in the said school in first [1st] standard on 16/06/2005 and as per the school record, her date of birth was 25/05/1999. The said register contained the information in respect of the date of birth, date of admission and date of issuing school leaving certificate. The relevant extract from the said register was brought on record at Exhibit – 86. Though he was working in the said school since one and half years [1 ½] from his date of evidence and he had no personal knowledge about the entries made in the said register, the said document was the school record and had come from proper custody. His

further evidence shows that the Prosecutrix was given admission in the school on the basis of extract of register of the *Anganwadi* which was received from the *Anganwadi Sevika*. There is nothing in the cross-examination to doubt the testimony of this witness. The extract brought on record corroborate his testimony. By examining this witness, the Prosecution has successfully proved the date of birth of the Prosecutrix as 25/05/1999 from the school record where she was studying from standard 1st.

11. The evidence of PW – 1 Prosecutrix, shows that the report dated 17/07/2013, which was treated as FIR, was confronted to her and she only identified her signature on the same, which was marked as Exhibit – 31 [signature]. The evidence of PW – 2 [Meena Nivrutti Hange], who was the elder sister of PW – 1 Prosecutrix, shows that on 04/07/2013, when she along with PW – 1 Prosecutrix, her daughter and friends had gone to the Temple in the morning, PW – 1 Prosecutrix, was not feeling well and she was feeling giddiness and vomited. She took PW – 1 Prosecutrix to the Doctor, who advised a Sonography. The result of Sonography was that PW – 1 Prosecutrix was pregnant for four [4] months. On 13/07/2013, PW – 1 Prosecutrix was admitted to the Ghati Hospital and during the medical examination, it was found that the foetus was dead and abortion was carried. This evidence remained undiluted in cross-examination. The evidence of PW – 10 [Dr. Anjali Suresh Darekar] shows that on 13/07/2013, she was working as Lecturer in Gynaecology Department in Ghati Hospital. On that day, PW – 1 Prosecutrix was admitted to the Ghati Hospital and her Sonography showed that she was pregnant for twenty [20] to twenty one [21] weeks. On 16/07/2013, PW – 1 Prosecutrix aborted naturally. Her evidence remained unchallenged.

12. The above evidence in respect of date of birth of PW – 1 Prosecutrix and her admission to the Hospital and her abortion, which led to the non-viable foetus, establishes that at the relevant time, PW – 1 Prosecutrix was a child. Her date of birth, her admission to the Hospital and her date of abortion clearly shows that at the relevant time, she was aged fourteen [14] years, one [1] month, twenty one [21] days. The learned Trial Court has rightly held that PW – 1 Prosecutrix was below sixteen [16] years in age and a child.

13. For proving the Charge, the star witness of Prosecution was the Prosecutrix herself, who is examined as PW – 1. She did not support the case of Prosecution. She denied the contents of the report, which was treated as FIR. She further denied giving of supplementary statement to the Police. The Prosecution cross-examined her, however, nothing came in her evidence towards establishing the Charge, even remotely. Her evidence that at the relevant time, she told her sister PW – 2 [Meena Nivrutti Hange] that the Appellant had sexual intercourse with her, cannot take the place of substantive evidence. It was a previous oral statement made to her sister. According to her, she was unable to say as to how she conceived. Though in her re-examination done by the Prosecution, she admitted of recording her statement in the Ghati Hospital, Aurangabad, which was recorded in presence of two - three ladies, which was narrated by her without any pressure, that cannot take the place of substantive evidence. All in all, the evidence of PW – 1 Prosecutrix is of no assistance to the Prosecution in establishing the Charge.

14. The learned APP relied on two Judgments. In **Selvamani Vs. The State Rep. By the Inspector of Police, in Criminal Appeal**

No.906/2023, delivered on May 08, 2024, wherein, the Prosecutrix as well as her mother and her aunt had fully supported the Prosecution, which is not so in the case in hand. In **Imran Shamim Khan Vs. State of Maharashtra ; 2019 DGLS [Bom] 366**, wherein, the conviction recorded by the learned Trial Court was upheld, as the Prosecution examined the Magistrate, who recorded the statement of the Prosecutrix under Section 164 of Cr.PC. In catena of Judgments of the Hon'ble Supreme Court of India, it is well settled position in law that the statement recorded under Section 164 of Cr.PC is not the substantive evidence.

15. PW -2 [Meena Nivrutti Hange] was admittedly not the eye witness to any of the incidents, for which, the Crime was registered. Her evidence that, on detection of pregnancy, PW – 1 Prosecutrix told her that, it was because of the Appellant, is hearsay in nature and not substantive evidence. Her evidence shows that her marriage with the Appellant was at the instance of her parents and she was not happy with the marriage. Her evidence shows that once she was hospitalized for consuming poison. Of course, this is not the issue in question, it shows that the relations between PW – 2 and the Appellant were not harmonious. It is, thus, clear that the evidence of PW – 2 [Meena Nivrutti Hange] do not take the case of Prosecution any further to prove the Charge.

16. The evidence of PW – 3 [Dnyaneshwar Ramkrushna Sonar], shows that he video-graphed the statement of Prosecutrix. The evidence of PW – 4 [Durga Mangilal Bhati] shows that the statement of Prosecutrix was recorded in her presence. Her evidence as to what the Prosecutrix stated, is hearsay in nature. The evidence of PW – 5 [Sandhya

Ramchandra Jadhav] shows that the DVD was seized in her presence. The evidence of PW – 6 [Girish Chidambarmurti Ringe] shows that he was the panch for the Spot Panchnama i.e. the room, which was on the first floor of the house. His evidence do not show that anything was seized from the said spot. Evidence of these witnesses have no potency to prove the Charge.

17. Another evidence, upon which, the Prosecution laid emphasis and which weighed heavily with the learned Trial Court to convict the Appellant, is the scientific evidence in the nature of DNA reports. Following Judgments are relied upon by the learned Advocates for the Appellant on this aspect.

[I] In **Pattu Rajan Vs. The State of Tamil Nadu; MANU/SC/0439/2019**, it is observed as follows :-

> *"31. Shri Sushil Kumar also argued that a DNA test should have been conducted in order to identify the dead body, and identification merely on the basis of a superimposition test, which is not a tangible piece of evidence, may not be proper.*
>
> ***One cannot lose sight of the fact that DNA evidence is also in the nature of opinion evidence as envisaged in Section 45 of the Indian Evidence Act. Undoubtedly, an expert giving evidence before the Court plays a crucial role, especially since the entire purpose and object of opinion evidence is to aid the Court in forming its opinion on questions concerning foreign law, science, art, etc., on which the Court might not have the technical expertise to form an opinion on its own. In criminal cases, such questions may pertain to aspects such as ballistics, fingerprint matching, handwriting comparison, and even DNA testing or superimposition techniques, as seen in the instant case.***
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> *32. The role of an expert witness rendering opinion evidence before the Court may be explained by referring to the following observations of this Court in* ***Ramesh Chandra Agrawal v. Regency Hospital Limited and Ors.****, MANU/SC/1641/2009 : (2009) 9 SCC 709 :*
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> > *16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an*

expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed....

Undoubtedly, it is the duty of an expert witness to assist the Court effectively by furnishing it with the relevant report based on his expertise along with his reasons, so that the Court may form its independent judgment by assessing such materials and reasons furnished by the expert for coming to an appropriate conclusion. Be that as it may, it cannot be forgotten that opinion evidence is advisory in nature, and the Court is not bound by the evidence of the experts. *(See* ***The State (Delhi Administration) v. Pali Ram****, MANU/SC/0189/1978 : (1979) 2 SCC 158;* ***State of H.P. v. Jai Lal and Ors.****, MANU/SC/0557/1999 : (1999) 7 SCC 280;* ***Baso Prasad and Ors. v. State of Bihar****, MANU/SC/8723/2006 : (2006) 13 SCC 65;* ***Ramesh Chandra Agrawal v. Regency Hospital Ltd. and Ors.*** *(supra);* ***Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.****, MANU/SC/1416/2009 : (2010) 2 SCC (Cri.) 299).*

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".

[II] In **Manoj and Others Vs. State of Madhya Pradesh; MANU/SC/0711/2022**, it is observed as follows :-

"134. During the hearing, an Article published by the Central Forensic Science Laboratory, Kolkata was relied upon. The relevant extracts of the Article are reproduced below:

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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.*

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136. The Law Commission of India in its report, observed as follows :

> *DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000. This is described as the 'random occurrence ratio' (Phipson 1999).*

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

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141. 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".

[III] In **Naveen Vs. The State of Madhya Pradesh; MANU/SC/1167/2023**, it is observed as follows:

"18. The issue concerning evidentiary value of DNA report has been considered by this Court in a recent judgment reported in the case of Rahul v. State of Delhi, Ministry of Home Affairs and Anr. MANU/SC/1455/2022 : (2023) 1 SCC 83 wherein the following has been held in Paragraphs 36 and 38 as under:

36. The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the Appellant-Accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged Under Section 45 and like any other opinion evidence, its probative value varies from case to case.

38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the Accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.

(Emphasis supplied)

19. In the case of Manoj and Ors. v. State of M.P. MANU/SC/0711/2022 :(2023) 2 SCC 353, it was held that 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 as it can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen even when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches the 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.

20. In the case of Anil @ Anthony Arikswamy Joseph v. State of Maharashtra MANU/SC/0124/2014 : (2014) 4 SCC 69, the following has been held in paragraph 18 as under:

> *18. 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 the DNA profile of the suspect, it can generally be concluded that both the 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". (Emphasis supplied)*

[IV] In **Prakash Nishad Vs. State of Maharashtra; MANU/SC/0613/2023**, one of the issue for consideration was whether DNA evidence can form the solitary basis in determining the guilt of the Appellant therein and it observed as follows :-

"*60. We may observe that the Maharashtra Police Manual1, when speaking of the integrity of scientific evidence in Appendix XXIV states -*

> *The integrity of exhibits and control samples must be safeguarded from the moment of seizure upto the completion of examination in the laboratory. This is best done by immediately packing, sealing and labeling and to prove the*

continuity of the integrity of the samples, the messenger or bearer will have to testify in Court that what he had received was sealed and delivered in the same condition in the laboratory. The laboratory must certify that they have compared the seals and found them to be correct. Articles should always be kept apart from one another after packing them separately and contact be scrupulously avoided in transport also.

61. In the present case, the delay in sending the samples is unexplained and therefore, the possibility of contamination and the concomitant prospect of diminishment in value cannot be reasonably ruled out. On the need for expedition in ensuring that samples when collected are sent to the concerned laboratory as soon as possible, we may refer to "Guidelines for collection, storage and transportation of Crime Scene DNA samples For Investigating Officers - Central Forensic Science Laboratory Directorate Of Forensic Sciences Services Ministry Of Home Affairs, Govt. of India"2 which in particular reference to blood and semen, irrespective of its form, i.e. liquid or dry (crust/stain or spatter) records the sample so taken "Must be submitted in the laboratory without any delay."

62. 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."

[V] In **Mukesh and Others Vs. State of NCT of Delhi and Ors.; MANU/SC/0575/2017**, it is observed as follows :-

"216 In ***Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh*** *MANU/SC/1306/2009 : (2009) 14 SCC 607, a two-Judge Bench had explained as to what is DNA in the following manner:*

41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken".

[VI] In **Ananda Vs. The State of Maharashtra; MANU/MH/3781/2024**, one of the evidence was in the nature of DNA reports and it is observed as under :

"39. The question is, based on the DNA reports, whether the conviction and/or sentence passed by the trial court would be sustainable. We have gone through the impugned judgment. The trial court has relied on the evidence of each and every witness. It also relied on the evidence of the medical officer who collected blood of the appellant for DNA analysis, even in breach of protocol in that regard. The reason assigned for relying on the said evidence is that the said witness is uninterested and independent one. Before appreciating the evidence relating to DNA, we must have a look at the guidelines for collection, storage and transportation of the crime-scene DNA samples. Those have been placed on record by learned counsel for the appellant. Item No.10 therein speaks of maintaining the chain of custody. It describes what chain of custody means. Same reads as under:-

***10.** Maintaining the chain of custody:*

• Chain of custody is a process used to maintain and document the chronological history of the evidence.

• A `chain of custody' document should be maintained 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.

Those were the guidelines issued by The Central Forensic Science Laboratory, Chandigarh. PW 18 – Vaishali admitted in cross-examination that the C.F.S.L., Chandigarh and Hyderabad are best in India."

18. From the above observations, it is clear that, there is protocol for selecting and preserving the samples for DNA analysis. Necessary precautions are necessary, right from taking samples for DNA till the final results of its analysis. Even, the chain of custody of samples is required to be established so as to rule out the possibility of contamination or tampering. Further, the said exercise is required to be taken up and completed without any delay. What can be gathered from the above observations made by the Hon'ble Supreme Court is that the evidence in the nature of DNA report can only be relied or accepted provided the Prosecution establishes that integrity of the samples remain uncompromised right from the beginning till end and the chain of handling the samples is established and all the possibility of contamination or tampering of the samples is completely ruled out. Further, it leads that DNA could not be said to be infallible, as after all it is an opinion evidence.

19. Coming to the case in hand, the evidence of PW – 8 [Dr. Sushilkumar Narayanrao Pundge] shows that he was the Medical Officer at G.M.C.H, Aurangabad and Prosecutrix had come along with her sister on 13/07/2011. He recorded her MLC and informed the Police and referred her to the OBGY Department for further expert opinion, investigation and management. The evidence of PW – 10 [Dr. Anjali Suresh Darekar], who was attached to the Gynaecology Department in Ghati Hospital, Aurangabad, shows that the Prosecutrix was pregnant for twenty [20] weeks and complained of abdomen ache and was hospitalized on 13/07/2013. On 16/04/2013, at

about 6.15 a.m., she aborted naturally. Her evidence shows that the aborted foetus was preserved by on duty Doctor for DNA test. However, who was the said Doctor is not known. The said on duty Doctor to whom this witness had handed over the foetus is not examined. The evidence of PW – 10 [Dr. Anjali Suresh Darekar] is completely silent as to how the foetus was preserved.

20. The evidence of PW – 7 [Dr. Nitin Subhash Ninal] shows that on 17/07/2013, he was attached as the resident Doctor at Government Medical College, Aurangabad and on that day, PSI - V. A. Tandale, [PW – 16] brought the foetus [dead] for postmortem and on postmortem, he opined that the foetus was 'non-viable fetus of gestational age 5 - 6 months' and accordingly, he prepared the postmortem report at Exhibit – 64. The samples femur and sternum were packed, sealed, labeled and handed over to the Police on duty for DNA analysis. Who was that Policemen to whom the said samples were handed over is not known.

21. The evidence of PW – 16 [Vishnu Arjun Tandale], the PSI of Mukundwadi Police Station, shows that, he conducted the inquiry of ADR, which was registered for the dead foetus. His evidence nowhere show that he had carried the foetus with him to PW – 7 [Dr. Nitin Subhash Ninal] for postmortem and thereafter the samples were handed over to him. His evidence only shows that he issued letter to the C.M.O with request to conduct the postmortem and collection of DNA vide Exhibit – 150. There is no *inter-se* corroboration in the evidence of PW – 7 [Dr. Nitin Subhash Ninal] and PW – 16 [Vishnu Arjun Tandale].

22. The evidence of PW – 16 [Vishnu Arjun Tandale] nowhere shows as to from where and from whose custody the foetus was taken in his custody for sending it to the postmortem. He further deposed of handling over the medical muddemal to PHC Ahire on 17/07/2013. It is not clear from his evidence as to what the said medical muddemal contained. Even if, it is taken that it was the sample of foetus, the said PHC Ahire is not examined.

23. The evidence of PW – 13 [Dr. Kanarjuman Mohammad Ibrahim] shows that on 15/08/2013, he was working as Casualty Medical Officer in Ghati Hospital, Aurangabad and Prosecutrix was brought by Lady Police Constable [LPC] Batch No.156, H. A. Chincholkar for drawing her blood samples along with the communication at Exhibit – 124. He accordingly took the blood samples of the Prosecutrix after filling up the identification form and handed over the blood samples to the Police for taking it to the Forensic Science Laboratory. The cross-examination shows that the blood samples of Prosecutrix were not collected in presence of third party. The column, '*The blood is collected, labeled and sealed in presence of following witnesses*' in Exhibit – 125, which is the identification form referred by this witness in her evidence, is blank. There are no names of witnesses and their signatures in the said Exhibit-125. It is worth to note that, at the bottom of the said identification form at Exhibit – 125, there is a Note as '*No column should be left empty*'. This evidence on record establishes that the protocol required for collecting the blood samples was not followed. Admittedly, this witness had not given the name of Police to whom the blood samples were handed over for taking it to Forensic Laboratory. Even for the sake of argument, it is

taken that the said blood samples were handed over to the said LPC - H. A. Chincholkar, she is not examined.

24. The evidence of PW – 15 [Asha Pandurang Bhange], the Police Officer, who investigated the Crime, shows that the blood samples were sent for DNA examination to Laboratory Kalina, Mumbai vide Exhibit - 94. However, her cross-examination shows that the Doctor handed over the blood samples for sending to Chemical Analysis and she did not remember the period for which the samples were lying with her. Her evidence nowhere shows as to where the blood samples were kept during that intervening period.

25. The evidence of PW – 11 [Vaijinath Eknath Phalke] shows that on 15/08/2013 when he was present at Mukunwadi Police Station, PSI – Bhange [PW – 15] handed over the blood samples of Prosecutrix for being taken to Mumbai and handed over a letter with sealed thermacol box and sealed envelop. Accordingly, he deposited the same at Mumbai. His cross-examination shows that the box and envelop were not sealed in his presence.

26. The evidence of PW – 12 [Madhuri Haibati Narwane] shows that she was attached to the Mukundwadi Police Station as Police Constable and on direction by PW – 17 [Dipali Bhagwat Nikam], she carried and deposited the DNA sample kit with one sealed envelop to the Forensic Laboratory, Kalina, Mumbai and took the acknowledgment in that regard. She had no reason to know the articles in the kit.

27. The evidence of PW – 14 [Dr. Archana Nivrutti Parsewar], who was the CMO at Ghati Hospital, Aurangabad, shows that on

16/04/2017, the Accused was brought for drawing his blood samples and accordingly, she took his blood samples for DNA after filling the identification form and the blood samples were taken in presence of the witnesses, whereas, as seen earlier, the blood samples of Prosecutrix were not drawn in the presence of witnesses. There is no explanation as to why the blood samples of Prosecutrix were not collected in the presence of witnesses, as is done while collecting the blood samples of the Appellant.

28. The above discussed evidence clearly shows that, the chain of custody of the non-viable foetus, which was aborted by the Prosecutrix, is not at all established. There is complete absence of evidence to show as to in what condition the said non-viable foetus was preserved. There is complete absence of evidence to show that the foetus was handled as required by the medical protocol so as to maintain its integrity. This deficiency in the Prosecution's case, examined in the light of the above legal position, is fatal for the Prosecution. As the chain of custody of the samples of foetus and blood is not established, the possibility of contamination or tampering or diminishment of its value cannot be ruled out.

29. The CA report at Exhibit – 161 is in respect of results of analysis of DNA extracted from blood samples of the Prosecutrix and samples of the foetus. The opinion after the analysis was that, the Prosecutrix was concluded to be the biological mother of the foetus. For clear understanding, chart given in the said report is re-produced below :

STR LOCUS	GENOTYPE	
	DNA ex1 femur bone of F.S.L. ML. Case No. DNA-	DNA Nikita Suryakant Gutte

	817/13	
D8S1179	10, 12	12, 13
D21S11	27, 32, 2	27, 30
D7S820	11, 12	9, 12
CSF1PO	10, 11	11, 12
D3S1358	17, 17	17, 17
THO1	6, 9	8, 9
D13S317	11, 13	10, 11
D16S539	11, 11	9, 11
D2S1338	18, 19	19, 23
D19S433	**14, 14.2**	**14.2, 14.2**
8VWA	16, 17	16, 17
TPOX	8, 11	8, 11
D18S51	13, 16	15, 16
AMEROGENIN	**X,X**	**X,X**
D5S818	14, 14	13, 14
FGA	23, 24	23, 26

30. The CA report at Exhibit – 162 shows that the Appellant and Prosecutrix were concluded to be the biological parents of the baby [foetus] of the Prosecutrix. A chart shown in the said report is re-produced below for better understanding :

STR Loci	**GENOTYPE**		
	DNA-992/13	**DNA-817/13**	**DNA-553/17**
	Ex. Nikita Suryakant Gutte	Ex. 1 femur bone of baby of Nikita Suryakant Gutte	Ex. 1 Nivrutti Nagorao Hange
D8S1179	12, 13	10, 12	10, 14
D21S11	27, 30	27, 32, 2	31.2, 32.2
D7S820	9, 12	11, 12	11, 11
CSF1PO	11, 12	10, 11	10, 11
D3S1358	17, 17	17, 17	16, 17
TH01	8, 9	6, 9	6, 8

D13S317	10, 11	11, 13	12, 13
D16S539	9, 11	11, 11	9, 11
D2S1338	19, 23	18, 19	18, 23
D19S433	**14.2, 14.2**	**14.2, 15**	**13, 15**
vWA	16, 17	16, 17	15, 16
TPOX	8, 11	8, 11	8, 11
D18S51	15, 16	13, 16	13, 14
AMELOGENIN	**XX**	**XX**	**X, Y**
D5S818	13, 14	14, 14	11, 14
FGA	23, 26	23, 24	24, 26

31. On close scrutiny of the above charts, we find merit in the contention of the learned Advocate for the Appellant that the reading in the vertical column styled as 'STR locus / Loci' for D19S433, in both the reports, in respect of femur bone of baby [foetus] is different. No doubt, the CA reports are admissible by virtue of Section 293 of Cr.PC. However, the said ambiguity is not cleared by the Prosecution. The CA report at Exhibit – 162 opining that the Appellant, Prosecutrix were the biological parents of baby [foetus], is dated 26/10/2018. True it is that the blood samples of the Appellants were taken on 16/04/2017 after his arrest, the said CA report shows that the analysis was started on 16/05/2018. Admittedly, there is no evidence to show as to in what condition the samples received by the Laboratory were preserved. This long delay in respect of result of analysis of DNA is not explained. The possibility of the samples getting contaminated cannot be ruled out. Under such circumstances, we do not find it safe to accept and rely on the said CA reports.

32. There is one more aspect to the matter. The evidence of PW – 7 [Dr. Nitin Subhash Ninal], who performed the

postmortem on the foetus shows that the sex of foetus was *Male*, whereas, AMELOGENIN, in the CA report at Exhibits- 161 and 162 shows the DNA of foetus as X, X, which is indicative of Female foetus. This inconsistency in the evidence of the Doctor and the CA reports is significant and gives severe dent to the Prosecution's case.

33. PW – 17 [Dipali Bhagwat Nikam] was the Police Officer, who investigated the Crime, after initial investigation was done by PSI Asha Pandurang Bhange [PW – 15]. She filed Charge-sheet against the Accused under Section 299 of Cr.PC as the Appellant was at large. Thereafter, she arrested the Appellant, got blood sample of the Appellant, which was forwarded to the Forensic Laboratory, Kalina, Mumbai and filed supplementary Charge-sheet against the Appellant. The abscondance of the Appellant, though may be relevant, cannot form the sole basis to hold him guilty, in absence of substantive evidence to prove the Charge.

34. The above discussed evidence leads us to hold that the report of Chemical Analysis in respect of DNA cannot form the basis to affirm the conviction recorded by the learned Trial Court. The evidence as discussed above shows number of shortcomings. There is no evidence to show that the samples were collected and preserved as prescribed by the medical protocol. The delay in respect of the analysis of the samples is also significant. This gives rise to reasonable possibility of the samples getting contaminated or tampered. Thus, the medical / scientific evidence in respect of DNA reports is liable to be discarded. This being so, there is no evidence to prove the Charge. The other evidence, as discussed above, takes the case

of Prosecution no further in proving the Charge. In the backdrop of the above discussion, it is not possible to uphold the conviction and sentence awarded by the learned Trial Court against the Appellant. Hence, the following order:

ORDER

[a] Criminal Appeal is allowed.

[b] The Judgment and Order dated 03/03/2022, passed by the learned Additional Sessions Judge, Aurangabad, in Special [POCSO] Case No.43/2016, convicting the Appellant for the offences punishable under Sections 3(a), 4, 5(j) (ii), 5(l), 5(n), 5(p) and Section 6 of the POCSO Act and for the offences punishable under Sections 376(2) (i) and 376 (2)(n) of IPC, is quashed and set aside.

[c] The Appellant stands acquitted for the offences punishable under Sections 3 (a), 4, 5(j) (ii), 5(l), 5(n), 5(p) and Section 6 of the POCSO Act and for the offences punishable under Sections 376(2)(i) and 376(2)(n) of IPC.

[d] The fine amount, if paid by the Appellant, be refunded to him.

[e] The Appellant be released, if not required in any other case.

[f] The Record and Proceedings be sent back to the learned Trial Court.

[g] Criminal Appeal stands disposed of accordingly.

35. The fees of appointed Advocate Ms. Vinaya Dharurkar for Respondent No.2 is quantified at Rs.10,000/- [Rupees Ten Thousand Only], to be paid by the High Court Legal Services Sub - Committee, Aurangabad.

[NEERAJ P. DHOTE, J.] **[R. G. AVACHAT, J.]**