

(2020) 05 KAR CK 0010
In the Karnataka High Court
Case No : Criminal Appeal No. 404 Of 2019

Azhar @ Azharuddin @ Md. Azharuddin	APPELLANT
Vs	
State By Women Police Station	RESPONDENT

Date of Decision : 05-05-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 313, 376, 506
Protection Of Children From Sexual Offences Act, 2012 — Section 6, 17
Code Of Criminal Procedure, 1973 — Section 164

Citation : (2020) 05 KAR CK 0010

Hon'ble Judges : Mohammad Nawaz, J

Bench : Single Bench

Advocate : Vishwajith Rai, K. Nageshwarappa

Final Decision : Allowed

Judgement

Mohammad Nawaz, J

1. This appeal is by accused No.1 challenging his conviction and sentence passed by the Court of II Addl. District and Sessions Judge and Special

Judge, Davanagere in SC No.103/2017, convicting and sentencing him for the offences punishable under Sections 376, 313 and 506 of IPC and

Section 6 of POCSO Act.

2. I have heard the learned counsel Sri. Vishwajith Rai for Sri. Jayaprakash K.N. for the accused-appellant and Sri. K. Nageshwarappa, learned

HCGP for the respondent-State.

3. The brief facts of the prosecution case are as under;

The first informant, Sri. K.Y. Raghavendra Rao is a resident of Vinoba Nagar in Davanagere. He has a daughter and a son. His daughter is a minor.

When she was studying in I PUC, accused No.1 used to follow her and tease her.

He used to roam in front of her house. She had informed the matter to her parents. In spite of advising the accused, he did not stop following her. The matter was brought to the notice of one Leela Kumaraswamy, working in an NGO. However, accused No.1 did not cooperate when she had called him over phone to enquire about the matter. The accused was threatening the victim girl to listen to his words or to face dire consequences.

4. It is the further case of the prosecution that accused No.1 forced the victim girl to fall in love with him and on 08.12.2016, by force and putting threat, he took her to his house. Accused Nos.2 and 3, his mother and sister gave juice to her, drinking which she became unconscious. Thereafter, accused No.1 took her to the bedroom and committed penetrative sexual assault against her will and without her consent. Thereafter, on several occasions, he committed forcible penetrative sexual assault on her in his house. Due to the said act, the victim became pregnant. Accused No.1 in order to cause abortion, administered three tablets to the victim, which caused abortion. Hence, the accused committed the charged offences.

5. Charges were framed against accused Nos.1 to 3 for the offences punishable under Sections 376, 506, 313 read with Section 34 of IPC and under Section 6 of the POCSO Act read with Section 34 of IPC and Section 17 of the POCSO Act.

6. The learned Sessions Judge by judgment and order dated 21.01.2019 passed in SC No.103/2017, convicted appellant-accused No.1 for the offences punishable under Sections 376, 313 and 506 of IPC and Section 6 of POCSO Act and acquitted accused Nos.2 and 3 of the charged offences against them.

7. Assailing the aforesaid judgment and order of conviction and sentence passed by the trial court, the learned counsel appearing for the appellant has vehemently contended that the entire case of the prosecution is false and it is a cooked up story. The learned counsel submits that the version in the first information report, statement of the victim recorded under Section 164 Cr.PC and the evidence given before the Court are not consistent. There are material omissions and contradictions in the evidence of the prosecution witnesses which goes to the root of prosecution case. The medical evidence does not support the version of the prosecutrix. The DNA examination report is negative. The evidence of prosecution witnesses is shrouded

with doubt. There is no convincing material to show that either the accused gave juice laced with sedatives and committed rape on the victim or that the accused administered tablets to the victim which caused abortion. There is no investigation as to from where the accused obtained the tablets or to show that the said tablets caused abortion. It is contended that on the same set of evidence, accused Nos.2 and 3 are acquitted. The date of birth certificate given in proof of age of the victim is a concocted document. The medical evidence with regard to age proof does not support the prosecution case. The prosecution has suppressed the actual age of the victim. Hence, the prosecution has failed to establish that the victim was a minor at the time of incident.

8. The learned counsel for the appellant would also contend that the accused were falsely implicated to cover up the act committed by the first informant-PW1 as he had tried to outrage the modesty of accused No.3, the sister of accused No.1. The learned counsel contends that even before PW1 went to lodge the complaint, accused No.1 was present in the police station which is evident from the material on record, which shows that initially it was accused No.1 who went to the police station to lodge a complaint against PW1. The learned counsel further contends that the case of the prosecution that the accused committed rape by threat and coercion and by making the victim unconscious is totally unacceptable. There is inordinate delay in lodging the complaint and a written complaint was filed making frivolous allegations. It is further submitted that even according to Ex.P18, victim was aged more than 17 years at the time of incident. In the circumstances of the case, two years should be added to her age and in that case, it cannot be said that the victim was a minor at the time of incident.

9. The learned counsel submits that the reasons assigned by the learned Sessions Judge are contrary to the legal proposition and catena of decisions.

Accordingly, seeks to allow the appeal.

10. In support of his contention, the learned counsel for the appellant has relied upon the following citations:

- (i) (2003) 8 SCC 202 â?" State of Karnataka Vs. Mapilla P.P. Soopi.
- (ii) AIR 1973 SC 2773 â?" Kali Ram Vs. State of H.P.
- (iii) 2004 Cri.LJ 226 (Orissa) â?" Sania Jani Vs. State.

(iv) 2001 CrLJ 2123 â?" Bhika Ram Vs. State of Rajasthan.

(v) 1997 CrLJ 954 (Bombay) â?" Peter Fernandes Vs. The State.

(vi) CrL.A.No.1933/2019 dated 19.12.2019 â?" Nagappa Vs. The State of Karnataka.

(vii) CrL.A.No.100162/2015 dated 22.03.2017 â?" Shri. Dadakhalandar Vs. State of Karnataka.

11. Per contra, the learned High Court Government pleader while supporting the impugned judgment and order passed by the trial court has

vehemently contended that there are no grounds to interfere with the conviction and sentence passed by the trial court. He contends that Ex.P18 is the

birth certificate issued by PW23 â?" Chief Officer, Hanagal Town Municipal Council. The said document proves that the victim was a minor at the

time of incident. The victim who is examined as PW2 has categorically supported the prosecution case. Her evidence shows that by threat and

coercion, accused committed rape on her. Her evidence is corroborated by other ocular and medical evidence. The medical evidence clearly suggests

that there was abortion. The evidence of the victim alone is sufficient to bring home the guilt of the accused. Her evidence inspires confidence. There

is no absolute rule that two years have to be added to the age of the prosecutrix. In the present case, the date of birth certificate issued by PW23 is an

authentic document in proof of age of the victim girl, which cannot be doubted. Hence, the prosecution has established the guilt of the accused beyond

all doubts. Accordingly, the learned HCGP seeks to dismiss the appeal.

12. The learned HCGP has placed reliance on the decision of the Honâ??ble Apex Court in â?"S?tate of U.P. vs. Chottey Lal reported in (2011) 2

SCC 550.

13. Having given anxious consideration to the rival submission and also having perused the entire evidence and material on record including the

impugned judgment passed by the trial court, the following points arise for consideration:

(i) Whether the prosecution has established the charges leveled against the appellant-accused No.1 beyond all reasonable doubts?

(ii) Whether the impugned judgment and order of conviction and sentence passed by the trial court is liable to be interfered with ?

(iii) What order?

14. The charges were framed against accused Nos.1 to 3 for the offences punishable under Sections 376, 506, 313 read with Section 34 of IPC and under Section 6 of the POCSO Act read with Section 34 of IPC and Section 17 of the POCSO Act, 2012.

15. To establish the guilt of the accused, the prosecution has in all examined PWs.1 to PWs.26 and got marked documents 1 to 25 and M.Os. 1 to 7.

16. PW1 is the first informant and he is the father of the victim. He has lodged complaint as per Ex.P1. PW2 is the victim girl. PW3 is the mother of

the victim. PW4 is a woman police constable who has handed over the blood samples of the victim and the accused to the RFSL, Davanagere. PW5

and PW6 are the panch witnesses to the spot mahazar â?" Ex.P3. PW7 and PW8 are the neighbours of the accused. They are circumstantial

witnesses who have seen the victim girl along with the accused. PW9 is the Woman ASI. She has produced the victim girl before the Magistrate for

recording her statement under Section 164 Cr.P.C. PW10 is the brother of PW3. PW11 is the WPC, who has taken the victim girl for medical

examination at CG Hospital, Davanagere. PW12, Head Constable has transmitted the FIR â?" Ex.P9, to the jurisdictional Magistrate. PW13 and

PW14 are known to PW1. PW15 is a Police Constable who has taken the accused for medical examination at CG Hospital, Davanagere. PW16 is a

neighbour and friend of PW1. PW17 is the doctor at CG Hospital, Davanagere, who collected the blood samples from the victim and accused for the

purpose of sending it for DNA examination. PW18 is the doctor at CG Hospital, Davanagere, who examined the accused and after receiving the FSL

report, has given a report as per Ex.P11. PW19 is the doctor, who after examining the curettage specimen of the victim girl, has given a report as per

Ex.P12. PW20 is the doctor at CG Hospital, Davanagere, who after medical examination of the victim girl, issued final reports as per Exs.P13 and

P14. PW21 is the doctor at CG Hospital, Davanagere, who has examined the blood samples of the victim and the accused and given reports as per

Exs.P15 and P16. PW22 is the Asst. Engineer, who has prepared the sketch as per Ex.P17. PW23 is the Chief Officer, Hanagal TMC, who issued

Ex.P18 â?" the birth certificate of the victim girl. PW24 was working in RFSL, Davanagere. He has given his opinion with regard to Ex.P21 issued by

the Scientific Officer. PW25 is the Investigating Officer who has filed the charge sheet. PW26, In-charge Asst. Director of DNA Sector, Bangalore,

has issued a report, as per Ex.P25.

17. The case of the prosecution against accused Nos.2 and 3 is that, on 08.12.2016, at about 12.00 noon, they along with accused no.1 in furtherance of their common intention, forcibly gave juice to the victim and made her intoxicated. Thereafter accused No.1 committed rape on her against her will and without her consent. Thus accused No.2 and 3 abetted accused no.1 to commit the offence.

18. In so far as allegations against accused Nos.2 and 3 are concerned, the learned Sessions Judge has held that the evidence against them is not sufficient to prove their guilt and acquitted them holding that their guilt has not been proved beyond all reasonable doubts for any of the charges leveled against them. The said finding recorded by the learned Sessions Judge has become final.

19. It is the specific case of the prosecution that accused No.1 used to follow and tease the victim girl. He forced her to fall in love with him. On

08.12.2016, at about 12.00 noon, by force and putting threat, he took her to his house. She was forced to drink juice and when she lost her

consciousness, he took her to the bedroom and committed aggravated penetrative sexual assault against her will. Thereafter, on several occasions, he

committed aggravated penetrative sexual assault on her in his house by threatening her and made her pregnant. When the victim brought this to his

notice, he administered three tablets to her, which caused abortion. He threatened the victim not to disclose the incident to others.

20. The first incident of rape is said to have occurred on 08.12.2016 in the house of accused No.1. Thereafter, on several occasions, accused No.1 is

said to have committed rape on the victim girl. Ex.P1 is the written complaint lodged by PW1 on 10.04.2017. It is stated in Ex.P1 that when the victim

girl informed accused No.1 that she has stopped menstruating, accused gave three tablets to her, consuming which, there was bleeding. In the first

information report, any of the accused giving juice to the victim girl or accused No.1 committing rape while she was in an inebriated condition is not

stated. On the other hand, it is stated that when no one was present in the house of accused No.1, he took the victim to his house and committed rape.

In the statement of PW2 recorded under Section 164 Cr.P.C., on 13.04.2017, PW2 has stated that on 08.12.2016 at about 12.00 noon, accused No.1

forcibly took her to his house. His mother and sister namely accused Nos.2 and 3 gave juice to her, drinking which, she felt giddiness and thereafter, accused No.1 committed rape on her. Then he threatened her with dire consequences. Thereafter, on two to three occasions, he took her to his house by threatening her and committed sexual intercourse. She has further stated that she developed some pain in her stomach and since there was no regular menstruation, she informed the matter to the accused on 06.04.2017. The accused gave three tablets without any cover and forcibly administered those tablets to her. On the same day, when she returned home, there was severe bleeding which came to the knowledge of her parents. On their enquiry, she revealed the entire incident to them.

21. According to the first informant who is examined as PW1, accused No.1 was pestering his minor daughter to fall in love with him and he used to follow her to the college and trouble her. Hence, he informed the matter to one Leela Kumarasway, working in an NGO. When the said person called the accused to enquire, accused did not cooperate. The accused was threatening his daughter with dire consequences. PW1 has deposed that, accused No.1 took his daughter to his house. At that time, his parents were present. After drinking juice, his daughter became unconscious. Thereafter, accused no.1 committed rape on her. Thereafter, he committed rape on her on two to three occasions. When his daughter did not menstruate, she informed the matter to the accused. At that time, the accused forcibly administered three tablets to her, on account of which, there was bleeding and abortion. Coming to know about the same, when his wife, PW3 enquired his daughter, she narrated the incident to her.

22. PW2 in her evidence has stated that accused used to follow her and tease her and he was forcing her to love him. She has stated that on 08.12.2016 at about 12.30 p.m., accused forcibly took her to his house. His sister and mother gave her juice to drink and she lost her consciousness. Thereafter, accused took her to his bedroom and committed rape on her. When she regained her consciousness and questioned him, he threatened her with dire consequences. PW2 has stated that thereafter on two-three occasions, accused No.1 took her to his house and committed sexual intercourse with her. After three months, she developed pain in her stomach and since there was no regular menstruation, she informed the matter to the accused.

Then, he administered three tablets to her and told her that everything will be alright and threatened her not to disclose the incident to anyone. Same day there was bleeding and she informed the matter to her parents. Then her parents went to the police station and lodged the complaint. PW3 â?" the mother of PW2, has corroborated the version of PW1 and PW2. PW10 is the brother of PW3. PW13, PW14 and PW16 are known to PW1. They are hearsay witnesses. They have supported the version of PW1.

23. It is relevant to see that in the first information report, it is not stated that accused by giving juice to the victim girl made her unconscious and thereafter committed rape on her. The said theory is introduced for the first time by PW2 in her statement recorded under Section 164 Cr.PC, which was recorded on 13.04.2017. If in fact she was raped on 08.12.2016 by making her unconscious, then in the written complaint lodged on 10.04.2017, the same would have been mentioned. PW2 has admitted in her cross-examination that she has not informed the police about the accused giving the juice, the colour of the juice and its flavour etc., It is stated in the first information report that when no one was present in the house, accused No.1 by inducing and threatening the victim girl, took her to his house and committed rape. Therefore, the evidence of the prosecution witnesses that the accused gave juice to the victim girl, drinking which she became unconscious and accused No.1 committed rape on her when she was in an inebriated condition, does not inspire confidence.

24. It is the specific case of the prosecution that even after 08.12.2016, accused No.1 on two-three occasions, committed sexual intercourse with the victim girl and since he had threatened her, she did not disclose the incident to her parents. PW2 has deposed that accused No.1 had threatened saying that he will kill her and also commit the murder of her brother. She has deposed that by threatening, he took her to his house on two-three occasions and committed rape. Though PW2 has stated that on 08.12.2016 accused No.1 committed rape on her while she was unconscious, in the cross-examination, she has stated that she had shouted and screamed when he committed rape but no one came to her rescue. She has admitted that when she came out of the house in the first instance, she did not scream and did not inform the matter to anyone. Even after accused took her to his house on two three occasions, she did not inform the matter to her parents. She

has stated that when accused No.1 took her to his house she was opposing till she reached the house. In this regard, it is relevant to examine the evidence of the neighbours of accused No.1 namely PW7 and PW8.

25. PW7 has deposed in his evidence that he has seen accused No.1 coming to his house along with a girl. He has stated that he has informed the police that the said girl was frequently coming there. He came to know about the name of the said girl. Even the evidence of PW8 goes to show that

he has seen on four or five occasions, accused No.1 going to his house along with the victim girl. Their cross-examination reveals that, there are

several houses near the house of accused No.1 and even if there is a slight commotion, the neighbours would come to know and they will gather

there. Their evidence does not indicate that there was any kind of resistance by the victim. On the other hand, the victim had accompanied accused

No.1 to his house on several occasions without any resistance. If accused No.1 had really threatened the victim girl with dire consequences telling her

that he will kill her and her brother if she did not cooperate and if the accused had committed rape on her by putting threat, then certainly she would

have informed the matter to her parents or her friends. On the other hand, she has admitted in her cross-examination that she did not inform the

matter to anyone on the way back to her house and also did not inform the matter to her parents. Even in the first information report, it is not stated

that accused threatened the victim saying that he would kill her brother if she did not cooperate. The fact remains that as per prosecution, it is not only

on 08.12.2016 that the accused committed forcible sexual intercourse with PW2, but even thereafter, on two-three occasions, he has committed rape

on her. However, the matter was informed to the parents by PW2 on enquiry by her mother when she complained about stomach pain. The evidence

of PW7 and PW8 indicate that the victim had accompanied accused No.1 to his house and they have seen them together going to the house of

accused No.1 on four-five occasions. Hence, on a careful examination of the evidence of the prosecution witnesses, it is difficult to accept that the

accused by making PW2 unconscious committed rape on 08.12.2016 and thereafter on two-three occasions he committed rape by threatening her.

26. It is the case of the prosecution that accused No.1 forcibly administered three tablets to the victim girl on account of which there was profused

bleeding and incomplete abortion. In the first information report, it is stated that the accused gave three tablets to the victim girl and asked her to

swallow those tablets consuming which there was bleeding. In the evidence, PW1 has stated that accused No.1 forcibly administered three tablets to

his daughter, on account of which, there was abortion. In the statement recorded under Section 164 Cr.P.C., PW2 has stated that accused No.1 gave

three tablets and forcibly made her to swallow it. In her chief-examination, PW2 has stated that accused No.1 administered the tablets to her.

However, in the cross-examination of PW2, it is elicited from her that about four " five days prior to lodging of the complaint, she informed accused

No.1 that she has not menstruated. On the next day, accused No.1 gave the tablets and she consumed the tablets in her house about four days prior to

lodging of the complaint. Next day, there was bleeding. This admission by PW2 goes to show that accused No.1 did not forcibly administer the tablets

to her. On the other hand, he gave the tablets to PW2 and she consumed it in her house about four days prior to lodging of the complaint. On the next

day of consuming the tablets, there was bleeding.

27. PW2 has categorically stated in her evidence that immediately when she started bleeding, she informed the matter to her parents on enquiry by her

mother and on the very same day, she along with her parents went to the police station and a complaint was lodged. However, the tenure of her

cross-examination clearly go to show that about three days after she started bleeding, complaint was lodged. According to PW3, they came to know

about the incident on 10.04.2017. PW3 has stated that about four-five days prior to 10.04.2017, her daughter was complaining about stomach pain and

her daughter was bleeding. On enquiry, her daughter disclosed about the incident. Immediately, she informed the matter to her husband and they went

to the police station and lodged a complaint.

28. The learned counsel for the appellant has drawn the attention of this court to the evidence of PW20, the Senior Medical Officer of CG Hospital,

Davanagere. In her evidence, PW20 has stated that the victim informed about the history of the incident. According to the history furnished, mother of

the victim after doing a UTP test which came positive, went to a Gynecologist. It is vehemently contended by the learned counsel that the said fact

has been suppressed by PWs.1 to 3. It is contended that when victim did not

menstruate, a UTP test was done and since the test was positive, PW2 was taken to a Gynecologist and there are chances that they tried to remove the fetus and therefore there was abortion and bleeding.

29. PWs.1 to 3 have not at all stated about the UTP test conducted by PW3 and the victim-PW2 having been taken to a Gynecologist prior to lodging

of the complaint. PW20 in her evidence has stated about the history given by the victim girl. According to her, victim has stated that the accused gave

juice to her two-three times and then she did not know what has happened. On 07.04.2017, her mother did a UTP test and she was taken to the

Gynecologist. As per the history given by PW2, on 08.04.2017, accused gave three tablets and on 09.04.2017 she had bleeding and there was blood

clumps found in the bathroom.

30. In the cross-examination, PW20 has stated that after the UTP test done by the victim's mother, victim was taken to a Gynecologist. She has

stated that on 10.04.2017 when she examined PW2, there was bleeding. PW20 has stated that even if the tablets are consumed on the advice of a

doctor, there could be abortion. Even when pregnancy is terminated medically, there could be abortion and bleeding.

31. The evidence given by PW20 is not denied by the prosecution witnesses. What was the test conducted by the said Gynecologist or the advice

given by her is not forthcoming. Suppression of PW3 taking the victim girl to the Gynecologist after conducting a UTP test gives room to doubt as to

whether the abortion took place on account of consuming the tablets administered by accused No.1 or as to whether it was at the intervention of the

Gynecologist before whom PW2 was taken by her mother prior to lodging of the complaint. Further, According to the prosecution, accused No.1 gave

three tablets to the victim girl, consuming which she started bleeding and there was abortion. There is absolutely no investigation as to from where the

accused obtained those tablets and also the name of the tablets. Hence, in the background of the history furnished to PW20, unless there is convincing

material to show as to what are the tablets given by accused No.1, merely on the oral evidence of the prosecution witnesses, it cannot be held that

either the accused gave tablets to the victim or that by consuming the tablets administered by him, there was abortion.

32. Another aspect is that the blood sample of the victim girl was sent for

toxicology examination. The report issued by RFSL Davanagere marked as

Ex.P21 goes to show that â??residues of barbiturates, benzodiazepine group of drugs, alkaloids and antiprogestogenic steroid were not detected. PW24

has specifically stated that the same are not detectedâ??. However, strangely PW20 has stated that the same were detected as per the report issued

by the toxicology department. Hence, PW20 was of the opinion that the same could be the result if a person is administered tablets and I.V. sedation.

When PW24 has categorically stated that such drugs are not detected, then the evidence of PW20 and her opinion stating that they are detected

which could be the result of some tablets and I.V. sedation is misleading and totally unacceptable.

33. PW20 has stated that bleeding and stomach pain are the symptoms of incomplete termination of pregnancy. She has stated that according to the

scanning report, there was retained product of conception. After examination of the victim girl, she has opined that the hymen was ruptured. There

was no external injuries on her body. Samples taken from the victim were sent to pathology department. PW19 has stated that she has received

curettage specimen sent from the CG Hospital and on microscopic examination, she has detected chorionic villi and gave a report as per Ex.P12 that it

is a product of conception, which is due to incomplete abortion. PW20 has stated that she has received a DNA report stating human origina and

female sex. She has given her final opinion stating that â??Primigravida with fifteen weeks (3Â½ months) of amenorrhea with history of intake of

MTPK with incomplete abortion, confirmed as product of conceptus in histo-pathology report and human origin and female sex in DNA report

RFSLâ??. The reports are marked as Ex.P13 and Ex.P14.

34. PW26 has stated that on examination of the three articles received by him and after conducting DNA examination, it was found that the DNA

profile result of the victim and curette specimen were identical and matching with each other indicating that the contributor of blood clots found in item

No.3 was the victim.

35. From the medical evidence on record, the prosecution has been able to establish that the victim conceived and thereafter there was an incomplete

abortion. The contention of the learned counsel for the appellant is that the paternal relationship of the curettage specimen has not been established

and therefore it is contended that the prosecution has not proved beyond all reasonable doubt that the accused No.1 is the culprit. However, PW2 the victim girl has categorically stated that it is accused No.1 who has committed sexual intercourse on 08.12.2016 and two-three times thereafter. That part of the evidence given by PW2 is consistent.

36. The defence taken by the accused was that a year prior to lodging of the complaint, accused No.2 was working as a maid servant in the house of PW1 and some times, accused No.3 i.e., the sister of accused No.1 was also working as a maid servant whenever accused No.2 was on leave. On 09.04.2017, when accused No.3 had been to the house of PW1, he attempted to sexually abuse her. Accused No.3 informed the matter to her mother and brother. Hence, to lodge a complaint, accused No.1 went to the police station. To cover up his misdeeds, PW1 by making false allegations lodged a frivolous complaint against accused Nos.1 to 3.

37. The learned counsel for the appellant by drawing the attention of this court to the evidence of PW1 has contended that when PW1 and others went to the police station to lodge the complaint, accused No.1 was already present there and therefore, it was accused No.1 who went to the police station in the first instance to lodge a complaint against PW1. However, his complaint was not received by the police, but a false case was registered on the complaint lodged by PW1.

38. PW1 in the cross-examination has stated that when they went to lodge the complaint, accused No.1 was present in the police station. PW3 also in her cross-examination has stated that the accused No.1 was present in the police station when they went to lodge the complaint. PW1 has clarified by saying that after he informed the police about the injustice caused to his daughter, the police secured accused No.1 to the police station. However, the said admission given by the witnesses does not establish that accused No.1 went to the police station to lodge a complaint against PW1 and that PW1 tried to commit sexual assault against the sister of accused No.1. The witnesses have categorically denied the said suggestion. The defence has failed to show that either accused No.2 or 3 were working as maid servants in the house of PW1 or that a day prior to lodging of the complaint, PW1 tried to commit sexual assault on accused No.3. Hence, the defence taken by the accused cannot be accepted as there is not even an iota of evidence in

that regard.

39. The learned counsel for the appellant has placed reliance on a decision in the case of *State of Karnataka vs. Mapilla P.P. Soopi* (supra),

wherein the Hon^{ble} Apex Court in the facts and circumstances of the said case has held that there was no any forceful assault and acquitted the

accused in view of undue delay in lodging the complaint.

40. The learned counsel has relied on a decision in the case of *Sania Jani vs. State* (supra), to contend that there is no convincing evidence to show

that PW2 offered any resistance and there is no mention of injury found either on her private part or anywhere on her body and therefore the accused

is entitled to the benefit of doubt.

41. Relying on a decision reported in the case of *Bhika Ram vs. State of Rajasthan*, (supra), the learned counsel contends that inordinate delay in

lodging the complaint is fatal to the prosecution case.

42. Relying on a decision reported in *Khali Ram vs. State of H.P.* (supra) the learned counsel contends that in a criminal trial, it is for the

prosecution to prove the different ingredients of the offence and unless it discharges that onus, it cannot succeed. He contends that if two views are

possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to

the accused should be adopted. Relying on the said decision, he submits that the guilt of the accused has to be adjudged not by the fact that a vast

number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record.

43. The learned counsel for the appellant, relying on a decision in the case of *Peter Fernandes vs. State* (supra) has contended that paternity

test is inconclusive and there are inconsistencies in the evidence of the prosecutrix. Hence, conviction of the accused cannot be based on such

evidence.

44. The learned counsel has also relied upon a decision of this Court in *Nagappa vs. State* (supra). However, the said decision is not

applicable to the facts of the present case, as in the said case, the prosecutrix and the parents have turned hostile and this court was of the view that

in such circumstances, only because the DNA test has given a positive result, it is unsafe to convict the accused.

45. In "Shri Dadakhalandar vs. State" (supra), this court has observed that it is the fundamental basic principles of criminal jurisprudence that

the prosecution has to prove the case beyond reasonable doubt. If any reasonable doubt occurs to the mind of the court that if that doubt is sufficient

to totally uproot the case of prosecution or suspicion occurred, if it is not satisfactorily explained by the prosecution, under all those circumstances, the

benefit of such doubt should be extended in favour of the accused.

46. There is no dispute with regard to the proposition of law laid down in the decisions relied upon by the learned counsel for the appellant. The nature

of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. In

the present case, even though the prosecution has failed to establish that PW2 suffered incomplete abortion due to the consumption of tablets

administered by accused No.1, the totality of the circumstances appearing on the record and on a careful perusal of the entire evidence and in

particular, the evidence of prosecutrix namely PW2, it can be safely gathered that accused No.1 has committed penetrative sexual assault against

PW2. However, on a close scrutiny of the entire material on record, this court is of the view that the prosecution has failed to establish beyond all

reasonable doubt that sexual act committed by accused No.1 against PW2 was either by inducement or by putting threat on her life or on the life of

her brother. The evidence on record clearly suggests that PW2 herself accompanied accused No.1 to his house when no one was present in the house

on 08.12.2016 and thereafter on several occasions, she accompanied accused No.1 to his house. There was ample opportunity for PW2 either to

resist the act of accused No.1 or to inform the matter to others including her parents. However, only on an enquiry by her mother, when PW2

developed stomach pain and her menstrual cycle was stopped, she informed the matter to her parents and complaint came to be lodged on 10.04.2017.

From the material on record, it cannot be said that consent was given under fear of injury or under a misconception of fact. The conduct of the

prosecutrix goes to show that she was a consenting party and there was consent on her part in the act committed by accused No.1.

47. PW3 "the mother of the victim girl, has admitted in her cross-examination that accused no.1 was known to them from his childhood and for that

reason, accused No.1 and her daughter were talking to each other. Though the prosecution has alleged that accused No.1 was following and teasing the victim girl and he was troubling her, there is no convincing evidence to hold that either accused No.1 was giving trouble to PW2 or that he was threatening her and forcing her to love him. As noted above, if there was any threat to the life of PW2 or to her brother, then, certainly, this could have been informed to the police. In the complaint, it was stated that since the accused was following and teasing the victim girl, the matter was brought to the notice of one Leela Kumaraswamy working in an NGO. The best evidence, prosecution could have placed in this regard is the evidence of the said independent witness. However, the said witness is neither named in the charge sheet nor has been examined before the Court.

48. It is the specific case of the prosecution that the victim was a minor at the time of incident. If that is so, consent if any on the part of the victim girl is not a consent in the eye of law. However, the onus is on the prosecution to convincingly establish that the victim was a minor at the time of alleged incident.

49. To establish that the prosecutrix was a minor, the prosecution has produced and marked Ex.P18, the birth certificate. PW23 is the Chief Officer, Hanagal TMC, who has issued Ex.P18. According to the said document, the date of birth of the victim girl is 17.09.1999, which means that at the time of incident, PW2 was aged about 17 years 3 months and therefore she was a minor. The defence has seriously disputed the said document issued by PW23. It is contended that the parents of PW2 are the residents of Davanagere and they never resided at Hanagal which is in Haveri District and therefore, the birth certificate issued by the Hanagal TMC is a concocted document. The learned counsel has drawn the attention of this court to the admission given by PW3 â?" the mother of the victim girl. In her evidence, PW3 has deposed that they are residing in Davanagere for the past twenty years. She has stated that her daughter was born in the hospital and she has handed over the hospital records to the police. In Ex.P18, the place of birth of the victim girl is shown as Community Health Centre, Hanagal. If according to PW3, she has handed over the hospital records to the police, then nothing prevented them to produce and mark the same. The evidence of PW3 was recorded on 20.01.2018. When there is a specific admission

given by PW3 that they are residing in Davanagere for the past twenty years and when it is nowhere stated that victim girl was born in Hanagal, then

a doubt arises in the authenticity of Ex.P18 issued by PW23. None of the witnesses have stated that PW1 and PW3 at any point of time were residing

in Hanagal and the birth of PW2 took place at Hanagal. PW23 has stated that according to the register, the name of the victim was recorded in the

year 1999. The place of birth is shown as per the Hospital records. However, he has stated that he has not brought the said register before the Court.

The Investigating Officer â?" PW25 has stated that on 25.05.2017, he gave a requisition to the Chief Officer of Hanagal TMC and obtained Ex.P18.

Perusal of Ex.P18 shows that date of its issue is on 06.05.2017. PW23 has stated that he does not remember as to whether he issued Ex.P18 at the

request of the police or the first informant. According to PW3 date of birth certificate was given to the police by them. Considering all these aspects, a

doubt arises with regard to Ex.P18 and the actual date of birth of the victim girl.

50. The learned Sessions Judge has observed that for non production of the original register, the entire evidence of PW23 and the document/Ex.P18

cannot be brushed aside. Document like Ex.P18 â?" Birth Certificate is the first and foremost document to prove the date of birth. The learned

Sessions Judge therefore relied on Ex.P18 and held that the victim was a minor. In this regard, it is very relevant to examine the evidence of PW20,

the Senior Medical Officer working at CG Hospital, Davanagere. In her evidence, she has stated that as per the x-ray report, the age of the victim girl

was estimated to be above 18 years and below 21 years and as per dental examination, her age was between 18 and 19 years. Strangely, those

reports are not placed on record. On the other hand, they are suppressed by the prosecution.

51. The learned counsel for the appellant would contend that in the facts and circumstances of the case, considering the nature of evidence on record,

two years have to be added to the age of the prosecutrix and therefore at the time of the incident in question, the prosecutrix was a major and not a

minor as alleged by the prosecution.

52. The learned HCGP has relied upon the decision of the Honâ??ble Apex Court in the case of â??Chhotey Lalâ?? (supra) to contend that there is

no such rule much less an absolute one that two years have to be added to the

age of prosecutrix. He contends that rape is a heinous crime and once if it is established, then, a suitable punishment should be awarded to the crime doer and therefore seeks to reject the contention of the learned counsel for the appellant.

53. In the aforesaid decision relied upon by the learned HCGP, the Honâ??ble Supreme Court has held that there is no such rule, much less an absolute one that two years have to be added to age determined by a doctor. In the said case, the doctor on basis of her x-ray as well as her physical examination, opined that prosecutrix was of 17 years. The High Court was of the opinion that age of prosecutrix could be even 19 years, done by adding two years to age opined by doctor. The Apex Court therefore held that the High Court erred in observing as aforesaid.

54. In the instant case, PW20 â?? Senior Medical Officer, CG Hospital, Davanagere, herself has stated that as per the x-ray report, the prosecutrix was aged above 18 years and below 21 years and as per dental examination, she was between 18 and 19 years. PW20 has admitted in her cross-examination that the x-ray report and the dental examination report have been brought by the police to take the opinion. The prosecution has not produced the said documents, on the other hand has suppressed the same. When the evidence of PW20 has not been controverted or disputed by the prosecution, then, as per the medical examination reports, the prosecutrix cannot be said to be a minor at the time of the incident. In the background of the doubt raised with regard to the genuineness of Ex.P18, the evidence given by PW20 regarding the estimation of age of the prosecutrix assumes importance. Therefore, the prosecution has failed to establish beyond doubt that the prosecutrix was a minor at the time of incident. The prosecution has also failed to establish that accused No.1 committed sexual intercourse against the victim without her consent by inducing or putting threat to her and that the prosecutrix suffered incomplete abortion due to consumption of tablets administered by the accused.

55. For the foregoing reasons, I am of the considered view that the trial court was not proper in convicting accused No.1 for the charged offences against him. The reasons assigned by the learned Sessions Judge are not in consonance with the evidence and material on record and without properly appreciating the admissions given by the prosecution witnesses, which goes to

the root of the prosecution case. The impugned judgment and order of conviction and sentence passed against accused No.1 is therefore liable to be set aside. The points raised are answered accordingly. Hence, I pass the following :

ORDER

The appeal is allowed. The impugned judgment and order of conviction and sentence dated 21.01.2019 passed by the II Addl. District and Sessions

Judge and Special Judge, Davanagere in SC No.103/2017, against appellant/accused No.1 for the offences punishable under Sections 376, 313 and

506 of IPC and Section 6 of POCSO Act, 2012 is hereby set aside.

Appellant-accused No.1 is acquitted of the aforesaid offences. He shall be set at liberty forthwith, if not required in any other case.

Fine amount if any is deposited by the appellant, the same shall be refunded to him.

Registry is directed to communicate the operative portion of the order to the concerned jail authorities.