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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Date of Decision: 23.03.2018**

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% **CRL.A. 1184/2017**

STATE OF NCT OF DELHI ..... Appellant

Through: Ms. Aashaa Tiwari, APP for the State.

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versus

DHARMENDER ..... Respondent

Through: Mr. Ashok Kumar Sherawat and Mr. Shashidhar Mishra, Advocates along with respondent in person

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CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P. S. TEJI

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VIPIN SANGHI, J. (ORAL)

1. The State has preferred the present appeal upon grant of leave to assail the judgment dated 24.03.2017 rendered by the learned Additional Sessions Judge-01-cum-Presiding Officer [Special Court designated under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act)], District South-East, New Delhi in Case No.1806/16, Sessions Case No.194/2013 arising out of FIR No.351/2013 registered at Police Station – Kalkaji under Sections 377 IPC and Sections 3 & 6 of the POCSO Act.

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2. By the impugned judgment, the Trial Court has acquitted the respondent accused on the premise that the accused has cast a doubt on the

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case of the prosecution and raised a possibility of false implication. The Trial Court held that there was a possibility of the deposition of the victim being tutored.

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3. The case of the prosecution was that on 15.08.2013, SI Mitha Lal received DD No. 6PP and reached Ram Dutt Dharmshala, Kalkaji Mandir, New Delhi. There he met the complainant with his son aged 10 years – the victim, and the complainant produced the accused Dharmender. The complainant stated that the accused had committed wrong act with his son in the night by taking him in a park. The victim was taken to the hospital for his medical examination, and thereafter, his statement was recorded in the hospital. The victim stated that he studies in 5th class. He with his mother had gone to attend a jagran on the same night. His mother came back to her residence, leaving the victim at the jagran. At about 2.30 AM, the accused Dharmender – who was also in the jagran and who is the son of his bade papa (son of the elder brother of the complainant), gave him a cold drink and took him in the park in front of Kalkaji Mandir. There the accused started removing the pant of the victim. When the victim objected, the accused slapped him and removed his pant as well, and then inserted his private part forcibly in the back of the victim. The accused threatened the victim that if he disclosed anything to anyone, he would be killed. The victim came home and told the incident to his parents.

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4. On the statement of the victim, the case was registered and investigated. The accused was also got medically examined. Samples were collected by the doctor during the examination of accused and the victim, which were seized. The accused was arrested and produced before the

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Court. The statement of the victim was also got recorded before the learned Magistrate under Section 164 Cr.P.C. Upon completion of investigation, the charge sheet for the offences punishable under Section 377 IPC and Sections 3 & 6 of the POCSO Act was filed before the Special Designated Court under the POCSO Act. The Special Court framed charge against the accused under Section 6 of the POCSO Act to which the accused pleaded not guilty and claimed trial.

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5. To prove the charge, the prosecution examined 13 witnesses in all, including PW-1 Dr. Sireesh – the doctor who examined the victim; PW-3 Dr. Karthik Krishna – the doctor who examined the accused; PW-9 the father of the victim, PW-10 the mother of the victim and PW-11 the victim. The statement of the accused was recorded under Section 313 Cr.P.C. and the evidence brought on record by the prosecution to prove the charge was put to the accused.

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6. The accused denied all the evidences put to him while recording his statement under Section 313 Cr.P.C. The accused opted to lead his evidence in defence and he produced his mother as DW-1. The Trial Court, as aforesaid, has acquitted the respondent accused, and thus, the present appeal.

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7. We are mindful of the principles applicable to examination of a judgment of acquittal in appeal. In ***Sheo Swarup & Ors. v. The King-Emperor***, AIR 1934 PC 227 (2), the Privy Council laid down the following principles that the High Court should follow while examining the judgment of acquittal:

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"... ... ... the High Court should and will always give proper weight and consideration to such matters as (1.) the views of the trial judge as to the credibility of the witnesses; (2.) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3.) the right of the accused to the benefit of any doubt; and (4.) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice.

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8. The Supreme Court has ever since applied the said principles and elaborated further on the same from time to time. In ***Ghurey Lal v. State of U.P.***, (2008) 10 SCC 450, after analyzing the earlier decisions, the Supreme Court in para 70 crystallised the principles that the High Court should follow if it is going to overrule, or otherwise disturb the Trial Court's acquittal. Para 70 of the said judgment reads:

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"70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

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1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

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A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

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(i) The trial court's conclusion with regard to the facts is palpably wrong;

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(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

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(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

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(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

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(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused."

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9. In the aforesaid light, we proceed to examine the issue whether the impugned judgment calls for interference by us in the present appeal.

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Submission of parties

10. The submission of Ms. Tiwari, learned APP is that the impugned judgment borders on perversity. The learned ASJ has grossly erred in determination of all the relevant issues in the case. She submits that the manner in which the learned ASJ has returned the finding that it could not be established/ proved that the age of the victim was below 12 years is laconic as the learned ASJ has ignored the evidence brought on record as well as the law applicable to determination of the said issue. She submits

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that the learned ASJ has been casual and cavalier in his approach inasmuch, as, he did not even invoke the judicial powers vested in him and did not fulfill the statutory obligation cast on him for determination of the age of the victim. In this regard, she has drawn the attention of the Court to the statutory provisions contained in the POCSO Act as well as the Evidence Act and the Cr PC.

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11. Ms. Tiwari has further submitted that while observing that the statement of the child witness requires corroboration before it could be relied upon on the ground that a child witness is susceptible to tutoring and his evidence should be evaluated more carefully with greater circumspection, the learned ASJ has failed to notice the ample corroboration of the statement of the victim found on record in the form of the statements of the parents as well as the medical evidence brought on record. The MLC of the victim has been completely overlooked as also the testimony of the examining doctor PW-1.

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12. The demeanor of PW-11, the victim at different points of time when his statements were recorded has also been completely overlooked and brushed aside by the learned ASJ while evaluating the statement. There is no basis for the learned ASJ to discredit the statement of the victim PW-11.

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13. Ms. Tiwari submits that minor abrasions in the statements of the witnesses are bound to occur. However, the learned ASJ has failed to appreciate that the crux of the case of the prosecution remained undented and, particularly, PW-11 the victim could not be shaken in his cross-examination. Ms. Tiwari has taken the Court through the statements of all

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the relevant witnesses and the MLC of the victim. He has also referred to the statement of the victim under Section 164 Cr PC and the evidence led in by the principal of the school where the victim had studied i.e. PW-2.

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14. On the other hand, learned counsel for the respondent submits that the respondent/ accused had been falsely implicated in the case on account of family dispute between the family of the child's parents and his own family.

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He submits that upon medical examination of the accused, no injury was found on his private part which would not be possible if he had penetrated the child's anus as alleged. He further submits that even though the child victim claimed that he had blood from his anus, no blood stains were found

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on his clothes and even the DNA of the semen collected from the victim did not match the DNA of the accused. Learned counsel places reliance on a judgment of a Division Bench of this Court in ***State (GNCTD) v. Mullah Muzib*** in Crl LP No.62/2015 decided on 09.02.2015 in support of his submissions.

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Discussion

15. On the aspect of age of the victim, the learned ASJ held that it was not

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proved as per law that the age of the victim was below 12 years. We may observe that the issue as to whether, or not, the age of the victim was below 12 years became relevant since Section 5 of the POCSO Act defines aggravated penetrative sexual assault, inter alia, to mean "*penetrative sexual assault on a child below 12 years;*" (as per clause (m) of Section 5 of the POCSO Act). The reasoning found in the impugned judgment for the aforesaid finding with regard to the age of the victim is contained in paragraph 6 thereof, and the same reads as follows:

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"6. As the age of victim is required to be proved below 12 years so the prosecution has called his school record which is produced by PW2. As per the record produced by this witness, victim was admitted in school in class 2nd on 18.08.2010 and his admission was entered in the admission register at serial no. 11187 and the date of birth of the victim is 16.06.2003. The witness stated that his mother gave an affidavit in support of date of birth. The mother has also deposed in this regard that she gave her affidavit in support of date of birth of her son. As per rules the birth certificate of the school first attended is required which has not been produced. No other document or birth certificate issued by any agency empowered under law to issue birth certificate has been brought on file. Thus in the facts the age of the victim below 12 years is not proved as per law. Reliance may be placed in this regard on the case of Satpal Singh v. State of Haryana (2010) 8 Supreme Court Cases 714."

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16. The first message with regard to the incident was received vide DD No.6 dated 15.08.2013 (Ex.PW-6/A) at 03:10 A.M. on the basis of a wireless message, to the effect that opposite Kalkaji Mandir, near Ram Piao in the parking of Kalkaji Metro Station, one boy has been raped.

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17. On the statement of the victim, the FIR was registered vide FIR No.351/2013 dated 15.08.2013 at PS – Kalkaji. In the said FIR, the age of the victim was disclosed as 10 years. The victim was got medically examined vide medical examination report (Ex.PW-1/A) on the date of the incident, i.e. 15.08.2013 at 05:12 A.M. The doctor had filled the particulars of the victim, including his age as a 10-year-old male, who had been brought with history of sexual abuse on 15.08.2013 at 02:30 A.M.

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18. The statement of the victim under Section 164 Cr.P.C. was recorded on 12.09.2013, wherein in response to the query raised by the learned Magistrate, the victim gave his age as 10 years. He disclosed that he studies

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in 5th class. The learned Magistrate after initial questioning of the victim recorded his opinion that the witness understood the answers and is capable of giving rational answers. The victim narrated the entire incident before the learned Magistrate.

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19. The statement of the victim was recorded before the Court as PW-11. In his statement recorded before the Court (which was recorded on 09.02.2015), the victim disclosed his age as 11 years, studying in 3rd class. The learned ASJ after posing initial queries recorded his satisfaction with regard to the intelligence of the child and the reason for dispensing with administration of oath to him in the following words:

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> " *I have satisfied myself that the child is intelligent. He understands the questions and can answer them in appropriate manner. I am convinced that he is a competent witness. However, he is only 11 years of age and therefore cannot be expected to understand the purpose and consequences of oath.*"

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20. The child victim was cross-examined at length on behalf of the accused and no suggestion whatsoever was given to him that he was not a child of 10 years on the date of the incident, or 11 years when his testimony was recorded and as disclosed by him. It was not suggested to him that he was over 12 years of age on the date of the incident, much less that he was a major on the date of the incident.

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21. The mother and the father of the victim, as aforesaid, were also examined on behalf of the prosecution as PW-10 and PW-9 respectively. Pertinently, neither of them was cross-examined on the aspect of the age of the victim being 10 years on the date of the incident. It was not even

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suggested to either of them that the victim was more than 12 years of age, or 18 years of age on the date of the incident.

b 22. Even the doctor (PW-1) – who stated in his statement that on 15.08.2013, the patient/ victim aged about 10 years was brought to the casualty of AIIMS by the Constable and medically examined by him, whereafter he prepared the detailed MLC (Ex.PW-1/A), was not cross-
c examined on the aspect of the age of the victim.

23. The evidences/ questions, inter alia, put to the respondent accused while recording his statement under Section 313 Cr PC, and the
d corresponding answers given by the accused were the following:

> "*Q1. It is in evidence against you that as per PW1 on 15.08.2013 victim PW11 aged about 10 years was brought to the casualty of AIIMS and he examined him and prepared the*
> e *MLC Ex.PW1/A. What do you have to say?*
>
> *A. I do not know.*
>
> *x x x x x x x x x*
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> *Q3. It is in evidence against you that as per PW2 PW11 was*
> f *admitted in SDMC co-ed primary school Kalkaji B Block in 2nd class on 11.08.2010 and as per record his date of birth is 16.06.2003 and she issued a certificate under his signatures as Ex.PW2/D in this regard.*
>
> *A. I do not know.*
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> *x x x x x x x x x*
>
> *Q.26 Why this case against you?*
>
> *A. There was a property dispute between my father and*
> h *father of victim and my father was sent to judicial custody by*

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the father of victim regarding the dispute over the property.

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Q.28 Do you want to say anything else?

A. I have been falsely implicated by the police at the instance of father of the victim."

24. Thus, even while recording his statement under Section 313 Cr.P.C., the accused, in response to queries No. 1 & 3, which specifically brought out the age of the victim was 10 years on 15.08.2013, and that his date of birth 16.06.2003, did not deny the same. He merely responded by showing his ignorance. He responded "*I do not know*". This stand taken by the accused has to be viewed in the light of the fact that the accused is the elder first cousin of the victim.

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25. Thus, no question arose during the proceedings before the Special Court whether the victim was a child, or not, or whether the victim was a child below 12 years, or not. Pertinently, the prosecution led in evidence PW-2, i.e. the Principal of the primary school, wherein the victim was admitted. She produced the original admission register. The relevant entry of admission in the record of the school was exhibited as Ex.PW-2/C. As per the said register, the victim was admitted in the said school in class 2 on 18.08.2010 vide serial No.11187. She also produced the admission form regarding the admission of the victim in the school. The application form was exhibited as Ex.PW-2/A. She also produced the affidavit given by the mother of the victim PW-10 showing his date of birth. Copy of the affidavit of the mother was exhibited as Ex.PW-2/B. She also brought the original admission register with her. He passed out from the school in 5th class on

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24.12.2013 after the incident in question. As per the school record, the date of birth of the victim was 16.06.2003. The only relevant question put to this witness in her cross-examination was that the mother of the victim had not given any date of birth certificate issued by the MCD, or any Government agency at the time of his admission in the school.

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26. The birth certificate of a child may not have been got made; it may not be available/ preserved, or; it may not have been led in evidence in a given case. In either of these situations, can it be said that the age of the victim would be presumed to be above 12 years or 18 years, even though the other circumstances contra-indicate such an assumption? In our view, no such presumption can be drawn and the Court would have to examine the circumstances and evidence in each case to arrive at its own conclusion on the aspect of age of the victim.

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27. The learned ASJ has held that the age of the victim has not been proved to be below 12 years on the premise that the victim's birth certificate issued by an agency empowered under the law to issue the same has not been brought on record. No other similar document has been placed on record.

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28. Section 35 of the Indian Evidence Act, 1872 (the Evidence Act) states that "*An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which*

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such book, register, or record or an electronic record is kept, is itself a relevant fact".

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29. As noticed hereinabove, PW-2 the school principal produced the admission register Ex.PW-2/C; the school application form Ex.PW-2/A and the copy of the affidavit of the mother of the victim Ex.PW-2/B, on the basis of which the date of birth of the victim in the school record was recorded 16.06.2013 when the victim/ child was admitted in Class-II on 18.08.2010. Pertinently, the incident in question is of 15.08.2013. Firstly, the affidavit had been given by the mother of the victim/child and not by a stranger who may not be aware of his date of birth. Secondly, the affidavit and the application form were processed and acted upon by the school, and the date of the birth of the victim/ child recorded in the school record by the school authorities in the discharge of the official duty. Thirdly, the date of birth of the child was disclosed by the mother as 16.07.2013 much before the incident took place and thus, there was no occasion for the mother to falsely declare the date of birth of her child/ victim.

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30. The learned ASJ has placed reliance on the judgment of the Supreme Court in ***Satpal Singh Vs. State of Haryana***, (2010) 8 SCC 714, in support of his aforesaid conclusion. A reading of the said judgment shows that the learned ASJ has applied the said decision mechanically and without appreciation thereof. In fact, on our reading we find that the said decision supports the case of the prosecution in the present case. ***Satpal Singh*** (supra) was a case of rape of a girl while she had gone with her brother to the fields for collecting cattle fodder. The prosecutrix had raised an alarm and upon hearing the same, her brother came running to the place of

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occurrence, by when the appellant/ convict had escaped from the scene. The Trial Court convicted the appellant and the High Court dismissed his appeal. However, his sentence was reduced by the High Court from 7 years to 5 year Rigorous Imprisonment, apart from fine for the offence under Section 376 of the IPC. Before the Supreme Court, the appellant raised primarily two issues. The first was that the making of the FIR was belated and, secondly, that the prosecutrix was a major, and not minor at the time of the incident. We are concerned only with the second aspect in the present case. We consider it appropriate to reproduce the relevant extract from the judgment of the Supreme Court in ***Satpal Singh*** (supra) dealing with the said aspect. The same reads as follows:

> *"19. So far as the issue as to whether the prosecutrix was a major or minor, it has also been elaborately considered by the courts below. In fact, the school register has been produced and proved by the Headmaster, Mohinder Singh (PW 3). According to him, Rajinder Kaur (PW 15), the prosecutrix, was admitted in Government School, Sharifgarh, District Kurukshetra on 2-5-1990 on the basis of school leaving certificate issued by Government Primary School, Dhantori. In the school register, her date of birth has been recorded as 13-2-1975. The question does arise as to whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. This question becomes relevant for the reason that in cross-examination, Shri Mohinder Singh, Headmaster (PW 3), has stated that the date of birth is registered in the school register as per the information furnished by the person/guardian accompanying the students, who comes to the school for admission and the school authorities do not verify the date of birth by any other means.*

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20. A document is admissible under Section 35 of the Evidence Act, 1872 (hereinafter called as "the Evidence Act") being a public document if prepared by a government official in the exercise of his official duty. However, the question does arise as to what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.

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21. In State of Bihar v. Radha Krishna Singh [(1983) 3 SCC 118 : AIR 1983 SC 684] this Court dealt with a similar contention and held as under:

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"40. ... Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. ... (SCC p. 138, para 40)

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53. ... where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight. (SCC p. 143, para 53)

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145. (4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little. (SCC p. 171, para 145)"

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22. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma v. State of Bihar [(1969) 2 SCC 359] ; Ram Murti v. State of

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Haryana [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029] ; Dayaram v. Dawalatshah [(1971) 1 SCC 358 : AIR 1971 SC 681] ; Harpal Singh v. State of H.P. [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361] ; Ravinder Singh Gorkhi v. State of U.P. [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632] ; Babloo Pasi v. State of Jharkhand [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] ; Desh Raj v. Bodh Raj [(2008) 2 SCC 186] and Ram Suresh Singh v. Prabhat Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194] . In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Such entries may be in any public document i.e. school register, voters list or family register prepared under the rules and regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain v. State of U.P. [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and Santenu Mitra v. State of W.B. [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587]

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23. There may be conflicting entries in the official document and in such a situation, the entry made at a later stage has to be accepted and relied upon. (Vide Durga Singh v. Tholu [AIR 1963 SC 361] .)

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24. While dealing with a similar issue in Birad Mal Singhvi v. Anand Purohit[1988 Supp SCC 604 : AIR 1988 SC 1796] , this Court held as under: (SCC p. 619, para 15)

"15. ... To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry

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relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

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25. A Constitution Bench of this Court, while dealing with a similar issue in Brij Mohan Singh v. Priya Brat Narain Sinha [AIR 1965 SC 282] , observed as under: (AIR p. 286, para 18)

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"18. ... The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate chowkidar, by somebody else at his request does not come within Section 35 of the Evidence Act."

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26. In Vishnu v. State of Maharashtra [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] while dealing with a similar issue, this Court observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the municipal corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded.

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27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate

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chowkidar at the instance of a person who came along with the child having no personal knowledge of the correct date of birth, cannot be relied upon.

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28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.

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29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the school register. It is not possible to ascertain as to who was the person who had given her date of birth as 13-2-1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the primary school register. More so, the entry in respect of the date of birth of the prosecutrix in the primary school register has not been produced and proved before the trial court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major. Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case."

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31. From the above extract, it would be seen that in ***Satpal Singh*** (supra), the evidence led by the prosecution to establish the date of birth/ age of the prosecutrix on the date of the incident was the school register of the Government school, wherein she was admitted on 02.05.1990. The prosecutrix had been admitted on the basis of the school leaving certificate Issued by the Government primary school. In the said register, her date of

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birth had been recorded as 13.02.1975. The Supreme Court posed the question whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. This question arose since the Headmaster of the Government school had stated that the date of birth was registered in the school register as per the information furnished by the parents/ guardian accompanying the students who came to the school for admission, and the school authorities did not verify the date of birth by any other means. The Supreme Court referred to Section 35 of the Evidence Act. It observed that admissibility of a document is one thing, and probity of the entry made in the said document is a different thing. A document may be admissible but as to whether the entry contained therein has any probative value may still required to be examined in the facts & circumstances of a particular case. It was held that even if an entry is made by an official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry was made has been exhibited and proved.

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32. The Supreme Court referred to ***Birad Mal Singhvi*** (supra), wherein it was held that an entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.

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33. The rationale behind making the entry made by a public servant in a public or other official register or record as a relevant fact was noticed in

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Brij Mohan Singh (supra). While doing so, the Supreme Court rejected the reliance placed on the entry made in the school register with regard to the date of birth, since the same had been made by an illiterate chowkidar which could not be relied upon. The entry made in the school register with regard to the date of birth provided by the parents could be disregarded, if it stands belied by unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of a municipal corporation; government hospital/ nursing home, etc.

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34. Pertinently, in the present case, there is no evidence to the contrary led by the defence to show that the date of birth of the child/ victim recorded in the school register as 16.06.2003 was not correct. This omission becomes more significant in view of the fact that the victim and the accused are first cousins and the victim/ his family would have had some idea, if not complete knowledge, of the date/ year of birth of the victim. As observed by the Supreme Court in paragraph 28 extracted above, the entry made in the official record by an official or person authorized, in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. In the present case, neither during the cross-examination of the prosecution witnesses, including PW-2 – the Principal of the school where the victim studied, nor in the cross-examination of the parents, i.e. PW-9 and PW-10, nor in the cross-examination of the victim, any challenge was raised with regard to the entry regarding the date of birth of the victim made in the school record. The respondent accused did not lead any independent

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evidence to raise a doubt with regard to the entry made in the school record of the date of birth of the victim.

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35. The learned ASJ has observed in the paragraph 6 of the impugned judgment, which is extracted hereinabove, that "*as per rules the birth certificate of the school first attended is required which has not been produced*". The learned ASJ has made no reference to any specific "rule" in

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this regard. However, we take it, that the learned ASJ had Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules 2007 (JJ Rules for short) in his mind.

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36. Firstly, we may observe that the Juvenile Justice (Care & Protection of Children) Act 2015 (JJ Act for short) and the JJ Rules have been framed with the object of "*catering to the basic needs through proper care, protection, development, treatment, social reintegration,* ***by adopting a***

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child-friendly approach *in the adjudication and disposal of matters* ***in the best interest of children*** *and for their rehabilitation through processes provided, and institutions and bodies established, ...*" (emphasis supplied) (See preamble to the JJ Act). The expression "child-friendly" is

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defined in Section 2(15) of the JJ Act to mean "*any behavior, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child;*". Under Section 7, the

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Juvenile Justice Board constituted under the JJ Act is obliged to observe its rules in regard to transaction of business, and to ensure that all procedures are child-friendly. The whole approach adopted by the authorities under the JJ Act, in the administration of the said Act, is to lean in favour of the

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accused/ juvenile in conflict with law. It is in this context that Rule 12 of

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the JJ Rules – which prescribes the procedure to be followed in determination of the age of the juvenile in conflict with law, has to be understood and applied. The said Rules, insofar, as it is relevant reads as follows:

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> *"12. Procedure to be followed in determination of Age.—*
>
> *(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*
>
> *(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.*
>
> *(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –*
>
> *(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;*
>
> *(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
>
> *(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
>
> *(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the*

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juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

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

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Pertinently, in cases falling under sub-rule (3)(b), the Court/ Board/ Committee shall, for reasons to be recorded, give benefit to the child or juvenile by considering his/ her age on the lower side within the margin of one year.

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37. No doubt, the Supreme Court in ***Mahadeo*** (supra) held that the same yardstick could be followed by the Court for the purpose of ascertaining the age of a victim, as is prescribed in Rule 12 of the JJ Rules, however, in our considered view, the said observations of the Supreme Court have to be viewed, firstly, in the factual context in which they were made, and also while keeping in mind the fact that *stricto sensu* Rule 12 of the JJ Rules is framed with a view to provide protection to the accused who may be juveniles, and not with a view to cause prejudice to a victim of a crime who may be a minor.

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38. In ***Mahadeo*** (supra), the appellant was convicted of the offence punishable under Section 363, 506 & 376 IPC. The High Court dismissed

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the appeal of the appellant. The two Courts affirmed the finding of fact that the prosecutrix was 15 years and 4 months of age when the offences were committed. The said findings were premised on the evidence led by the
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prosecution in the form of school leaving certification of the prosecutrix proved on record by the Headmistress of the school, which disclosed her date of birth 20.05.1990 as also the admission form and the transfer
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certificate issued by the primary school where the prosecutrix had studied, led in evidence by the Headmaster of the primary school. In the records of both the schools the date of birth of the prosecutrix was recorded as 20.05.1990. On behalf of the appellant, it was argued that the prosecutrix
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was not below the age of 18 years at the time of occurrence. In this regard, the appellant relied upon the evidence of doctor PW-8 who examined the prosecutrix. She deposed that the age of the prosecutrix could have been between 17 to 25 years at the relevant time. The Trial Court rejected the
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reliance placed by the defence on the version of PW-8, since the same was not premised on scientific examination of the prosecutrix by conduct of tests such as the ossification test. The mere opinion of PW-8 – the doctor, could not be acted upon. The Supreme Court agreed with the said finding of the
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Trial Court and in that context made reference to Rule 12 of the JJ Rules. The Supreme Court in the light of Rule 12(3)(b) observed that: *"only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the*
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medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well."

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39. Pertinently, in ***Mahadeo*** (supra) as well – like in the present case, the birth certificate of the prosecutrix had not been produced. What had been produced were the school records from the primary school and the Daneshwar Vidyalaya which recorded the date of birth of the prosecutrix consistently as 20.05.1990. The Supreme Court accepted the said evidence as good evidence to prove the minority of the prosecutrix as on the date of the offence. Thus, though the priority/ procedure laid down in Rule 12 of the JJ Rules would be attracted to determine the age of the victim/ prosecutrix, the tendency to lean in favour of the accused (in the case of a juvenile in conflict with the law) would, in such situations, be to lean in favour of the minority of the victim/ prosecutrix while determining the age of the victim/ prosecutrix.

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40. In our view, in the context of the evidence led by the prosecution, there was no occasion for the learned ASJ to hold that the birth certificate of the school first attended not having been produced by the prosecution, the age of the victim could not be said to have been proved to be below 12 years of age on the date of the incident, and to ignore the evidence of the school record produced by the prosecution. The approach of the learned ASJ in disbelieving the prosecution evidence with regard to the age of the victim on the date of occurrence is completely laconic, to say the least. There was no occasion for the learned ASJ not to believe the fact that the victim was below 12 years of age, i.e. he was only 10 years of age on the date of the incident.

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41. A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable

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that a prudent man, ought under the circumstances of the particular case, to act upon the supposition that it exists. We believe the date of birth of the victim to be 16.07.2003 in the light of the following circumstances:

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(i) The date of birth of the victim was disclosed by the mother of the victim in her affidavit Ex.PW-2/B contemporaneously when she sought admission for the victim in the school on 18.08.2010 vide serial No.11187 in Class-2;

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(ii) In the year 2010, there was no reason or occasion for PW-10 to swear a false affidavit, with regard to the date or year of birth of her child;

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(iii) The entry of date of birth as 16.06.2003 was made by the school in its record in the normal course in an official book/ register in the discharge of the duty of the school;

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(iv) The admission of the victim was made in the year 2010 in Class-2. Admission to Class-2 at the age of 7 years (considering that the date of birth of the victim was disclosed as 16.07.2003 by the mother PW-10), even otherwise, was age appropriate;

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(v) No material or evidence had been brought on record on behalf of the defence to raise a doubt in the mind of the Court with regard to the date of birth of the victim as disclosed in the school record;

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(vi) The accused did not raise a doubt with regard to the date of birth and age of the victim during cross-examination of either the parents of the victim, or the victim himself, or even the school Principal who

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produced the record, even though he is closely related – being the first cousin of the victim;

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(vii) Even when the case of the prosecution along with the evidence brought on record was put to the accused while recording his statement under Section 313 Cr.P.C., and the date of birth of the victim was squarely put to him as 16.06.2003 on the basis of the school record. The accused did not deny the date of birth and the age of the victim, but merely responded by feigning ignorance. His response to queries 1 & 3 raised under Section 313 Cr.P.C. have to be viewed in the context that he is the elder first cousin of the victim;

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(viii) The age of the victim was disclosed as 10 years at the time of commission of the offence from the very beginning, i.e. when the FIR was registered on 15.08.2013 (on the date of the occurrence itself) – which has the quality of spontaneity, when the child/ victim was medically examined by the doctor on 15.08.2013; when the statement of the child was recorded by the learned Magistrate under Section 164 Cr.P.C. on 12.09.2013 and, again when statement of the child was recorded before the Court on 09.02.2015. As aforesaid, there was no challenge raised on behalf of the defence to the date of birth/ age of the victim, as disclosed by him at any point of time.

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42. Even if one were to accept that there was good reason for the learned ASJ to consider the date of birth of the victim as not proved, it was the obligation of the learned ASJ under Section 34(2) of the POCSO Act to determine the said question after satisfying itself about the age of the victim.

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The learned ASJ was empowered, and ought to have exercised the jurisdiction vested in him under Section 311 of the Code and Section 165 of the Evidence Act, to get the victim medically examined. Even Rule 12 of the JJ Rules also requires the adoption of that course of action.

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43. Recently, we had occasion to consider another decision of the same learned ASJ in a case relating to kidnapping and rape of a girl child aged about 8-9 years in the case of ***The State Govt of NCT of Delhi Vs. Sonu Kumar***, Crl.Appeal No.1137/2017 decided on 07.03.2018. In the said case as well, the learned ASJ held that the age of the prosecutrix as being a minor was not proved. We set aside the said judgment of the learned ASJ and in relation to the finding returned by the learned ASJ on the age of the prosecutrix, we, inter alia, observed as follows:

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> *"23. The reasoning adopted by the learned ASJ to conclude that the minority of the prosecutrix on the date of the incident was not established, to say the least, borders on perversity. The learned ASJ, observes in para 6 of the impugned judgment that the prosecution had not examined any witness to prove the date of birth of the victim, nor her birth certificate issued by any authority empowered to issue the same had been produced. He observes that while deposing in Court, the prosecutrix had given her age as 11 years and considering her age, the Court examined her without administering oath. The father of the victim PW-9 had also not given her date of birth. Consequently, the learned ASJ came to the conclusion that "It cannot be said that the age of the victim below 18 years has been proved by the prosecution as per law".*
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> *24. The aforesaid reasoning adopted by the learned ASJ shocks the conscience of this Court in the factual background of this case.*

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27. The approach of the learned ASJ, that because no birth certificate or other reliable document of the date of birth of the prosecutrix had been led in evidence to establish the age of the prosecutrix, it could not be accepted that she was below the age of 18 years on the date of occurrence is shockingly absurd. The prosecutrix had given her age as 9 years. She had disclosed in her statement recorded under Section 164 Cr PC that she was studying in third class. Neither the learned MM recording her statement under Section 164 Cr PC, nor the Court while recording her testimony, firstly, on 07.07.2012 doubted her claim that she was 9 years and 11 years of age respectively when the said statements were recorded. Even the doctor while preparing the medical report of the prosecutrix upon her examination vide Ex. PW-11/A recorded the age of the prosecutrix as 9 years and did not raise any question or doubt about the said claim.

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28. In this background, the learned ASJ had no cause to doubt the age of the prosecutrix as on the date of occurrence to be 18 years or more. Pertinently, the learned ASJ does not state that the prosecutrix appeared to be 18 years, or more, on the date of occurrence in her physical appearance. In a given case, where the age of the prosecutrix may be bordering 18 years, and on physical appearance it is not obvious that the prosecutrix was a minor on the date of the occurrence, the Court may, with a view to satisfy itself, direct the conduct of medical examination of the prosecutrix to ascertain her age, or to call for other evidence in exercise of its power under Section 311 Cr PC read with Section 165 of the Indian Evidence Act.

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29. In ***Jamatraj Kewalji Govani v. State of Maharashtra****, AIR 1968 SC 178, the Supreme Court held that Section 540 of Code of Criminal Procedure, 1898 (which corresponds to Section 311 of Code of Criminal Procedure, 1973) read with Section 165 of the Evidence Act confers wide jurisdiction on the Court, with no limitation on its power to summon any person as a witness, or examine any person present in Court although not*

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summoned, or recall or reexamine a witness already examined. The Supreme Court in this decision, inter alia, held:

> *"10. Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory.* ***The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways: (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.*** *There are, however, two aspects of the matter which must be distinctly kept apart, The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. ... ...". (emphasis supplied)*

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30. Similarly, in ***Mohanlal Shamji Soni v. Union of India & Anr.****, AIR 1991 SC 1346, the Supreme Court observed in para 27 of the decision as follows:*

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> *"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the* ***criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case****". (emphasis supplied)*

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31. But this course of action would not even be called for to be adopted, when the prosecutrix is so small and there is no reason to raise a doubt with regard to the age of the prosecutrix on the date of the occurrence – either by the defence, or on the physical appearance of the prosecutrix before the Court.

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32. The finding that the age of the victim/ prosecutrix could not be said to be below 18 years being completely perverse is set aside."

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44. The manner in which the learned ASJ has proceeded to deal with the matter exhibits a completely casual, cavalier and insensitive approach on his part. Offences relating to sexual abuse of children are amongst most heinous crimes. It is for this reason that the Parliament has framed the special law, namely, the POCSO Act, since the provisions contained in the IPC were found to be not adequate enough to deal with such like offences. The gravity of such offence, as perceived by the society and the law makers can be gauged from the severity of the punishment prescribed in the POCSO Act. Considering the fact that the POCSO Act relates to child victim, the law also raises presumptions under Sections 29 and 30 of the said Act

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against the accused – which demonstrates a distinct shift from the fundamental criminal jurisprudence that every person accused of an offence is assumed to be innocent unless proven guilty. We are dismayed that the learned ASJ has shown complete lack of sensitivity in dealing with the present case. On this aspect we are not yet finished and our following discussion will further demonstrate the reasons for our aforesaid conclusion.

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45. The learned ASJ evaluated the testimony of the victim PW-11 in the background that "*a child witness is susceptible to tutoring and his evidence must be evaluated more carefully and with greater circumspection and that evidence of a child witness must find adequate corroboration before it is relied upon*". On this aspect, we consider it appropriate to notice some of the decisions of the Supreme Court.

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46. We may first notice ***Rameshwar v. State of Rajasthan***, 1952 (3) SCR 377. In this case, the appellant was charged with committing rape of an eight year old girl. He was convicted by the Assistant Sessions Judge and sentenced. In appeal before the Sessions Judge, the learned Sessions Judge held that the evidence was sufficient for "moral conviction" but fell short of "legal proof" because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution, and the corroborative evidence – in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. Accordingly, the accused was acquitted giving him the benefit of the doubt. The State appealed to the High Court and the High Court held that the law requires corroboration in such cases, but held that the statements made by the prosecutrix to her mother was legally admissible as corroboration, and

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considering that to be sufficient, the High Court set aside the acquittal and restored the conviction and sentence of the appellant.

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47. The Supreme Court, inter alia, considered the question whether the law requires corroboration of the statement of the victim/ prosecutrix in such like cases. The Supreme Court observed that the Evidence Act does not prescribe that the statement of the victim/ prosecutrix in the case of rape requires corroboration. The Supreme Court referred to Section 114 (b) of the Evidence Act – which states that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, and Section 133 of the Evidence Act – which states that an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The Supreme Court observed that a woman, who has been raped, is not an accomplice. She is the victim of an outrage. If she consented, there is no offence unless she is a married woman, in which case questions of adultery may arise. However, adultery presupposes consent and so is not on the same footing as rape. The Supreme Court, inter alia, observed as follows in its decision:

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> "*… … In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences.* ***But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to under- stand***

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> ***exactly what the rule is and what the expression "hardened into a rule of law" means.***" (emphasis supplied)

48. Vivian Bose, J, who authored the judgment, observed that in this branch of law, the legal position is the same in India as in England. He relied upon ***The King v. Baskerville***, (1916) 2 K.B. 658. ***Baskerville*** (supra) was a case where the accused was convicted of committing acts of gross indecency with the two boys. The two boys were accomplices because they were freely consenting parties and there was no use of force. In ***Baskerville*** (supra), the learned Chie Justice observed:

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> "***There is no doubt that the uncorroborated evidence of an accomplice is admissible in law...... But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence***......
>
> *This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed...... If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated.*" (emphasis supplied)

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49. Justice Bose held that the law was exactly the same in India. He held:

> *"That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is* ***where this class of offence is***

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sometimes tried by a judge without the aid of a jury. In these cases it is necessary that the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. *I am of opinion that the learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration.*

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There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown-up woman it is unnecessary in the case of a child of tender years. Bishram. v. Emperor, A.I.R. 1944 Nag. 363 is typical of that point of view. On the other hand, the Privy Council has said in Mohamed Sugal Esa v. The King A.I.R. 1946 P.C. 3 at 5 that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. In my opinion, ***the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in***

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> ***every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand***". (emphasis supplied)

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50. Thus, as early as in 1952, the Supreme Court made the legal position clear that, firstly, a woman subjected to rape is not an accomplice and, secondly, the rule of corroboration is not a mandatory rule, but a rule of prudence and caution, which could be dispensed with in the facts and circumstances of a given case. All that is required is that it should be present to the mind of the Judge, that it is advisable to look for corroboration of the statement of the prosecutrix/ victim. The Judge may dispense with the need for corroboration if he thinks that it is safe to do so. The tender years of the child, coupled with other circumstances appearing in the case, for example, his demeanour and unlikelihood of tutoring and so forth may render corroboration unnecessary, but that is a question of fact in every case.

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51. The Supreme Court then considered the nature and extent of corroboration required when it is not considered safe to dispense with it. Once again, the Supreme Court referred to ***Baskerville*** (supra). The Supreme Court held that it is not independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant (who is treated like an accomplice) is true, and that it is reasonably safe to act upon it. The independent evidence must not only

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make it safe to believe that the crime was committed, but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. However, this does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. All that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witnesses story that the accused was the one, who committed the offence.

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52. The Supreme Court proceeded to observe that the corroboration must come from independent sources, and that the testimony of one accomplice would not be sufficient to corroborate that of another. There may, however, be circumstances which may make it safe to dispense with the necessity of corroboration, and in such cases a conviction based on the statement of the victim/ prosecutrix, without corroboration, would not be illegal. The Supreme Court also observed that corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "*many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice*".

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53. The Supreme Court then proceeded to consider whether a previous statement of an accomplice/ complainant/ prosecutrix/ victim could be accepted as corroboration? In this regard, the Supreme Court drew the attention to illustration (j) to Section 8 of the Evidence Act, which reads -

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"*The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant*."

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54. The Supreme Court also referred to Section 157 of the Evidence Act, which reads:

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> "*In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved*."

55. The Supreme Court concluded that where the conditions prescribed in the said section are fulfilled, the statement of the prosecutrix/ victim would be legally admissible in India as corroboration.

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56. The Supreme Court then considered the question whether the mother of the victim/ prosecutrix could be regarded as an "independent" witness. The Supreme Court held that there was no legal bar to exclude the mother of the prosecutrix/ victim from being considered as an independent witness, merely on the ground of their relationship. It observed:

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> "*... ... Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. It is true the accused suggested that they were on bad terms but that has not been believed by anyone*".

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57. The Supreme Court held that the testimony of the mother provided independent corroboration connecting the accused with the crime in the facts of the case, and considering the conduct of the victim/ prosecutrix and her

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mother from start to finish, the Supreme Court held that no corroboration beyond the statement of the child to her mother was necessary.

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58. In ***Prakash & Anr. v. State of Madhya Pradesh***, (1992) 4 SCC 225, the fourteen year old minor was the brother of the deceased. The minor Ajay Singh was stated as an eye witness to the crime. The Trial Court discarded the evidence of the minor Ajay Singh, being influenced by the fact that he was of tender of age and that he was likely to be tutored. The Supreme Court did not accept this reasoning of the Trial Court. The Supreme Court observed:

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> "*11. ... ... In discarding the evidence of the brother of the deceased namely Ajay Singh the learned Additional Sessions Judge was influenced by the tender age of Ajay (about 14 years) and was of the view that he was likely to be tutored. We do not think that a boy of about 14 years of age cannot give a proper account of the murder of his brother if he has an occasion to witness the same and* ***simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored.*** *The High Court has given very convincing reasons for accepting the evidence of Ajay Singh as an eyewitness of the murderous act and we do not find any infirmity in the finding made by the High Court ... ...*". (emphasis supplied)

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59. Thus, it cannot be assumed that a witness who is a minor is tutored. There should be evidence/ material on record to conclude that a child witness has been tutored. At the same time, the Court has to be satisfied that there is no likelihood of the child witness being tutored.

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60. In ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat***, (2004) 1 SCC 64, the child was an eye witness to the murder of the two deceased persons.

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Relying on the testimony of the child witness, the Trial Court convicted the accused under Section 302 IPC and, accordingly, sentenced them. Before the Supreme Court, the appellant placed reliance on ***Arbind Singh v. State of Bihar***, 1995 (4) SCC 416 to contend that where the Court finds traces of tutoring, corroboration is a must before the evidence of the child witness could be acted upon. The Supreme Court referred to ***Dattu Ramrao Sakhare v. State of Maharashtra***, (1997) 5 SCC 341, wherein it had been held:

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> *"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof.* ***The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."*** (emphasis supplied)

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61. The Supreme Court went on to observe:

> "*The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.* ***The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous.*** *This precaution is necessary because child witnesses are amenable to tutoring and often live*

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> *in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that* ***if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness***". (emphasis supplied)

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62. While dealing with the merits of the case before it, the Supreme Court held that there was no reason for false implication by the child witness. The Trial Court on careful examination was satisfied about the child's capacity to understand and to give rational answers. That being the position, it cannot be said that the child witness had no maturity to understand the import of the questions put to her, or to give rational answers. The child witness had been cross-examined at length and she stood her ground. The Supreme Court held that the evidence of the child witness was credible, which revealed her truthful approach and that her evidence had the ring of the truth. Consequently, the Supreme Court accepted the said evidence of the child witness and dismissed the appeal.

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63. In ***State of Madhya Pradesh v. Ramesh & Anr.***, 2011 (3) Scale 619, the daughter of the deceased, aged about eight years, was a witness to the crime. On the basis of the statement of the child witness, the two accused were convicted under Section 302 IPC. Accused no.2 was convicted with the aid of Section 120B IPC. The High Court, however, reversed the said judgment and acquitted the accused on the premise that the eye witness PW-1 was a child witness and was, therefore, disbelieved. The Supreme Court reversed the decision of the High Court and restored the conviction of the

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accused. On the aspect of admissibility of the evidence of a child witness, the Supreme Court referred to several earlier decisions. The relevant passage from this decision of the Supreme Court being instructed, is reproduced herein below:

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"*6. In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.*

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The Court further held as under:

> *".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."*

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7. In Mangoo & Anr. v. State of Madhya Pradesh, AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that ***there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and***

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from the contents thereof as to whether there are any traces of tutoring.

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8. In Panchhi & Ors. v. State of U.P., AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that ***the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring***."

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9. In Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra, AIR 2008 SC 1460, this Court dealing with the child witness has observed as under: "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

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10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the crossexamination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, AIR 2009 SC 2292).

b c d

11. In State of U.P. v. Krishna Master & Ors., AIR 2010 SC 3071, this Court held that ***there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature****.*

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12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan

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Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516)". (emphasis supplied)

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64. The Supreme Court, in view of the aforesaid legal position, summarized the law in the following words:

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"*13. In view of the above, the law on the issue can be summarized to the effect that* ***the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition***". (emphasis supplied)

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65. Thus, the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the Court may rely upon his evidence. Evaluation of the evidence of a child witness requires more care and greater circumspection, because he is susceptible to tutoring. Only in case there is evidence on record to show that the child has been tutored, the Court may reject his statement partly or fully. An inference as to whether the child has been tutored or not, can be drawn from the content of his deposition.

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66. At this stage, we may, firstly, take notice of the statement of the victim made before the police, on the basis of which the FIR was registered, secondly, the statement of the victim recorded under Section 164 Cr.P.C.

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before the learned Magistrate, and, thirdly, the statement recorded before the Court as PW-11.

b 67. In his statement made to the police on 15.08.2013, on the basis of which the FIR was registered (Ex. PW-5/A), the victim stated that he lives at his residential address with his parents and studies in Class-5 at the named school. On that night, he had gone with his mother to Kalkaji Mandir to c attend the jagran. His mother returned home to sleep. At about 02:30 A.M. the accused, who is the son of his "Bade papa" (father's elder brother) came to him and told him that he will make him drink a cold drink. He gave the victim a cold drink and took the victim in the park opposite the temple d where the accused started taking off the pant of the victim. The victim resisted, whereupon he was slapped by the accused. The accused took off the victim's pant and he inserted his private part into the back side of the e victim forcibly. He also threatened the victim that if he disclosed the incident to anybody, he would be killed. Thereafter the victim came home and narrated the incident to his parents.

f 68. In his statement recorded under Section 164 Cr.P.C. before the learned Magistrate vide Ex.PW-4/B, the victim stated that his family members reside at Kalkaji Mandir. He stated that his family offers service at the temple. On 14.08.2013, a jagran was being held near the victim's g house. The family of the victim renders service at the jagran. He stated that he was dancing at the jagran. His brother Dharmender – the accused, slapped him from behind and held his collar. Dharmender stated that he would take the victim to his mother. Thereafter Dharmender made the h victim roam around in the jagran. Then he took the victim to the canteen

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and made him drink a cold drink. Thereafter, Dharmender took the victim in the jungle. There the accused took of his pants, and asked the victim to take his private part in his mouth. The victim refused, whereupon the accused hit him. The accused took off the clothes of the victim and tried to make the victim sit on his private part. Thereafter the accused put his private part in the victim's mouth. The accused boxed the victim in his stomach and thereafter made him lie at his stomach and climbed on the victim. Thereafter, he inserted his private part in the back side of the victim. The victim urinated. The accused then put on his clothing. The victim jumped over a rail and ran from the spot and came on to the road. He disclosed that he used to come first in the race in the school. He also stated that he was bleeding. He went to the temple and one Aunty took him to his home. At his home, he told everything to his mother. The mother of the victim called the police. The police and others took him to the hospital.

69. In his testimony, PW-11 – the victim, narrated the same incident with consistency in all material respects. He stated that the accused Dharmender slapped him on his neck and caught hold of him by collar when the victim was dancing in the jagran, and asked him to come with him as he will give him pepsi. On that pretext, the accused took victim to the nearby jungle. In the jungle, the accused beat up the victim and removed his pant as well as the clothes of the victim, and inserted his private part forcibly in the victim's mouth. Thereafter the accused made the victim to lie down in the knee elbow position and inserted his private part into the victim's anus. The accused again started beating the victim and started inserting his private part into the mouth of the victim. Blood started coming out from the anus of the

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victim and he felt like passing stool. He sat down for the said purpose when the accused again started beating him. The victim refused to accompany the accused. He put on his clothes and the accused also put on his clothes. The victim tried to run away, on which the accused threw a brick on him but he escaped the said blow. Thereafter he ran towards one person (uncle) and asked for his help to save him, otherwise the accused would hit him. Thereafter, the victim ran away to his home. He informed the incident to his mother and the mother asked the father to ring up the police. The father of the victim went for search of the accused; located him, and; handed over the accused to the police. The police then brought the victim as well as the accused to the police station from where they were sent for medical examination. The victim exhibited his MLC Ex.PW-1/A which bear his thumb impression. He was allotted a bed in the hospital and on the next day he was sent for operation. Thereafter, he was discharged from the hospital. He also exhibited his statement recorded before the Magistrate under Section 164 Cr.P.C. as Ex.PW-4/B. He stated that his statement was recorded by the police which was exhibited as PW-11/A. The victim also correctly identified the accused in Court. He also identified his jean pant Ex.P-1.

70. The victim was cross-examined on behalf of the accused. He denied that any quarrel had taken place between his family and the family of the accused. One day a quarrel had taken place when the accused had come to the house of the victim heavily drunk and demanded the keys of the bike from the victim's father. The victim's father had refused the keys of the bike, whereupon the accused had started abusing the father and the

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grandmother of the victim. He denied the suggestion that he had filed the case in order to falsely implicate the accused. He denied the suggestion that his statement was recorded before the Magistrate under pressure of his parents. He volunteered to stated that his parents always told him that one should speak the truth. He disclosed the time of the incident as about 2:00 – 2:30 A.M. in the park. He also denied that he had been tutored by his parents to level false allegations against the accused. He also denied the suggestion that blood had come out from his anus as he received injuries while playing with his friends in the park. He volunteered to state that "*Bum par khoon aise thode hi nikal ata he*".

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71. From the three statements of the victim, namely Ex.PW-11/A, Ex.PW-4/B, and his testimony recorded before the Court, it is clear that in all material respects the same are entirely consistent, natural and believable. The consistent version given by the victim in all the three statements is as follows:

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a. On the night of the incident, the victim had gone to the jagran near his house;

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b. The victim was dancing in the jagran. The victim was left in the jagran and his mother returned to her residence;

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c. The accused came to the victim and caught hold of him.

d. The accused offered the victim a cold drink;

e. The accused took the victim to the forest/ park opposite the temple;

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f. In the forest/ park, the accused tried to remove the pant of the victim, which was resisted by the victim. The accused beat up the victim and forcibly removed his clothes. He also removed his own clothes and put his vital part in the mouth of the victim, and thereafter in the backside of the victim;

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g. The victim started bleeding and felt like passing stool/ urine;

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h. The accused again inserted his private part in the mouth of the victim;

i. The victim and the accused put on their clothes and the victim did not accompany the accused;

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j. The victim ran away from the spot and escaped;

k. The victim took the help of one person and reached his home;

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l. The victim then informed the incident to his mother and the mother informed the incident to the father. The police was called.

m. The father of the victim went in search of the accused and located him. The accused was handed over to the police by the father of the victim.

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n. The police brought the victim and the accused to the police station, from where they were sent for their medical examination to AIIMS;

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o. The victim was admitted to the hospital and operated upon and remained in the hospital for a few days;

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p. The statement of the victim was recorded by the Magistrate under Section 164 Cr PC.

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72. It is well settled that minor discrepancies and embellishments naturally creep in when statements of any person are recorded at different points of time due to lapse of memory. What the Court has to examine is whether the embellishment and discrepancies point towards fabrication, afterthought, or improvements in the statements made by the witness from time to time with a view to implicate the accused. The witness may narrate the incident, or a part of it more elaborately at one stage, and at an earlier or later stage, he may narrate the incident or a part of it with brevity. He may, on different occasions, elaborate upon different part of the incident. Such elaborations at different times do not necessarily lead to inconsistency, or discredit the statement made by the witness in the Court. When we compare the three statements of the victim, as aforesaid, we find that there are only minor embellishments, which do not go to the root of the matter and they are expected. The version of the victim (PW-11), at the core has remained consistent.

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73. The learned ASJ while observing that a child witness is susceptible to tutoring; that his evidence must be evaluated more carefully and with greater circumspection, and; that it should find adequate corroboration before it is relied upon, unfortunately, has failed to apply himself to examination of these very aspects. The statement of the victim was recorded by the police (Ex. PW-11/A), and a perusal thereof does not betray the sense of it being tutored. On the basis of this statement, the FIR came to be registered in the present case. The victim's statement was recorded under Section 164 Cr PC

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on 12.09.2013 vide Ex. PW-4/B. The learned Magistrate recorded the statement after requiring the I.O. to leave the chamber of the Magistrate. The learned Magistrate inquired from the victim whether he wishes to make his statement – to which he replied in the affirmative, and whether his statement was being made under threat, force or coercion - to which he replied in the negative. The learned Magistrate recorded his satisfaction that the witness was making the statement voluntarily. The learned Magistrate then put initial questions to ascertain whether the child victim was able to understand the questions/ statement. He was asked as to what is his age; how many siblings he has; the name of his mother; what he does; whether he believes in god (to which he responded *thoda-thoda* – i.e. little bit), and; why he had come before the Magistrate. He was also asked whether he knew the meaning of oath, to which he responded "*kasam kakar sach hi bolte he*" i.e. after taking oath, one only speaks the truth. Thereafter, the statement of the victim was recorded under oath and he appended his signatures. A perusal of this statement also shows that the same is natural and it does not betray a sense of it being tutored, or dictated. In all material respects, the same is consistent with the statement made by the victim before the police vide Ex. PW-11/A.

74. The victim deposed before the Court on 09.02.2015. His statement was recorded by holding in-camera proceedings. He was provided a support person in terms of the guidelines issued by this Court. The support person was instructed not to prompt, sway or influence the witnesses during the testimony, nor to discuss the evidence to be given by the witness. Once again, the child witness was posed initial questions to understand his

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maturity and to understand whether he is a competent witness. He was asked his name; in which class he studies; whether he knows counting; who had brought him; whether he knew the place where he had been brought – to which he responded by stating "*This is Saket Court*"; whether he knew why he had come to the Saket Court – to which he responded '*mere case ke silsile mein*" i.e. in relation to his case; how many brothers, sisters are you; how many years old are you, and; whether one should speak the truth or lie – to which he responded "*sach bolna chahiye*" i.e. one should speak the truth.

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75. The learned ASJ then recorded her satisfaction that the child is intelligent and he understands the questions and can answer them in an appropriate manner. She recorded her satisfaction that the child witness was a competent witness. However, considering that he was only 11 years of age, and he could not be expected to understand the purpose and consequences of oath, the administration of oath was dispensed with. The child thereafter narrated the incident, as aforesaid, and his statement is consistent with the ones recorded earlier by the police as well as by the learned Magistrate. Pertinently, while deposing, the child started weeping due to the trauma. He was pacified. Once he was comfortable, he stated that he would depose. This demeanor of the child witness has been completely overlooked by the learned ASJ. Pertinently, the learned ASJ who recorded the statement of the child witness does not make any observation to the effect that the child appears to be pretending, or to be acting to show that he is suffering trauma. In fact, the learned ASJ records the demeanor of the witness that while deposing the witness started weeping

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due to the trauma, and he was pacified. Similarly, when the accused was shown to the child witness through the video link on the screen, after seeing him, the child witness identified him. The child witness stated "*mein kehna chahta hoon ki isse phasi hona chahiye*" i.e. the accused should be hanged. This statement of the child witness demonstrates the anger in him towards the accused, stemming from the treatment he was subjected to by the accused.

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76. The child witness was cross examined by the accused. He, inter alia, denied that quarrels used to take place between his family and the family of the accused. At the same time, he narrated an episode of a small quarrel which had taken place when the accused had come to his house heavily drunk, demanding the keys of the bike from the victim's father. The victim's father had refused to give the keys of the bike, whereupon the accused started abusing the victim's father and grandmother. He denied the suggestion that he had filed the case in order to falsely implicate the accused. He denied the suggestion that the statement recorded before the Magistrate was under pressure of his parents. He volunteered to state that his parents always tell him that one should speak the truth. He, once again, denied the suggestion that he had been tutored by his parents to level false allegations against the accused. He denied the suggestion that blood came out from the anus as he received injury while playing with his friends in the park. He volunteered to state "b*um par khoon aise thode hi nikal ata he*". The statement of the victim recorded before the Court, far from indicating that the same was tutored or made under the influence of the parents of the victim, gives a clear indication of the same being truthful. This is evident

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from the demeanor of the child witness as taken note of herein above, as well as his spontaneous responses and voluntary statements. If the child had been tutored, he would not have narrated about the minor incident about the accused demanding the motorcycle from his father after consuming alcohol and on being refused by the father, of the accused misbehaving with PW-9.

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77. In the statement of the victim's mother PW-10, she stated that the victim returned to the house at about 3:00 a.m. when he narrated the incident to her of the accused committing "*galat kaam*". She even explained the meaning of the said expression and stated that her son i.e. the victim was "*so much scared at that time*". During her cross examination, the witness PW-10 stated "*There was great issue/ dispute between my family and the family of my jaith, namely, Ram Gopal*". The learned ASJ while passing the impugned judgment has sought to make much of this statement of PW-10 to probablise false implication. Clearly, this statement is in relation to the incident in question itself. The dispute between the families arose on account of the incident. It was not suggested to her that there was already some great dispute/ issue pending between her family and the family of her jaith, namely, Ram Gopal when the incident is alleged to have taken place. Pertinently, during her cross examination, it was not suggested to PW-10 that "*great issue/ dispute*" between the two families related to any specific issue, such as a property dispute or any other dispute. She specifically denied that the accused had been falsely implicated in the case. She also denied that she had pressurized her son to make a statement before the Magistrate. She volunteered to state that whatever happened with her son, he had narrated before the Magistrate.

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78. The father of the victim examined as PW-9. His statement is consistent with that of PW-10, as well as his son PW-11. He, inter alia, stated that his son came back to the house at about 2:30 a.m. (night) and he narrated the incident to PW-9. In his cross examination, PW-9 stated that he had cordial relation with his brother Ram Gopal, who was also residing in the Dharamshala at that time. Pertinently, it was not suggested to PW-9 that he did not have cordial relations with his brother, or the family of the brother, or the accused. Though it was suggested that in order to take revenge from the accused he had been falsely implicated in the case, he was not confronted with any past incident, or suggested any particular reason, which would provide the motive to take revenge. It was not suggested to this witness that he had tutored his son i.e. the victim PW-11 to make a false statement. Thus, there was absolutely no basis for the learned ASJ to conclude that the child witness PW-11 had been tutored by his parents.

79. So far as the aspect of corroboration is concerned, the statement of the victim was duly corroborated by his parents PW-9 and PW-10, both of whom testified that when the victim returned to the house between 2:30 a.m. and 3:00 a.m. in the night, he narrated the incident to them, whereafter the accused was located and police was called. The statement of the victim is also corroborated by the medical evidence of PW-1, who exhibited the MLC Ex. PW-1/A. As per the said MLC, upon local examination of the victim, the doctor, inter alia, found "*abrasion present over the left inguinal region, tear present in anal mucosa at 12 0' clock position*". In his cross examination, PW-1 stated that "*From the injury mentioned above it is clear that the carnal intercourse was done upon the victim/ master Rohit*". Thus,

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not only there was corroboration of the statement of the child victim by his parents, but also by independent medical evidence. In our view, this itself would be sufficient to safely rely upon the statement of the victim. The parents of the child victim do not cease to be independent and competent witness, merely on account of their relationship with the victim. The decision of the Supreme Court in ***Rameshwar*** (supra) is clearly attracted in the present case.

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80. In the impugned judgment, the reasoning given by the learned ASJ for rejecting the case of the prosecution is found in para 12. The same reads as follows:

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> "*12. The victim has not deposed that he was taken by the accused in the jagran. The prosecution has not examined the said uncle or aunty from whom the victim help in reaching his home. Nor has examined anyone from the friends of the victim with whom he was dancing and was taken from there by the accused no any other independent witness who had seen the victim in the company of accused. The victim has stated that he ran from the spot but if the testimony of police officials is admitted then it is not possible that he was able to run. As per victim he was bleeding but no blood stained cloth has been produced in the trial although one jean was produced to which the victim identified as belonging to him. The victim in his statement made first in time to the police has not alleged that oral sex was also made with him by the accused*".

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81. A perusal of the same shows that the learned ASJ has completely misdirected him in the matter of appreciation of evidence. It is clear to us that his approach is not judicious. It is wholly irrelevant that the victim had not deposed that he was taken by the accused in the jagran. The issue was not as to who had taken the child victim to the jagran. The issue was

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whether the accused had taken the child victim from the jagran on the pretext of giving him a cold drink and dropping him home. The "uncle" or "aunty" from whom the victim had taken help in reaching his home after the incident was not shown to someone known to him. It was not suggested to the victim in his cross examination that he knew the person who had dropped him home. Thus, there was no question of the prosecution being expected to examine the said person. The argument that the friends of the victim with whom he was dancing were not examined, is neither here nor there.

82. The learned ASJ had to appreciate the evidence which had been led in the case, and not to pick holes by referring to other evidences which may, or may not, have been led. The examination of the other friends of the victim was not essential to establish the charge against the accused. It was not the case of the prosecution that any of the friends of the victim were eye witnesses to the offence itself. It was not the defence of the accused that he was not present in the jagran. He did not set up an *alibi*. The fact that he was in the vicinity of the place of incident is evident from the fact that he was located and produced before the police by PW-9, the father of the victim. The learned ASJ concludes that it was not possible for the victim to run in view of the testimony of the police officials. However, it was not even suggested to PW-11 in his cross examination, that he was not in a position to run. The casual manner in which the evidence has been appreciated by the learned ASJ can also be gauged from the fact that he only refers to "*the testimony of police officials*", without stating as to the testimony of which police official he is relying upon, and which part of the

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testimony of a particular witness is being relied upon by him, to reach his conclusion.

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83. Constable Dinesh Kumar PW-7, during his cross examination, inter alia, stated that "*The age of victim Rohit was about 10 years at that time. Victim Rohit was weeping at that time and was not in a proper position to walk however, he was talking*". The aforesaid statement cannot be understood to mean that the victim was not in a position to walk or run, particularly in the face of an emergency like the one he faced. PW-1 Dr. Sireesh had stated in his cross examination that the victim was limping at the time when he was examined and was not in a position to walk properly. However, it was not stated by him that the victim was not in a position to walk at all, or that he could not have run, even for a short distance, in an emergent situation. The fact that he was weeping itself shows that some incident had taken place concerning him. Even Constable PW-8 Karamvir states that when he reached the spot, the condition of the victim Rohit was not well and somehow he was feeling pain.

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84. Non-detection of blood stain in the forensic examination of the jean worn by the victim does not destroy the case of the prosecution. That may be a result of bleeding not being severe or continuous. Pertinently, the medical examination of the victim did find a tear/ abrasion present over the left inguinal region. The tear was found to be present in anal mucosa at 12 0' clock position. Thus, there was no scope for doubting the injury suffered by the victim in the anal region, merely because blood was not detected in the jean pant of the victim.

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85. Even if the statement of the victim of his being subjected to oral sex were to be discarded on account of his not having made any such allegation in Ex. PW-11/A, that does not detract from his clear and categorical assertion of his being subjected to anal sex by the accused, which statement of his was corroborated by his parents as he had, soon after the incident, narrated the incident to them, and also by his medical examination report. Thus, we are of the view that the prosecution clearly established the charge against the respondent/ accused of having committed the offence under Section 6 of the POCSO Act.

86. Reliance placed by learned counsel for the respondent/ accused on ***Mullah Muzib*** (supra) is completely misplaced. By the said order, the Division Bench merely dismissed the leave petition preferred by the State against the acquittal of the accused of the charges punishable under Section 377 IPC read with Section 6 and 10 of the POCSO Act. In that case, the medical examination of the minor child, who was aged 15 years and who claimed to have been subjected to repeated sexual assaults by the accused, did not reveal any external injury on the body of the victim, except one scab on his right buttock, which had no relation with the alleged sexual assault. However, as noticed herein above, in the present case, there is clear and distinct medical evidence to support the case of the prosecution with regard to the sexual assault on the victim.

87. Learned counsel for the respondent has also placed reliance on the testimony of PW-3 Dr. Karthik Krishna, who examined the accused. The said doctor opined that there was nothing to suggest that the accused was incapable to perform sexual assault under normal circumstances. In his

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cross examination, he stated that no fresh injuries were present on the body of the accused when he was medically examined. The submission is that if the accused had committed the sexual assault, the same would have left injuries on his private part.

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88. We do not find any merit in this submission, since it is not necessary that he should definitely have suffered any injury on his private part at the time of committing sexual assault on the minor child. Pertinently, in ***Mullah Muzib*** (supra), the doctor PW-9 deposed that there was no standard guideline that if an adult has carnal intercourse with a boy aged 15 years, he would suffer injury. Thus, we find no merit in the submission of the respondent. Reliance placed on the DNA report to say that the DNA found on the samples lifted from the victim/ his clothes did not match with the samples drawn from the accused, does not rule out the involvement of the accused.

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89. In view of the aforesaid discussion, we set aside the impugned judgment and hold the respondent guilty of having committed the offence under Section 6 of the POCSO Act, since the victim was a child below 12 years of age, and he is found to have committed aggravated penetrative sexual assault on the victim as defined in Section 5(m) of the POCSO Act.

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VIPIN SANGHI, J.

P. S. TEJI, J.

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a *This print replica of the raw text of the judgment is as appearing on court website (authoritative source)*

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