



IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA

Cr. Appeal No.97 of 2019

Date of Decision: 3.3.2021

Sanjeev Kumar

.....Appellant

Versus

State of H.P.

.....Respondent

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? ¹ Yes.

For the Appellant: Mr. Dushyant Dadwal, Advocate.

For the Respondent: Mr. Sudhir Bhatnagar, Additional Advocate
General with Mr. Kunal Thakur, Deputy
Advocate General.

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal filed under Section 374(II) of the Code of Criminal Procedure, lays challenge to judgment of conviction and order of sentence dated 5th/6th March, 2019 passed by learned Special Judge, Kangra, District Kangra, Himachal Pradesh, in Sessions Case No.67-P/VII/2014, titled as *State of Himachal Pradesh versus Sanjeev Kumar and another*, whereby learned Court below while holding appellant (*hereinafter referred to as the accused*) guilty of having committed the offence punishable under Section 4 of the Protection of Children from Sexual Offences

¹ Whether the reporters of the local papers may be allowed to see the judgment?

Act, 2012(*for short 'POCSO Act'*), convicted and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs.50,000/- and in default of payment of fine, to further undergo simple imprisonment for six months. ◇

2. For having bird's eye view, facts relevant for proper adjudication of the case at hand are as under:-

- (i). Victim/prosecutrix, who happened to be minor daughter of complainant Raj Sunani (PW-9) had gone to her school on 14.8.2014 to appear in her 10+1 examination, but since she did not return back in the evening, her mother (wife of the complainant) informed her husband and son in the evening at 7:00 PM. Though, complainant and other family members tried to search the victim/prosecutrix, but since she was not found, complainant (PW-9) lodged missing report at police Station, Panchrukhi. Subsequently, complainant, as named hereinabove, allegedly received telephonic information that the victim/prosecutrix is in the house of one of the co-accused, Rajni Bala at Banuri as such, complainant, his father-in-law, his brother-in-law and nephews went to the house of above named accused Rajni Bala to know the whereabouts of victim/prosecutrix, but since co-accused Rajni

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Bala feigned ignorance, complainant telephonically informed Panchrukhi police.

- (ii). Police officials conducted search of the house of accused Rajni Bala in the presence of some independent witnesses and allegedly recovered victim/prosecutrix from the bed box kept in the drawing room. After having prepared recovery memo, police recorded the statement of the complainant under Section 161 Cr.P.C and thereafter on the basis of the same, FIR Ex.PW 19/A came to be registered against the present accused Sanjееv Kumar and co-accused Rajni Bala under Sections 342, 376, 120-B of IPC and Sections 4 and 17 of the POSCO Act and since then the accused is behind the bars, whereas co-accused Rajni Bala stands acquitted vide judgment impugned in the instant appeal.

3. After completion of the investigation, police presented the challan in the competent court of law, who being satisfied that a prima-facie case exists against the accused, framed charges under the aforesaid provisions of law against both the accused. However, subsequently, vide judgment dated 5th/6th 3.2019, learned Special Judge, Kangra at Dharamshala though held present accused guilty of having committed the offence punishable under Section 4 of the

POCSO Act and accordingly, convicted and sentenced him to undergo rigorous imprisonment for seven years, but acquitted co-accused Rajni Bala of the commission of offence punishable under Sections 342, 120-B of IPC and Sections 4 and 17 of the POCSO Act. In the aforesaid background, accused has approached this Court in the instant appeal, seeking therein his acquittal after setting aside the judgment of conviction and order of sentence recorded by learned Court below. It is not in dispute that no appeal, if any, ever came to be filed at the behest of the respondent-State qua acquittal of co-accused Rajni Bala.

4. Mr. Dushyant Dadwal, learned counsel representing the appellant/accused while making this Court to peruse the evidence adduced on record by the prosecution vis-à-vis reasoning assigned by learned Court below while holding accused guilty of having committed the offence punishable under Section 4 of the POCSO Act, vehemently argued that learned Court below has failed to appreciate the evidence in its right perspective, as a consequence of which, accused has been wrongly convicted under Section 4 of the POCSO Act. Learned counsel representing the accused submitted that since all the material prosecution witnesses including the victim/prosecutrix have resiled from their statements given to the

police under Section 161 and 164 Cr.P.C. respectively; there was no occasion, if any, for the court below to conclude the guilt of present accused. While referring to the statement of victim/prosecutrix (PW-10) recorded before the trial Court, Mr. Dadwal, contended that she has herself stated that on account of darkness in the room, she was not able to identify the person, who forcibly sexually assaulted her against her wishes. Mr. Dadwal further argued that bare perusal of statement of the victim/prosecutrix recorded under section 164 Cr.P.C, itself suggests that she had prior acquaintance with the accused and she of her own volition visited the house of co-accused Rajni Bala. Lastly, Mr. Dadwal argued that once Doctor, who had an occasion to examine the prosecutrix categorically opined the age of the prosecutrix to be between 16 to 19 years, court below could not have believed the version of the prosecution that at the time of alleged incident, prosecutrix was minor. While concluding his arguments, Mr. Dadwal, contended that bare reading of judgment impugned in the instant appeal clearly suggests that conviction of accused is based upon the report submitted by SFSL, Junga qua DNA Profiling, wherein admittedly DNA of the prosecutrix has been opined to be matched with the DNA of the accused, but since there is nothing on record that blood sample obtained by the Investigating

Agency on FTA card was ever sent to SFSL for examination and as such, report qua DNA profiling submitted by SFSL could not have been taken into consideration by the court below while holding accused guilty of having committed the offence under Section 4 of the POSCO Act.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General while supporting the impugned judgment of conviction and order of sentence recorded by learned Court below, strenuously argued that there is overwhelming evidence available on record suggestive of the fact that accused Sanjeev Kumar sexually assaulted the prosecutrix against her wishes and as such, no illegality and infirmity if any, can be said to have been committed by Court while dictating the judgment impugned in the instant proceedings. While refuting the submission made by learned counsel for the accused with regard to sampling of blood on FTA Card, learned Additional Advocate General drawn attention of this Court to the report of SFSL to demonstrate that DNA Profiling was not only done on the basis of blood obtained on FTA Card, rather same was done on the basis of blood obtained from the vest of the accused and underwear of the victim/prosecutrix and as such, learned Court below rightly placed reliance on the FSL report while

holding accused guilty of having committed the offence punishable under Section 4 of the POCSO Act.

6. Having heard learned counsel representing the parties and perused the evidence collected on record by the Investigating Agency, this Court finds that the prosecution with a view to prove its case examined as many as 22 witnesses. Accused though in his statement recorded under Section 313 Cr.P.C., denied the case of the prosecution in toto, but he did not lead any evidence in his defence. Statements of all the 22 prosecution witnesses may not be very relevant to determine the correctness of the findings recorded by the court below.

7. Statements of PW-9, Raj Sunani, PW-10 victim/prosecutrix, PW-12, Ajay Sharma, PW-13, Dr. D.S. Bindra, PW-14, Ms. Arti, PW-1, Dr. Prem Raj Bhardwaj, PW-6, Constable Devendra Acharya and PW-7, HC Vipin Chand No.162 are relevant. Having perused the statements of Raj Sunani (PW-9), victim/prosecutrix (PW-10), Shanti Devi (PW-11) and Ms. Arti (PW-14), this Court finds that all the material prosecution witnesses have not supported the case of the prosecution and as such, they were declared hostile. Cross-examination conducted upon these witnesses by the Public Prosecutor, if perused in its entirety, nowhere suggest that the

prosecution was able to shatter the testimonies of aforesaid witnesses. But judgment impugned in the instant proceedings, if read in its entirety certainly compels this court to agree with the submissions made by learned counsel for the accused that the judgment of conviction recorded against the accused is entirely based upon FSL report Ex .PX, wherein it has been recorded as under:-

- (i). The DNA profile obtained from **Exhibit-7a** (underwear, Neha) **matches completely** with the DNA profile obtained from **Exhibit-10a**(blood sample on FTA card, Sanjeev Kumar).
- (ii). The partial DNA profile obtained from Exhibit-4b(vest, Sanjeev Kumar) **is consistent** with the DNA profile obtained from **Exhibit-6c** (blood sample on cotton gauge, Neha).

8. Though, having scanned evidence oral as well as documentary adduced on record by the prosecution, this Court in view of the fact that all the material prosecution witnesses have resiled from their statements, sees no necessity to deal with the statements made by material prosecution witnesses, but with a view to bring more clarity with regard to stand taken by the complainant, victim/prosecutrix and other recovery witnesses, especially Doctor, who on the askance of police had drawn blood

sample of accused for sending the same to FSL, this Court deems it proper to take brief note of the same.

9. PW-9, Raj Sunani i.e. father of the prosecutrix deposed that though originally he is resident of Kalahandi, but he is residing at Banuri for the last 15-20 years in the house of one Om Prakash as a tenant. He deposed that he is mason by profession and his family is also residing with him. This witness while supporting the case of the prosecution stated before the learned court below that in the year, 2014 prosecutrix was studying in 10+1 class at Government School, Banuri and on 14.8.2014, she had gone to school to appear in the examination. He deposed that his wife (PW-11) Shanti Devi informed him telephonically that the prosecutrix had not returned. He deposed that initially he thought that his daughter might have gone to the house of her friend, but once she was not found there, he lodged missing report. He deposed that someone told his father-in-law that the prosecutrix was in the house of accused Rajni Bala at Banuri and as such, he alongwith his elder brother-in-law and nephew went to the house of accused Rajni Bala, who feigned ignorance about the whereabouts of her daughter. This witness further deposed before the court below that he telephonically informed the Panchrukhi police, which came to the

spot and recorded his statement Ex.PW9/A. He deposed that police searched the house of the accused Rajni Bala and recovered the prosecutrix from the bed box lying in the drawing room of the accused Rajni Bala. This witness in the cross-examination by the State denied that his daughter identified the bed sheet and told that accused Sanjeev Kumar had committed forcible sexual intercourse with her. This witness also admitted that bag of the prosecutrix was recovered from there alongwith her dupatta, salwar and clipboard etc. and same were seized by the police vide memo Ex.PW9/C. This witness in his cross-examination further admitted that they had not inquired from anyone about the whereabouts of the prosecutrix. While stating that he did not remember the date of birth of his daughter, this witness stated that she was born at Palampur hospital and his father-in-law had got his name recorded as Ravinder and not as Raj Sunani. Though, he was also known as Ravinder. Interestingly, this witness in his cross-examination conducted on behalf of the accused Sanjeev Kumar stated that he did not go with the police inside the house of Rajni Bala. He also stated that mobile number of accused Sanjeev Kumar was disclosed to him by his nephew, who was informed by some other person. In his cross-examination by accused Rajni Bala, this witness deposed

that he is residing there for the last 15-20 years and he had contracted second marriage with Shanti Devi (PW-11), who is resident of Orissa. This witness specifically denied that prosecutrix was born in Orissa or that she was above 18 years of age. This witness also admitted that first husband of Shanti Devi was Ravinder, but he was unable to produce any record to show that he is also called as Ravinder. This witness also admitted that prior to 2014, accused Rajni Bala was residing in his neighbourhood and prosecutrix used to visit her house and she also used to come to their house.

10. Prosecutrix (PW-10) in her statement while admitting the factum with regard to her going to school on 14.8.2014 stated that since she could not do well in the examination, she had gone to the house of her friend at Palampur. She deposed that on 15.8.2014, she came to Banuri and went to the house of Rajni Bala in the clothes which she had changed at her friend's house at Palampur. She deposed that accused Rajni Bala was not at home and she inquired from the shop keeper, who gave her Rs.10/- and thereafter she went to Palampur. Prosecutrix deposed that in the evening she returned back to Banuri to meet Rajni Bala and stayed with her in her house. She stated that she after having taken food slept. On

16.8.2014, during night someone had committed sexual intercourse with her, but due to darkness, she could not identify him. This witness specifically denied that accused Sanjeev Kumar was known to her or that accused Rajni Bala made her to talk to him on phone from her house on 16.8.2014. Though, this witness was declared hostile, but even cross-examination conducted upon her by learned Public Prosecutor, nowhere suggests that something material could be extracted from this witness. This witness in her cross-examination denied that accused Sanjeev Kumar came to the house of accused Rajni Bal after she talked to him over the phone. She also denied that accused Rajni Bala suggested her to marry accused Sanjeev Kumar. She also denied that during night accused Sanjeev Kumar slept with her in the separate room and Rajni Bala slept in other room. She also admitted that she had made statement to the police, but self stated that she was beaten by the police and she was mentally upset. She specifically denied that accused Sanjeev Kumar has committed forcibly sexual intercourse with her and there was bleeding from her private part. This witness denied that she had told the police that she had cried whereafter accused gagged her mouth. She has admitted that she had disclosed to the police that she was having pain and she had sound sleep thereafter. This

witness denied that on 17.8.2014 accused Sanjeev Kumar left her by saying that he would come again in the evening. This witness while admitting that during day time accused Rajni Bala locked the room from outside further deposed that when her relatives came, accused Rajni Bala asked her to hide herself alongwith the school bag in the bed box. While admitting that police has recovered her from the bed box and she had signed recovery memo Ex.PW9/B in the presence of witnesses Ajay Sharma and Ashwani Kumar i.e. Pradhan and Up-Pradhan of Gram Panchayat, Banuri, this witness denied that accused Sanjeev Kumar had assured her that he would marry her and asked her to resile from her statement. In her cross-examination by accused Sanjeev Kumar, this witness denied that bed sheet Ex.P-2 was not the same on which she had slept on 16.8.2014. She stated that when her family members came, she out of fear had hidden herself in the bed box. She also stated that due to good acquaintance with the accused Rajni Bala, she had gone to stay there with her. If aforesaid version of the prosecutrix is perused juxtaposing her earlier statements recorded under sections 161 and 164 Cr.P.C, there are material contradictions and inconsistencies, especially with regard to offence, if any, committed by accused under section 4 of the POCSO Act.

11. PW-11, Smt. Shanti Devi, i.e. mother of the prosecutrix, almost reiterated the version put forth by PW-9, Raj Sunani. She categorically deposed that prosecutrix had told the police that someone had committed forcible sexual intercourse with her in the house of accused Rajni Bala, but she could not disclose that it was accused Sanjeev Kumar. This witness was also declared hostile, but even cross-examination conducted upon this witness by the learned Public Prosecutrix nowhere suggests that it was able to extract something contrary what she stated in her examination-in-chief. This witness in her cross-examination denied that accused Rajni Bala had taken her daughter in confidence that accused Sanjeev Kumar would marry her and she had gone to sleep with accused Sanjeev Kumar. In her cross-examination by accused Sanjeev Kumar, this witness deposed that statement of her daughter was not recorded in her presence. In her cross-examination by accused Rajni Bala, this witness admitted that the prosecutrix is daughter from her first husband Ravinder, however, she denied that the prosecutrix was born in Orissa and not in Palampur. While admitting the factum with regard to her prior acquaintance with accused Rajni Bala, she denied that the prosecutrix was around 20 years of age.

12. Now, if version put forth by PW-9, PW-10, PW-11 and PW-12 are read in conjunction, it can be safely concluded that none of these witnesses supported the case of the prosecution, rather they all in unison categorically deposed before the court below that on account of darkness in the room, prosecutrix was unable to identify the person, who allegedly sexually assaulted her against her wishes. These witnesses have specifically admitted in their cross-examination that at no point of time prosecutrix disclosed the name of the present accused Sanjeev Kumar to them as far as commission of offence punishable under Section 4 of the POCSO Act is concerned.

13. Similarly, PW-12, Ajay Sharma, Pradhan, Gram Panchayat, Banuri, who was associated on 17.8.2014 by the police at the time of recovery of prosecutrix vide memo Ex.PW9/B, has not supported the case of the prosecution. PW-12, Ajay Sharma, deposed that prosecutrix was not recovered in his presence. This witness was declared hostile, but even in cross-examination, prosecution was not able to extract something contrary what he stated in his examination-in-chief. This witness stated that other material witnesses had signed in his presence, except Ashwani, but denied that in his presence the prosecutrix had disclosed that the

accused Sanjeev Kumar had committed sexual intercourse with her or that she had identified the place. This witness in cross-examination by accused Rajni Bala stated that recovery memo was neither read over to him nor he has himself had gone through the same.

14. PW-14, Arti, friend of the victim/prosecutrix stated that on 14.8.2014 prosecutrix had come to her house in school uniform and told her that her parents were not at home and she stayed with her at night. She stated that on the next day, she had gone to school and she had given clothes to prosecutrix. Thereafter around 8:30 AM the prosecutrix again met her at school.

15. PW-15, Chamru Ram in whose house accused Rajni Bala was living on rented accommodation deposed that in the year 2014, one girl had come and asked about Rajni Bala. He deposed that he told that she was not there. He stated that he gave Rs.10/- to the girl and on the next day, the girl again came and asked about Rajni Bala and around 11:30 AM accused Rajni Bala came there and the girl accompanied her to the quarter.

16. PW-13, Dr. D.S.Bindra, Medical Officer, Civil Hospital, Palampur deposed that on 17.8.2014 police moved an application Ex.PW13/A, praying therein to conduct medication examination of

the prosecutrix. He deposed that he after having preserved necessary samples, sealed them and handed over to the police. The clothes of the prosecutrix were also sealed and handed over to the police. This witness stated that on 7.11.2014 on the request of the police, he gave his provisional opinion Ex.PW13/C, but reserved his final opinion till the receipt of chemical examination report. He stated that on 25.11.2014 police produced FSL report Ex. PX before him and thereafter he gave his final opinion on the MLC Ex.PW13/D.

17. Before elaborating upon aforesaid statement made by PW-13, Dr. D.S.Bindra, it would be profitable to take note of opinion rendered by aforesaid witness on 25.11.2014 on the MLC Ex.PW13/D hereinbelow:-

“As per State Forensic Science Laboratory, H.P. Shimla Hills Junga report No1684-A SFSL Bio(175)/14, Ref. No.3056/5A, R.C. No.173/14 produced to me today by HG Pinku 9/7-32, human blood and human semen was detected in exhibit-7a(underwear of Neh),so in my opinion there is nothing to suggest that she has not been subjected to sexual intercourse.”

18. Careful perusal of aforesaid opinion clearly reveals that since human blood and human semen was detected on Ex.7a

(underwear of Neha), doctor opined that there is nothing to suggest that she has not been subjected to sexual intercourse. But definitely there is no finding, if any, with regard to complicity of accused as far as commission of offence under Section 4 of the POCSO Act, PW-13, Dr. D.S. Bindra in his aforesaid report Ex.PW13/D also opined that victim/prosecutrix is more than 16 and less than 19 years in age. Aforesaid opinion is based upon the examination of dental and X-rays examination.

19. Statement of PW-1, Dr. Prem Raj Bhardwaj, Medical Officer, Civil Hospital, Palampur, is very crucial in the case at hand. This witness deposed that on 20.8.2014 he after having received application of police Ex.PW1/A, drawn the sample of accused Sanjeev Kumar for DNA profiling on FTA Card and handed over the same to the police. Record reveals that no cross-examination of this witness ever came to be conducted by learned Public Prosecutor or counsel representing the accused. If the version put forth by aforesaid witness is accepted, it creates serious doubt with regard to correctness and genuineness of the story put forth by the prosecution, especially qua the complicity of the accused. This court was unable to lay its hand on any evidence led on record by the prosecution suggestive of the fact that blood sample of the

accused drawn by PW-1, Dr. Prem Raj Bhardwaj for DNA profiling on FTA card was ever sent to FSL for chemical analysis, rather material available on record reveals that on 17.8.2014, Inspector Gurbachan Singh (PW-22) deposited seven sealed parcels, sample seal 'K' and 'CHP', alongwith two mobile phones, which came to be entered in Malkhana register at Sr. No.87 to 89 and abstract of the same is Ex.PW7/A. PW-7, H.C. Vipin Chand No.162, I/O police station, Palampur in his statement recorded before the court below deposed that he remained posted in police Station, Palampur as Additional MHC in the year, 2014. He stated that in the present case on 17.8.2014, Inspector/SHO Gurbachan Singh deposited seven sealed parcels, sample seal K & CHP alongwith two mobile phones with him, which he had entered in Malkhana register at Sr. No.87 to 89. He also submitted that entry abstract of these entries is Ex.PW7/A. This witness deposed that on 21.8.2014 vide RC No.173/14 he had handed over the aforesaid seven parcels to Constable Devender for depositing the same at SFL, Junga. He specifically stated that the copy of RC Ex.PW7/B is correct as per the original record.

20. If the statement of aforesaid witness is perused/ examined juxtaposing entries as recorded in Ex.PW7/A i.e. entry of

abstract, it clearly emerges that blood sample drawn by PW-1, Dr. Prem Raj Bhardwaj, M.O. Civil Hospital, Palampur on 20.8.2014 for DNA profiling on FTA card was not handed over by PW-7, H.C Vipin Chand to Constable Devinder Acharya (PW-6) for further depositing the same at SFL, Junga. There is no mention, if any, with regard to blood sample of accused on FTA card in the record Ex.PW7/A. Otherwise also, entries were recorded in Ex.PW7/A on 17.8.2014, whereas as per admitted case of the prosecution blood sample of accused Sanjeev Kumar for DNA profiling on FTA card was drawn on 20.8.2014, as has been specifically deposed by PW-1, Dr. Prem Raj Bhardwaj, Medical Officer, Civil Hospital, Palampur.

21. PW-6, Constable Davinder Acharya while admitting the factum with regard to handing over of sealed parcel on 21.8.2014 vide RC. No.173/14 by MHC, police Station Palampur i.e. PW-7 deposed that he had deposited the intact parcels at SFL, Junga on 22.8.2014.

22. PW-22, Inspector, Gurbachan Singh, Investigating Officer of the case deposed that the case property was sent to RFSL and after receipt of the report Ex. PX, he prepared the challan on 28.9.2014. This witness also deposed that during investigation, he procured the blood sample of accused Sanjeev Kumar on FTA Card

for conducting DNA profiling and application in this regard was moved before the Medical Officer, Civil Hospital, Palampur. It is ample clear from the statement of aforesaid material witness that application for drawing blood sample of accused on FTA card for conducting DNA profiling was filed on 20.8.2014, but there is no evidence, worth credence, to prove that the blood sample was further sent to FSL for chemical analysis.

23. Though, perusal of FSL report Ex. PX suggests that FSL, Junga had received Ex-10a containing one FTA card bearing a brownish stain and the same was stated to be blood sample of Sanjeev Kumar on FTA card, but it is not understood that how such Ex.10a came to be deposited with SFSL Junga, especially when there is no entry of the same in the record of the police, as is evident from Ex.PW7/A. Otherwise also, entries made in Ex.PW7/A are with regard to case property recovered/collected by the Investigating Agency on or before 17th August, 2014. PW-6 and PW-7 have categorically admitted factum with regard to deposit made by them of the articles/case property, as detailed in Ex.PW7/A on 22.8.2014 to SFSL, Junga without there being any reference to the blood sample of Sanjeev Kumar drawn on FTA card.

24. No doubt, blood sample of accused for DNA profiling was obtained on FTA card by PW-1, Dr. Prem Raj Bhardwaj, but question needs to be examined in the case at hand is “whether blood sample drawn by PW-1 for the purpose of DNA profiling was ever sent to SFSL Junga or the report submitted by SFSL, Junga with regard to DNA profiling is based upon the blood sample drawn by PW-1 of the accused or not”. SFSL in its report has concluded that DNA profile obtained from exhibit-7a (underwear of Neha) matches completely with the DNA profile obtained from exhibit-10a (blood sample on FTA card, Sanjeev Kumar). But having taken note of the fact that at no point of time blood sample of accused on FTA card was received by SFSL, Junga, aforesaid report submitted by SFSL, Junga could not be made sole basis to conclude the guilt of the accused.

25. Mr. Sudhir Bhatnagar, learned Additional Advocate General argued that DNA profile has been not done on the basis of blood sample on FTA card, rather same has been done on the basis of semen and blood collected from vest and underwear of accused and the prosecutrix respectively and as such, no prejudice, if any, can be said to have been caused to the accused on account of non-submission, if any, of blood sample of accused on FTA card to SFSL.

However, this Court is not inclined to accept aforesaid submission of learned Additional Advocate General for the reason that conclusion drawn by FSL in its report Ex. PX clearly reveals that DNA profile obtained from Ex.7a i.e. underwear, Neha was matched with the DNA profile obtained from EX.10a i.e. blood sample of accused Sanjeev Kumar, but once such blood sample on FTA card was never received by SFSL from the police, as is evident from EX.PW7/A, there was no occasion for SFSL to match DNA profile obtained from Exhibit -7a with the blood sample of the accused obtained on FTA card. Though, in conclusion SFSL has concluded that partial DNA profile obtained from exhibit-4b(vest, Sanjeev Kumar) is consistent with the DNA profile obtained from exhibit-6c(blood sample on cotton gauge, Neha), but if such conclusion is analyzed/examined in the light of the observations made in SFSL report before drawing final conclusion, aforesaid conclusion drawn by the SFSL does not appear to be correct. At this stage, it would be apt to take note of observations made by SFSL, Junga, as under:-

“Exhibit-4b(vest, Sanjeev Kumar) and **Exhibit-6b** (blood sample, Neha) yielded highly degraded DNA; however these exhibits showed partial amplification with **powerplex** PCR Amplification Kit”.

26. Learned Court below despite having taken note of the fact that all the material prosecution witnesses including the victim/ prosecutrix have resiled from their statements proceeded to conclude the guilt of the accused merely on the basis of report of SFSL Ex. PX, which otherwise cannot be said to be conclusive on account of the fact that the blood sample of the accused on FTA Card was never received by SFSL. The prosecutrix on oath stated before the Court below that though she was raped during the intervening night of 16th/17th 8,2014, but it was not the accused, however learned Court below taking note of DNA report concluded the guilt of the accused. It is not understood that how court below recorded the finding that underwear of the prosecutrix was tested and the DNA profile obtained from it matched with the blood sample of accused Sanjeev Kumar, taken on FTA card.

27. Moreover, if the report of SFSL is perused in its entirety, it has been categorically reported that DNA profile was carried out from only that exhibit of victim that was tested positive for presence of semen through biological and serological examination by Biology and Serology, Division, SFSL, Junga. Interestingly, in the case at hand, learned Court below while placing reliance upon the provisions of Section 105 of the Evidence

Act has wrongly concluded that it was the accused, who was required to show as to how his semen came to be there in the underwear of the prosecutrix. Careful perusal of provisions contained in Section 105 of the Evidence Act, nowhere suggests that in the facts and circumstances of the case accused was under an obligation to prove that under what circumstances his semen came to be recovered from the underwear of prosecutrix, rather explanation, if any, he owes is to explain how the blood of the prosecutrix came there on his vest. While recording aforesaid finding learned Court below has wrongly interpreted the provisions of Section 105 of the Evidence Act, which otherwise cannot be made applicable in the facts and circumstances of the present case, especially qua the aforesaid aspect of the matter. Though, link evidence, if any, with regard to transfer of blood sample of accused on FTA card by police to FSL Junga is completely missing, but otherwise also, there is no evidence at all that after drawing sample on 20.8.2014 same was preserved by the police for further sending the same to SFSL, Junga. However, it appears that learned court below ignoring aforesaid important aspect of the matter has gone completely astray by concluding that once no suggestion to witness was given that sample was not taken scientifically on FTA card

conclusion drawn by SFSL is sufficient to conclude the guilt of the accused. Since factum with regard to sending of blood sample on FTA card to SFSL, Junga is doubtful or under challenge, there was no occasion at all for defence to suggest to witness that sample was not sufficiently taken on FTA card, especially when factum with regard to drawing of sample by PW-1 stood established on record.

28. Having perused the evidence be it ocular or documentary adduced on record, it is ample clear that none of the material prosecution witnesses, including the victim- prosecutrix supported the case of the prosecution, especially with regard to commission of offence, if any, punishable under Section 4 of the POCSO Act by the accused. Though, learned trial Court after having scanned the entire evidence categorically recorded in para- 45 of the judgment that all the material witnesses have turned hostile, but despite that proceeded to convict the accused on the basis of SFSL report, correctness whereof has become highly doubtful on account of the fact that there is no evidence that sample of accused drawn by PW-1 on FTA card was ever sent to SFSL. Otherwise also, report of SFSL could not be made sole basis for concluding the guilt of the accused, especially when

victim/prosecutrix categorically denied that accused Sanjeev Kumar committed rape upon her.

29. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Ramesh Chandra Agrawal v. Regency Hospital Ltd and others** (2009) 9 SCC 709, wherein it has been held as under:-

11) EXPERT OPINION:

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 expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

- i) that the expert must be within a recognized field of expertise
- ii) that the evidence must be based on reliable principles, and
- iii) that the expert must be qualified in that discipline.

[See Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 ed., Cambridge University Press, p.178]

12) Section 45 of the Indian Evidence Act speaks of expert evidence. It reads as under:

"45. Opinions of experts - When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of hand writing or finger-impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts. Such person called experts. Illustrations

(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is whether A, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinion of experts on the question whether the two documents were written by the same person or by different persons are relevant."

13) The importance of the provision has been explained in the case of *State of H.P. v. Jai Lal and Ors.*, [(1999) 7 SCC 280]. It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

14) It is not the province of the expert to act as Judge or Jury. It is stated in *Titli v. Jones* (AIR 1934 All 237) that the real function of the expert is to put before the court all the

materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

15) An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and Others) [Criminal Appeal Nos. 1191-1194 of 2005 alongwith Civil Appeal No. 1727 of 2007, decided on 7.8.2009].

16) In the case of State of Maharashtra v. Damu s/o Gopinath Shinde and others., [AIR 2000 SC 1691 at page 1700], it has been laid down that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone. In this regard, it has been observed in The State (Delhi Administration) v. Pali Ram, [AIR 1979 SC 14] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him."

30. Stingent provisions of POCSO Act, gravity of sentence and stringency of provisions, call for heightened scrutiny of evidence for establishing foundational facts. Conviction under aforesaid provisions of law cannot be based on conjectures and surmises. Special Acts like NDPS, POSCO and TADA, contain provision of presumption of guilt, however such presumption can be raised when

certain “foundational facts” are established by the prosecution. The statutory presumption would stand activated only if prosecution succeeds in proving foundational facts, even then accused can rebut the presumption and if creates serious doubt about the veracity of the prosecution, prosecution version cannot be treated as gospel truth. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in *Gangadhar alias Ganga Ram versus State of Madhya Pradesh*, (2020) 9 Supreme Court cases 202, wherein it has been held as under:

“10. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of 10 years, absence of any provision for remission do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt after investigation, only where (after which the burden of proof shall shift to the accused. The gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.

14. In view of the nature of evidence available it is not possible to hold that the prosecution had established conscious possession of the house with the appellant so as to attribute the presumption under the NDPS Act against him with regard to recovery of the contraband. Conviction could not be based on a foundation of conjectures and surmises to conclude on a preponderance of probabilities, the guilt of the appellant without establishing the same beyond reasonable doubt.”

31. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in *Noor AGA versus State of Punjab and*

another, (2008) 16 Supreme Court Cases 417, wherein it has been held as under:-

“57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

32. Hon'ble Apex Court in **Babu versus State of Kerala** (2010) 9 Supreme Court Cases 189, wherein it has been held as under:-

“27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The

courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (*Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., (2004) 10 SCC 699, Rajesh Ranjan Yadav v. CBI, AIR (2007) 1 SSC 70, Noor Aga v. State of Punjab & Anr., (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325*).

33. Patent absurdities and inherent infirmities or improbabilities in the prosecution version leads to irresistible inference of false hood in prosecution case. In the case at hand none of the prosecution witnesses including the prosecutrix has supported the case of the prosecution that accused Sanjeev Kumar raped victim/prosecutrix on the date of alleged incident, but still accused came to be convicted on the basis of FSL report, correctness whereof is under serious doubt for the reasons detailed in the earlier part of the judgment. DNA report cannot be considered as a conclusive proof of guilt of accused, but definitely it can be considered as conclusive proof of innocence of accused. Such report can only lend support to other evidence, but definitely cannot be made sole basis to conclude the guilt of the accused. DNA report cannot be sole and conclusive evidence to record conviction and same cannot be accepted in isolation, in the absence of foundational evidence on record.

34. Hon'ble High Court of Gujarat in **Premjibhai Bachubhai Khasiya versus State of Gujarat and another**, 2009 Cr.L.J.2888,, has held as under:-

“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 Indian Penal Code. All important R/CR.A/224/2012 JUDGMENT 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 sections 363, 366 and 376 of the Indian Penal Code. 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.

"In view of clear and emphatic conclusion of the DNA report, the accused must be acquitted."

35. Otherwise also, DNA report is not practically accurate and exact science and as such, report furnished in this regard can

be used to corroborate the other evidence led on record by the prosecution. Report of DNA can be read in the nature of opinion evidence and is only advisory in nature and court below is not bound by evidence of expert because probative value of DNA evidence varies from case to case and depends on the other corroborative foundational evidence on record. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Pattu Rajan versus State of Tamil Nadu**, (2019) 4 Supreme Court Cases 771, wherein it has been under as under:-

“51. 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 *State (UT of Delhi) v. Pali Ram*, (1979) 2 SCC 158; *State of H.P. v. Jai Lal & Ors.*, (1999) 7 SCC 280; *Baso Prasad & Ors. v. State of Bihar*, (2006) 13 SCC 65; *Ramesh Chandra Agrawal v. Regency Hospital Ltd.* (2009) 9 SCC 709; *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors.*, (2010) 2 SCC (Cri) 299).

52. 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”.

36. Consequently, in view of the detailed discussion made hereinabove, this Court has no hesitation to conclude that learned court below has failed to appreciate the evidence available on record in its right perspective, as a consequence of which, accused wrongly came to be convicted under Section 4 of the POCSO Act.

37. Accordingly, the present appeal is allowed and the judgment passed by learned Special Judge, Kangra at Dharamshala, District Kangra, H.P, is quashed and set-aside. The accused is acquitted of the charges so framed against him. His bail bonds are ordered to be discharged and interim order, if any, is vacated. Fine amount, if any, deposited by the accused be refunded to him forthwith. Since the appellant /accused is in judicial custody, he be released forthwith. Registry is directed to issue release warrant forthwith.

38. The appeal is disposed of along with pending applications, if any.

**(Sandeep Sharma),
Judge**

3rd March, 2021
(shankar)