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

Judgment reserved on: 07.08.2018

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% **Judgment delivered on: 12.10.2018**

\+ **CRL.A. No. 223/2018**

THE STATE OF NCT OF DELHI ..... Petitioner

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Through: Mr. Rajat Katyal, APP for State with Mr. Ashray Behura, Advocate with SI Raj Kumar, PS-KM Pur.
Mr. Bharat S. Kumar and Ms. Ankita Goswami, Advocates for Minor Victim.

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versus

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SUMIT KUMAR ..... Respondent

Through: Mr. Sundeep Sehgal, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE I.S. MEHTA

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J U D G M E N T

VIPIN SANGHI, J.

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1. The State has preferred this appeal upon grant of leave to assail the judgment dated 15.12.2016 rendered by the learned ASJ-01, (Designated Special Court Under The Protection of Children From Sexual Offences Act, 2012 (POCSO Act)) District South East, New Delhi, Shri Sunil Chaudhary in Case No. 1434/16, Sessions Case No. 93/13, arising out of FIR No.49/13,

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registered at PS Kotla Mubarakpur under Section 376IPC and 6 POCSO Act, 2012 against the respondent accused.

2. By the impugned judgment the Trial Court has acquitted the respondent accused on the ground that there are contradictions and inconsistencies in the testimonies of the prosecution witnesses which raise a doubt on the case of the prosecution, and probablise the possibility of false implication.

3. On 25.02.2013 telephonic information was received by the police at 2.40 PM about "wrong act" being done with a girl, aged 15 years. The information was diarized vide DD No. 21A. Inquiry was assigned to SI Sunil PW13. He along with a lady constable- Pooja PW12 and constable– Arvind PW10 reached the address of the prosecutrix where the prosecutrix "S"– PW1 along with her mother– PW5 met the police party. Accused Sumit was also produced, and they (PW1 and PW5) alleged that the accused had committed "wrong act" with the prosecutrix "S". The accused was apprehended. The statement of the prosecutrix was recorded on 25.02.2013 by SI Rita- PW14 vide Ex. PW1/A. In the said statement, the prosecutrix gave her age as 11 years. She, inter alia, stated that she resides at her given address which was a tenanted premises, along with her parents. She was studying in MCD School in III Class. She stated that her father puts up a fruit rehdi at Sewa Nagar. She has three younger sisters and two brothers. One of her brother is elder to her, while the other brother is the youngest. She stated that about 10 days ago, her father had gone to Mathura for some work. Since he did not return, her mother had gone to bring him back from Mathura. She stated that on 20.02.2013– Wednesday, her brother– Rahul

PW2 had gone in the afternoon to participate in the Budh Bazar at Sadik Nagar. Since her brother– Rahul returns late from Budh Bazar, the prosecutrix and her sisters slept at about 11.00 P.M., leaving the door of the room open. Thereafter, the accused, aged 21 years came over to the house of the prosecutrix. She stated that she knew the accused from before and he used to put up a *pan bidi* shop on the corner of the street. The accused woke up the prosecutrix and removed her pant. He also removed his pant and thereafter he raped her (did *galat kaam* with her), which also caused pain to the prosecutrix. She also stated that some hot fluid (*garam paani*) was released by the accused. Thereafter, the accused gave her Rs.10/- and told her not to speak about the same to anyone. She stated that her Sister- Divya PW7, aged 7 years, witnessed the incident. The prosecutrix stated that she did not inform about the incident to anyone. On the date when her statement was recorded i.e., 25.02.2013, she informed her mother of the incident. The mother then made a complaint on number 100. Thereafter the police arrived and the accused was apprehended.

4. The prosecutrix– accompanied by her mother, and the accused were taken by the police party to AIIMS for medical examination of the prosecutrix and the accused. After medical examination of the prosecutrix "S" vide MLC No. 1833/13 (Ex. PW8/A), the exhibits were seized vide seizure memo Ex. PW12/B and were taken into possession. The sealed exhibits in relation to the medical examination of the accused- Sumit were also duly taken into possession vide Ex. PW 13/A.

5. The MLC Ex. PW8/A records the history as given, that the prosecutrix was sexually assaulted by Sumit, who lived in the neighborhood.

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The history records that Sumit undressed the prosecutrix and then undressed himself and did sexual intercourse with the prosecutrix on Wednesday-21.02.2013 at the home of the prosecutrix. The prosecutrix was found not to b have attained menarche i.e., the first occurrence of menstruation yet. It further records that the prosecutrix had taken bath twice and defecated since Wednesday. There was no sign of external injury. Pertinently, the hymen c was found torn upon local examination. The vaginal smear was taken.

6. FIR Ex. PW9/A was accordingly registered. The accused was arrested on 25.02.2013 at 9.00PM vide Ex.PW10/A. The statement of the prosecutrix was got recorded under Section 164 Cr.P.C. before the Ld. MM d (vide Ex. PW4/B & PW4/C) on 27.02.2013.

7. Upon completion of investigation the charge sheet was filed. The charge was framed against the accused on 24.09.2013 which reads as e follows:

> *" That on 21.02.2013 at about 01.00A.M at House No. F-211, Ist Floor Sewa Nagar, New Delhi within the jurisdiction of police stateion Kotla Mubarakpur you* f *committed aggravate penetrative sexual assault upon the prosecutrix Ms. "S", a minor girl aged around 11 years and you thereby committed an offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012, within my cognizance.*
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> g *In the alternative, on aforesaid date, time and place, you raped Ms. "S", a minor girl aged around 11 years and thereby committed an offence punishable under Section 376 of the I.P.C., 1860 and within my cognizance."*

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8. The accused pleaded not guilty and was, consequently, tried. The prosecution examined 14 witnesses which include the prosecutrix PW1, her brother Rahul as PW2, her mother Simla as PW5, her younger sister- Baby Divya as PW7. The other witnesses examined were Dr. Runchen as PW8, Ms. Chetna, the learned MM who recorded the statement of the prosecutrix under Section 164 Cr.P.C as PW4, and Ms. Seema Sharma, Principal, S.D.M.C. Primary School, Seva Nagar East as PW6, apart from the formal/ police witnesses.

9. The Ld. ASJ has, firstly, returned the finding that the prosecution had failed to prove with certainty that the age of the prosecutrix was below 12 years on the date of occurrence.

10. The learned APP has submitted that, firstly, the said finding returned by the learned ASJ is irrelevant, since POCSO Act is attracted where the age of the victim is below 18 years on the date of occurrence. The relevance of the victim being below 12 years of age, is only that if the victim is below the said age, the offence of sexual assault (defined in Section 7 of POCSO Act) tantamounts to aggravated sexual assault, as defined in Clause (m) of Section 9 of the said Act. The learned APP points out that the Trial Court has proceeded on the basis that, if the age of the prosecutrix was not established to be below 12 years on the date of occurrence of the offence, no offence would be made out. Mr. Katyal submits that this approach of the learned ASJ is completely mindless, perverse and laconic.

11. Mr. Katyal submits that the finding returned by the Trial Court that the prosecution had not established, with certainty, the age of the prosecutrix

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to be below 12 years on the date of occurrence, is also patently incorrect. He submits that the Trial Court has brushed aside the evidence in the case on the specious ground that the age of the victim had not been established by b production of school record from the school first attended by the prosecutrix. Since the school record produced by the witness PW6 is in respect of the admission sought by the prosecutrix in second class, the same c has not been believed. Mr. Katyal submits that the learned ASJ has failed to appreciate that the age of the prosecutrix was disclosed in the Rukka Ex. PW1/A as 11 years; it was disclosed before the doctor who medically examined the prosecutrix vide MLC Ex.PW8/A as 11 years; the doctor d found that the prosecutrix had not even attained menarche yet i.e., she had not yet had her first menstruation; the prosecutrix disclosed her age before the Ld. MM PW4– while recording her statement under Section 164 Cr.P.C. as 11 years; PW6- the principal of SDMC Primary School, Seva Nagar East, e New Delhi had brought the original pasting register containing the application form regarding the admission of the prosecutrix in the said school, coupled with the affidavit given by her father showing her date of f birth and the original admission register; the prosecutrix was admitted in class II on 10.05.2011 i.e, nearly two years before the date of occurrence of the incident. PW6 stated that the date of birth of the prosecutrix as per the school record was 02.02.2005; PW6 exhibited the application form made by g the father of the prosecutrix as Ex. PW6/A; the affidavit given by the father of the prosecutrix as Ex. PW6/B; copy of the admission register containing the relevant entry of admission of the prosecutrix as PW6/C; the prosecutrix was examined before the Court on 29.10.2013 when she gave her age as 11 h years; She was described by the Ld. ASJ as Baby “S”; the prosecutrix gave

the class in which she was studying as class IV; the Ld. ASJ recorded her satisfaction that "*the child is intelligent";* the Ld. ASJ observed *" However, she is only 11 years of age and therefore cannot be expected to understand the purpose and consequences of oath. I, therefore, dispense with administration of oath to the witness*"; the Ld. ASJ, thus, was satisfied about the age of the prosecutrix as being 11 years (and certainly not above 18 years).

12. Mr. Katyal points out that PW6 was not cross examined at all to raise a doubt on the school record. It was not suggested that the age of the prosecutrix at the time of grant of admission to her in the year 2011 was not correctly recorded in the school record. He further submits that in the affidavit tendered by the father at the time of the admission of the prosecutrix, he had stated that there was no documentary proof of the correct and true age of birth of his daughter i.e., the prosecutrix.

13. Mr. Katyal points out that neither the prosecutrix, nor her mother PW5– who had deposed that the age of the prosecutrix was 11 years on the date of occurrence, were cross examined on the said aspect of age. Thus, the age of the prosecutrix as being 11 years, on the date of occurrence, was not contested by the accused. The testimonies of the prosecutrix and her mother went uncontested.

14. Mr. Katyal submits that in the aforesaid background, for the learned ASJ to raise a doubt with regard to the age of the prosecutrix being below 12 years on the date of occurrence, was completely uncalled for and reflects a patently erroneous approach.

15. On merits, the Ld. ASJ has held that there are inconsistencies in the statements of the material witnesses, which raise doubts on the case of the prosecution. The accused has been given the benefit of the doubt and, consequently, acquitted.

16. Mr. Katyal submits that the learned ASJ has doubted the statements of the material prosecution witnesses by resort to an extremely erroneous and misdirected approach in the matter of appreciation of evidence. In this regard, he has read the statements of the material prosecution witnesses- being the prosecutrix PW1, her brother Rahul- PW2, her mother Simla- PW5 and Baby Divya PW7, her sister. Mr. Katyal has made his submissions in respect of the said statements, in the context of appreciation of these statements by the trial Court. We shall deal with his submissions a little later while examining and appreciating the evidence. He has drawn the attention of the Court to paragraph 13 of the impugned judgment which reads as follows;

> *"Thus, as per testimony of mother the incident was told to her by the victim on 25.02.2013 after her return from village but as per testimony of sister it was told on next morning. The victim has deposed that she narrated the incident to her brother while weeping but her brother has deposed that when he returned to home his sister was sleeping and she on next morning narrated the incident to him. As per brother he shared the incident with one tailor who told it to his mother. Thus all the four witnesses have deposed contrary to each other and the same is sufficient to raise doubt on the case. The prosecution has not brought any evidence to support the version that the parents of victim were not present on the day of incidence at home. Admittedly the offence of rape*

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> *is very shameful for the victim and the family and there is possibility of non reporting it to the police promptly but in the case in hand there is doubt that such an offence has happened as when brother of the victim returned to home, as per testimonies, he found her sister sleeping and that he met with the accused in the stairs while he was coming to home. If the offence had been occurred it would have been observed by him in the night itself. It is not possible that a girl with whom the offence of rape has occurred and another girl who has seen the occurrence will sleep within minutes."*

17. Mr. Katyal submits that the so called inconsistencies and contradictions highlighted by the learned ASJ are neither material, nor relevant, and do not go to the root of the matter. Minor inconsistencies are normal and natural. They are bound to creep in, in normal circumstances. They are not relevant, unless they impinge on the core of the case of the prosecution. He submits that the prosecutrix and her two siblings i.e., PW2- Master Rahul and PW7- Baby Divya were consistent and corroborative in their statements. Moreover, the statement of the prosecutrix stood duly corroborated by her MLC Ex. PW8/A, which showed that her hymen was torn. The core of the case of the prosecution was intact, and was duly established. Mr. Katyal, thus, submits that the impugned judgment is patently laconic, borders on perversity, and has led to grave miscarriage of justice. The same suffers from glaring errors in the matter of appreciation of evidence on account of the misdirected approach of the Ld. ASJ. The same deserves to be set aside, and the accused convicted as charged.

18. On the other hand learned counsel for the respondent accused had defended the impugned judgment. He submits that there are material

contradictions and inconsistencies in the story narrated by the prosecution witnesses, namely, PW1- the prosecutrix, PW2, Master Rahul, PW5- the mother of the prosecutrix and PW7- Baby Divya. He submits that the forensic examination of the samples did not find presence of semen in the vaginal swab, or the clothes of the prosecutrix. The FIR was highly belated in as much, as, the incident was allegedly of 20.02.2013 night, and the FIR was registered only on 25.02.2013.

19. The principles applicable to examination of the judgment of acquittal, in appeal, were laid down in ***Sheo Swarup & Ors. v. The King Emperor***, AIR 1934 PC 227 (2) in the following words;

> "*... ... ... 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."*

20. The Supreme Court crystallized the principles that the High Court should follow while examining a judgment of acquittal passed by the Trial Court in ***Ghurey Lal v. State of U.P.***, (2008) 10 SCC 450. The Supreme Court observed;

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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.

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

(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.

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

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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

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Courts/appellate courts must rule in favour of the accused."

21. We have duly considered the rival submissions in the light of the b evidence brought on record, and the law relevant to the subject. We now proceed to examine and appreciate the evidence in the aforesaid light.

22. The approach of the Ld. ASJ in dealing with the aspect of the age of c the prosecutrix is completely flawed. Firstly, we may observe that whether the prosecutrix was below 12 years of age or above 12 years of age, and less than 18 years of age – or even above the age of 18 years, is not relevant insofar as the offence of rape is concerned. The law deals with rapes d involving below 18 years of age under the special enactment, namely, the Protection of Children against Sexual Offences Act (POCSO ACT). The offences of rape of a child below 12 years are treated with greater severity. However, even in respect of a person who is above 18 years of age, the e offence of rape does not get obliterated only on account of age of the prosecutrix. However, from the discussion found in the judgment, it is evident that the ld. ASJ appears to be reeling under the impression that f unless the age of the prosecutrix is established to be under 12 years, the offence of rape would not be made out.

23. We now proceed to consider whether the finding returned by the Ld. g ASJ that the prosecution has not been able to establish that the prosecutrix was below 12 years of age can be sustained.

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24. The record shows that in the first telephonic information given to the police on 25.02.2013 at 2:40 P.M vide DD No.21A, it was reported that "*wrong act had been done with a girl aged 15 years*."

25. PCR Form entries are invariably recorded (and in this case it was recorded) on the basis of telephonic communication. Accurate transmission of such telephonic information may, or may not take place– particularly in respect of names and numbers. The information travels from mouth to mouth, before it gets recorded. Thus the possibility of inaccuracies creeping into the details of the recording made in the Daily Diary on the basis of telephonic calls cannot be ruled out, and is inconsequential.

26. We may refer to the judgment of the Division Bench in ***Rakesh @ Toni v. State (NCT of Delhi),*** 2014 SCC Online (Del) 6986. In ***Rakesh*** (supra) information was received on Number 100 that somebody was stabbed at the disclosed location. That information was entered in the Police Control Room (PCR) Form Ex.15/A.

27. The discussion in the judgment shows that the information contained in Ex.15/A was inaccurate. While dealing with entries made in the PCR form, the Division Bench observed as follows;

> *"15. A perusal of the information relayed contemporaneously to the Police Control Room and recorded in the PCR Form would reveal that W/Ct.Soni Kumari has recorded that injured Suraj S/o Raju was accompanied by his maternal uncle Manoj who informed that Suraj and his maternal uncle Titu had gone to purchase All Out when somebody stabbed Suraj. That*

Suraj and the man who stabbed him were on foot and had collided with each other.

16. ***Entries in the Police Control Room form are cryptic because there is hardly any time for the In-charge of the Police Control Room van to redictate what was conveyed and there is hardly any time for the operator to seek clarifications. Information received, with its accompanying aberrations, are recorded in the PCR form, but it contains vital information, as in the present case. The accompanying aberration in the instant case is a reference to Manoj as the maternal uncle of Suraj.*** *Manoj referred to in the information recorded is not the maternal uncle of Suraj. He is Ct.Manoj Kumar PW-12, who in his deposition has stated that the area in question where the incident took place fell in his beat and that he was on patrolling duty when he learnt about a stabbing incident at Shani Bazar near Primary School and he reached the spot. He saw Suraj lying in an injured condition. A PCR van reached. He removed the injured in the PCR van to the hospital. One Om Prakash and another person whose name he did not remember accompanied them. The person Om Prakash referred to in his testimony by Ct.Manoj is Om Prakash PW-4, the maternal uncle of the deceased and his pet name is Titu. The reference in the information recorded in the PCR form to Titu is to Om Prakash. It is apparent that it was Om Prakash who told Ct.Manoj as to what had happened because Ct.Manoj was the first police officer to reach the spot. As Ct.Manoj, Om Prakash, Rajesh Kumar and the deceased were travelling in the Police Control Room van to take the deceased to the hospital, Ct.Vinod passed on the information to the In-charge of the PCR van „Libra-39", who in turn conveyed the same to W/Ct.Soni Kumari.* ***When information is relayed from person to person there is bound to be discrepancies here and there. But at its core, the vital information conveyed is that Om Prakash and Rajesh Kumar were in the company of the deceased when the deceased collided***

> ***with the assailant who then stabbed the deceased***. *Om Prakash and Rajesh Kumar would thus be natural witnesses to the incident."* (emphasis supplied)

28. Thus, on the basis of the other evidence brought on record, the Court read the information contained in Ex. 15/A in a meaningful way by taking notice of the inaccuracy which had crept into the recording of the PCR form.

29. Similarly, in ***Om Parkash @ Omla v. State of Delhi*** 1971 (3) SCC 413, the appellant sought to raise an argument before the Supreme Court- on the basis of the entry in the roznamcha maintained at the control room (the information recorded was that the victim had been stabbed with a knife by a *badmash* inside Dharam Kanta Gali near Airlines Hotel), that the police had shifted the place of offence from the place mentioned in the roznamcha, to the shop of the deceased. The information was conveyed telephonically in that case. The Supreme Court observed that the name of the accused or the name of the deceased would not be very important in the message received at the control room. The control room is not concerned with the actual investigation of the offence. The object of information was to call the police to the scene of occurrence. That is why Dharam Kanta Gali near Airlines Hotel is mentioned for facility of location of the place of occurrence. Thus, in ***Om Parkash*** (supra) as well, the entry made in the roznamcha maintained at the police control room was not accepted by the Supreme Court as the gospel truth in all respects.

30. In the present case as well, there is absolutely no evidence whatsoever brought on record to suggest that the age of the prosecutrix was indeed 15 years at the time of the commission of the offence. If the age of the

prosecutrix was 15 years on the date of occurrence, there was no reason for the mother of the prosecutrix PW5 to claim that she was 11 years of age in her subsequent statement. Similarly, there was no reason for the prosecutrix PW1, her brother PW2 or the other witnesses to claim that she was 11 years of age. Even the school record regarding admission granted to the prosecutrix, does not support the inaccuracy in the statement recorded vide DD No. 21A with regard to the age of the prosecutrix.

31. The statement of the prosecutrix was recorded on the same day i.e., 25.02.2013 vide Ex.PW1/A wherein she disclosed her age as 11 years and that she studies in 3rd class in MCD School. The prosecutrix was medically got examined vide MLC PW8/A. The age of the prosecutrix was disclosed to the doctor as 11 years by the mother who accompanied her. Pertinently, the prosecutrix had not even attained menarche when she was examined by the doctor and her hymen was found torn. On the basis of the rukka, a FIR Ex.PW9/A was registered on 25.02.2013 under Section 376IPC. The FIR also records the age of the prosecutrix as 11 years. The statement of the prosecutrix was got recorded before the Ld. MM under Section 164 Cr.P.C. on 27.02.2013 vide Ex. PW4/B and Ex. PW4/C. Even before the Ld. Magistrate the prosecutrix gave her age as 11 years. She disclosed that she was a student of 3rd class, which is age appropriate. The statement of the prosecutrix was recorded before the Court as PW1 on 29.10.2013. The Ld. ASJ described the prosecutrix as "Baby S" looking to her tender appearance. She disclosed that she was studying in class 4th and gave her age as 11 years. The Ld. ASJ then recorded that she was satisfied that the "*child is intelligent*". She further recorded that "*however she is only 11 years of age*

and, therefore, cannot be expected to understand the purpose and consequences of oath." Therefore, administration of oath to the witness was dispensed with. Pertinently, no doubt arose in the mind of the Ld. ASJ with regard to the age of the prosecutrix being 11 years when the statement of the prosecutrix was recorded on 29.10.2013. No such suggestion was given by the accused to PW1, that she was not 11 years of age, or that she was either more than 12 years of age, or more than 18 years of age.

32. The mother of the prosecutrix– Ms. Shimla was examined as PW5. She stated that she has 6 children, including the victim. The victim "S" is her second child and her age is about 11 years. On the date when her statement was recorded i.e., 31.05.2014, she stated that the prosecutrix was studying in 4th standard. However, she could not tell the date of birth of the prosecutrix, being illiterate. Cross examination of PW5 shows that on behalf of the accused, though certain questions were put with a view to elicit the age of the prosecutrix, it was not suggested to her that the prosecutrix was not below 12 years of age or that she was a major. In fact, her answers given in her cross examination are consistent with her testimony in her examination in chief.

33. The prosecution examined Ms. Seema Sharma, Principal, S.D.M.C School, Seva Nagar East, New Delhi as PW6. She produced the school record as per which the prosecutrix was admitted in second class on 10.05.2011 vide Serial No. 4589 and was still studying in the school. As per the school record her date of birth was 02.02.2005. The copy of the application form was exhibited as Ex. PW6/A and the affidavit of Mukesh Chand– the father of the prosecutrix was Ex. PW6/B. The said affidavit was

affirmed and attested on 09.05.2011 i.e., nearly 2 years before the date of the incident. PW6 also exhibited the admission register containing relevant entry of the admission of the prosecutrix which is Ex. PW6/C. Pertinently, PW6 was not cross examined on behalf of the accused and it was not suggested to the Principal PW6 that the date of birth recorded in the school qua the prosecutrix was incorrect, or that the record was not duly made or maintained.

34. The cross examination of PW13, SI Sunil Kumar, who was entrusted with the enquiry of DD No. 21A, shows that, for the first time, the accused sought to raise a defence that the prosecutrix was not a minor. The suggestion given to PW13 that the prosecutrix was a major at the time of the incident is neither here nor there. PW13 neither had any personal knowledge with regard to the age of the prosecutrix, nor had he collected the evidence in that respect from the SDMC School– where the prosecutrix was studying. In any event, he denied the said suggestion. Thus, this suggestion given to PW13 was pointless.

35. Pertinently, a pointed question was put to the accused while recording his statement under Section 313 Cr.P.C. vide question No. 13 "*that PW6 produced the admission register of PW1 Ex.PW6/C containing application form Ex. PW6/A regarding admission of PW1 coupled with the affidavit Ex. PW6/B of her father who was admitted in SDMC Primary School in Class IInd on 10.05.2011 vide serial number 4589 showing her date of birth as 02.02.20058. What do you have to say?*" The accused answered the said question by stating that "*it is a matter of record*". Even on that stage, he did not set up a defence that the school record was incorrect, or that the

prosecutrix was more than 12 years of age on the date of incident, or a major.

36. We have had several occasions to deal with decisions rendered by the same Ld.ASJ wherein, in similar circumstances, he has held that the prosecution has not been able to establish the age of the victim/ prosecutrix to be below 12 years, and on that basis, he acquitted the accused. We may take note of our decision in ***State (GNCT OF DELHI) v. Hargovind*** in Crl.a. 334/2018, decided on 02.07.2018, wherein we referred to our earlier decision in ***State of NCT of Delhi V. Sonu Kumar*** in Crl.A.1137/2017, decided on 07.03.2018, and ***State of NCT of Delhi V. Dharmendra*** in Crl.A. 1184/2017, decided on 23.03.2018. The relevant extract of decision in ***Hargovind*** (supra) reads as follows;

"19. *The issue that arises for consideration is, as to what approach the Court should adopt in the matter of determination of age of the prosecutrix, if the prosecution – while claiming that the prosecutrix/ victim is below the age of 16 years, or 12 years – as the case may be, does not prove her birth certificate on record. Would the Court be justified in presuming and proceeding on the basis that the prosecutrix/ victim is a major, or above the age of discretion, i.e. 16 years, or the Court is obliged to call for the medical examination of the victim/ prosecutrix to determine her age?*

20. *Recently, we had occasion to consider some aspect about the age of the victim in our decision rendered in* ***State of NCT of Delhi v. Dharmendra****, Crl. A 1184/2017 decided on 13.03.2018. In that case the age of the victim was disclosed by prosecution as 9 years. The learned ASJ held that the prosecution had not established that the victim was below 12 years of age– which is relevant for the purpose of Section 9 of the POCSO Act. This Court, inter alia, observed as follows in the said decision:*

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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.

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.

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

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.

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 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:*

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"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.

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.

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:

"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

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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

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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)"

22. Therefore, a document may be admissible, but as to

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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 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

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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

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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]

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] .)

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 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."

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)

"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."

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.

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

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.

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."

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 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.

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.*

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 ***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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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 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.

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

"12. Procedure to be followed in determination of Age.—

> *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.*
>
> *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.*
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> *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 –*

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

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

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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
f *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."*

Pertinently, in cases falling under sub-rule (3)(b), the
g *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.*

37. ***No doubt, the Supreme Court in Mahadeo***
h ***(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.

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

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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 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.*** *"* (emphasis supplied)

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37. The evidence brought on record shows that it was really not even in issue, whether the prosecutrix was below the age of 12 years or not. It was a consistent case of the prosecution that the prosecutrix was 11 years of age at the time of the incident. That was so disclosed by the prosecutrix in the rukka; before the doctor when her MLC was conducted; in her statement recorded under Section 164 Cr.P.C.; in the FIR and; before the Court. The age of the prosecutrix was also disclosed to be of 11 years by PW5– the

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mother, Ms. Shimla and the age of the prosecutrix was also established by the school records produced by PW6, Ms. Seema Sharma. Neither the prosecutrix PW1 nor her mother PW5, nor Ms. Seema Sharma PW6 were cross examined on the aspect of the age of the prosecutrix.

38. As noticed hereinabove even while recording his statement under Section 313 Cr.P.C., when the accused was confronted with the school record Ex.PW6, he responded by merely stating that it was a matter of record. The incident took place nearly 2 years after the father of the prosecutrix gave the affidavit disclosing her age Ex. PW6/B and it could not be said that he deliberately suppressed the age of the prosecutrix with a view to falsely implicate the accused. Pertinently, the affidavit was given by none other than the father of the prosecutrix and he was no stranger to her. There was no other evidence brought on record inconsistent with the date of birth of the prosecutrix recorded in the school record.

39. As noticed hereinabove, the prosecutrix was not found to have even attained menarche. As per ***Modi's Medical Jurisprudence and Toxicology*** menarche is generally reached by a female at the age of 13-14 years. In this regard we may quote the relevant extract from the aforesaid medical literature.

> *"Age–Puberty in the female usually commences at the thirteenth or fourteenth year in India. The age of onset of menstruation is variable and factors like race, heredity, general health, environment, climate, diet and hygiene play a part"*

40. The prosecutrix was a student of 3rd Grade at the time when the offence was perpetrated. It would even, otherwise, be absurd to assume that a child of 3rd Grade is of 18 years plus. The Grade in which she was studying was age appropriate with 11 years, as stated by the prosecutrix.

41. Thus, in the light of the aforesaid discussion, the finding returned by the Trial Court that the age of the prosecutrix was not established to be of 12 years on the date of the incident is completely fallacious and contrary to the evidence brought on record. The same cannot be sustained and is accordingly set aside.

42. At the same time, we may observe – at the cost of repetition, that the offence of rape does not get obliterated even if the prosecutrix is assumed to be above the age of 12 years. The only consequence – of the prosecutrix being found to be below 12 years of age, is that the rape, if established to have been committed, would tantamount to aggravated sexual assault as defined in Section 5(m) of the POCSO Act.

43. We may now turn to examine the evidence led by the prosecution on record in relation to the offence with which the accused was charged.

44. The first statement of the prosecutrix given to the police Ex.PW1/A, insofar as it is relevant, was that about 10 days ago, her father had gone to Mathura for some work. Since he did not return, her mother went to Mathura to bring him back. On 20.02.2013–Wednesday, her brother Rahul had gone to participate in the Budh Bazaar at Sadik Nagar in the afternoon. Since her brother used to return late after participating in the Budh Bazaar, the prosecutrix and her sister had left the door of their home open and had

gone to sleep at around 11.00P.M. While they were sleeping, the accused-whom she knew from before, came to their house and removed the pant of the prosecutrix while she was sleeping and he also removed his own pant and thereafter, he did "*galat kaam*" with her which caused considerable pain to her and after the act some "*garam paani*" also came out. Thereafter, the accused gave Rs. 10/- to the prosecutrix and told her not to speak to anyone about his act. She also stated that her sister Divya, aged 7 years saw the entire episode. She and her sister did not tell about the incident to anyone and on 25.02.2013, she told the incident to her mother. The mother, in turn, informed the police.

45. In her statement recorded under Section 164 Cr.P.C. before the Ld. Magistrate Ex.PW4/B, the prosecutrix, narrated the incident as already narrated by her in Ex.PW1/A. She added that the accused raised her legs at the time of committing the offence. She stated that the accused left before the arrival of her brother and that the accused threatened her with dire consequences if she spoke to anyone. She also stated that her brother saw the accused in the stairway. She stated that she got scared and she informed her brother about the incident after about 3-4 days. Thereafter, he informed the parents about the incident. In her statement made before the Court, the prosecutrix was consistent with earlier two statements. She explained the reason why her parents were not at home; why the door of the house had been left open on the fateful night; that the accused entered the house and removed the clothes of the prosecutrix and his own clothes and that he committed rape upon her. She also stated that she felt pain in her abdomen and that her sister– Divya witnessed the same. She also stated that her

brother– Rahul came home late in the night, and the accused was going downstairs when he came, and when her brother questioned the accused, he stated that he had come to see if all was well. She also stated that while committing the rape the accused had intimidated and threatened her not to reveal the incident to anyone, otherwise, he would kill her and take her away. She stated that when her mother returned home, she was crying in pain and told about the incident to her mother, whereafter the police was called at number 100. She was cross examined and she stood her ground. She denied the suggestion that on the night of the incident some more boys had come to her home to meet her. She denied that on the said day, the tailor had met her.

46. The statement of the prosecutrix was corroborated by both PW7– Baby Divya, sister and PW2– Master Rahul, the brother. PW7– Baby Divya narrated the incident by stating that on one day the accused came to their house. At that time he was drunk. Her parents were not at home. The door of the house was not bolted and was slightly open and electricity was off at that time. Her brother was also not there. The accused came inside the house and removed his clothes and the clothes of her sister and laid upon her. Thereafter, he did "*gandi cheez*" with her sister. She explained that he inserted his penis into the vagina of the prosecutrix. The accused put one hand on the mouth of her sister, and threatened her and her sister that if they raise alarm, he will kill both of them. After some time, hearing the footsteps of her brother, he went downstairs, threatening them not to follow him, otherwise, he will kill them. When her parents came in the morning, the police was called. She identified the accused correctly. She was cross

examined on behalf of the accused but her examination in chief was not at all shaken. She denied that she had been tutored by her mother to depose before the Court. She also denied that she was tutored by her elder sister. She stated that the incident was not narrated to her brother in the night. However, the incident was disclosed to the mother in the morning.

47. PW2– Master Rahul, the brother of the prosecutrix in his testimony corroborated the statement made by the prosecutrix. He stated that on the fateful night, he returned home in the night at about 01.00 A.M. When he was going upstairs to his home, the accused was coming downstairs. He asked the accused why he had come to his home. He said that the mother of the prosecutrix had asked him to meet her children in her absence and said that he had come to meet the prosecutrix. He stated that when he came upstairs, there was no light and his sister was sleeping and he also went to sleep. The next morning his sister narrated the incident to him. He stated that he asked his sister to remain calm till the mother arrives. After about 2-3 days, the mother came back. He shared the incident with the tailor known to them and he informed the mother about the incident. The prosecutrix also narrated the incident to her mother. The mother then called up the police and the police made enquiries.PW2 was cross examined on behalf of the accused but his examination in chief was not shaken.

48. PW5- Ms. Shimla, the mother of the prosecutrix stated that she returned to Delhi on 25.02.2013 to her house. On that day, her daughter– the prosecutrix "S" was not well (*woh bujhi si ho rhi thi*). She asked her-what had happened? She told her that the accused had come to their house 3 days earlier and had done wrong act with her. She made a call to number

100 about the incident, whereafter, the police came. She stated that the police took into its possession the t-shirt, pant of her daughter- the prosecutrix and one blanket. She denied the suggestion that the tailor of the nearby shop was involved in the incident, or that the accused had been falsely implicated instead of the tailor.

49. From the testimonies of the aforesaid witnesses, it is seen that the prosecutrix was consistent in her statements at all stages. She narrated the incident as it happened while recording her statement Ex.PW1/A; while recording her statement under Section 164 Cr.P.C. Ex. PW4/B and Ex. PW4/C and while recording her testimony before the Court. Her statement has been fully corroborated by PW7- her younger sister, Baby Divya, who is an eye witness to the occurrence of the incident. To the extent that the accused was seen coming down after the incident from the house of the prosecutrix, the statement of Master Rahul is corroborative.

50. The statement of the prosecutrix is also corroborated by the MLC of the prosecutrix Ex. PW8/A, which shows that her hymen was found torn. Though it is possible for the hymen to get torn due to physical activity or injury, it cannot be assumed that in every case where the hymen of a small girl child is found torn, the same is a result of a physical activity or injury. The defence did not probablise the possibility of the hymen of the prosecutrix being torn due to physical activity or due to injury. When there are serious allegations of penetrative sexual assault and the hymen of the prosecutrix is also found torn, the fact that the hymen of the prosecutrix– who is a minor child of only about 11 years, is torn, is certainly an

incriminating circumstance and is a corroborative piece of evidence in relation to the statement of the prosecutrix and other prosecution witnesses.

51. We have, in detail, referred to the statements made by the prosecutrix from time to time and find that they are all consistent in their material part. The statement of the prosecutrix is completely credible and believable. The accused has not been able to raise any doubt on the said statement. The prosecutrix, who was only about 11 years of age described the incident as it happened in detail, not only in her first statement Ex. PW1/A but also in her statement recorded before the Magistrate under Section 164 Cr.P.C. Ex. PW4/B and PW4/C. It is evident from the statement of the prosecutrix, that she had no earlier experience of sexual activity. She stated in Ex. PW1/A that on account of penetration by the accused into her vagina, she suffered considerable pain and, thereafter, some hot fluid "*garam paani*" was discharged. This refers to the act of ejaculation of semen by the accused– a phenomenon with which she was not conversant. It is on this account that she described the ejaculation of semen as the discharge of "*garam paani*" when her statement was recorded under Section 164 Cr.P.C. She described the offence by stating that the accused raised her legs while committing the act. This, again, is a graphic narration of the incident by the prosecutrix which she would not have given had she not actually been subjected to rape. The prosecutrix and PW-2 and PW-7 are all minors. Their statements have to be approached with caution. Their statements are duly corroborated and rule out the possibility of tutoring.

52. The reasons given by the Ld. ASJ to disbelieve the case of the prosecution are found in paragraph 13 of the impugned judgment, which reads as follows;

> *"Thus as per testimony of mother the incident was told to her by the victim on 25.02.2013 after her return from village but as per testimony of sister it was told on next morning. The victim has deposed that she narrated the incident to her brother while weeping but her brother has deposed that when he returned to home his sister was sleeping and she on next morning narrated the incident to him. As per brother he shared the incident with one tailor who told it to his mother. Thus all the four witnesses have deposed contrary to each other and the same is sufficient to raise doubt on the case. The prosecution has not brought any evidence to support the version that the parents of victim were not present on the day of incidence at home. Admittedly the offence of rape is very shameful for the victim and the family and there is possibility of non reporting it to the police promptly but in the case in hand there is doubt that such an offence has happened as when brother of the victim returned to home, as per testimonies, he found her sister sleeping and that he met with the accused in the stairs while he was coming to home. If the offence had been occurred it would have been observed by him in the night itself. It is not possible that a girl with whom the offence of rape has occurred and another girl who has seen the occurrence will sleep within minutes*"

53. The Ld. ASJ has found discrepancy in the statement of the prosecutrix that, on the one hand, she stated that she narrated the incident to her mother on 25.02.2013 after her return from the village, and on the other hand, her younger sister PW7- Divya, stated that the incident was narrated on the next morning. The Ld. ASJ, in our view, has taken an absurdly hypothetical view

of the matter. It is well settled that minor aberrations and inconsistencies naturally creep in the statements of witnesses. That cannot be a reason to discard the, otherwise, credible and consistent testimonies of the witnesses. The Ld. ASJ failed to appreciate that PW7 was merely 8 years old at the time when her statement was recorded on 17.01.2015. The incident is of 20/21.02.2013. Thus, the statement of PW7 was recorded, nearly 2 years after the incident. When the incident took place, she was still very young. To expect such exacting recollection and memory from anyone, much less a child, who is barely 8 years of age, is to live in an unrealistic world.

54. The Ld. ASJ, unfortunately, has shown complete lack of sensitivity to human feelings and limitations. The cut and dry approach demonstrated by the Ld. ASJ has led to serious miscarriage of justice. We find that the reasoning given by the Ld. ASJ is, even, otherwise, absurd. He observes that the victim deposed that she narrated the incident to her brother while weeping. Pertinently, while making the said statement, the prosecutrix did not state that she narrated the incident to her brother on the same night. Thus, there is no contradiction between this statement of the prosecutrix, and the statement of the brother that the prosecutrix and her sister were sleeping when he came back home around 1.00A.M. The statement of the brother that he shared the incident with one tailor, who told to his mother, and the statement of the prosecutrix that she told about the incident to her parents and to her brother, in our view do not tantamount to such serious inconsistency which could be said to go to the root of the matter. As to who informed whom first, is an aspect which does not concern the incident itself, since the offence/ incident had already taken place.

55. Insofar as the incident is concerned, the statements of PW1, PW2 and PW7 are consistent and credible. In our view, the minor embellishments and inconsistencies with regard to the subsequent developments which took place before the police was called are not sufficient to raise any doubt on the case of the prosecution which has remained intact.

56. The Ld. ASJ has observed that the prosecution has not established that the parents of the victim were not present at home at the time of the incident. We are dismayed at this line of reasoning adopted by the Ld. ASJ for the reason, that it was not even suggested to either the prosecutrix PW1, or to PW2- Master Rahul, or to PW5- Ms. Shimla, or even to PW7-Baby Divya that the parents of the prosecutrix were at home on the fateful night, or that they had not gone out of town. The accused could not have been heard to contend that the parents of the prosecutrix were home on the fateful night. The learned ASJ appears to have pulled out this argument of his own hat – something he could not have done, to raise a doubt on the case of the prosecution.

57. The Ld. ASJ has not believed the case of the prosecution for the reason that when PW2 returned home, he found the prosecutrix and the younger sister sleeping. He doubts the case of the prosecution, because they- i.e. the prosecutrix and PW-7 did not report the crime to him on the same night. However, he does not appreciate the consistent statement made by both PW1 and PW7 that the accused threatened them with dire consequences if they were to speak about the incident to anyone.

58. Merely because the prosecutrix and her sister may have appeared to be asleep when PW2 returned home late in the night, it does not follow that they were deep in sleep. Pertinently, it has come in the evidence of PW1 and PW7 that they were both aware of the fact that their brother had met the accused on the stairway when he was returning to the room. Thus, obviously, both the prosecutrix and PW7- Divya were not asleep when PW2 returned, but they gave the appearance of being asleep, to PW2.

59. Sexual offences carry with them a great deal of shame, embarrassment and guilt for the victim and the other family members. It is not easy, and it requires courage and confidence for the victim to speak up and disclose the offence. This is more so when the victim and other witnesses are small children and have been threatened with dire consequences. Unfortunately, the Ld. ASJ has shown complete lack of sensitivity and understanding of human behavior in this regard while appreciating the evidence.

60. It has been argued on behalf of the accused that the samples drawn and sent to FSL did not establish the presence of semen, much less of the accused. The explanation for the same is simple. The incident took place on the night of 20/21.02.2013, whereas the complaint was made and MLC conducted only on 25.02.2013.The MLC records that the prosecutrix has taken bath twice and defecated since the day of occurrence. That being the position, it was not unusual to not find semen on the vaginal swabs taken from the prosecutrix during the conduct of her medical legal examination.

61. It has also been argued that the clothes of the prosecutrix and the blanket collected from her residence also did not show the presence of semen. It appears from the record that the said clothes and blanket were collected by the I.O. only with a view to investigate whether the same had any semen marks which could be attributed to the accused. Pertinently, it was not the case of the prosecution, and it was not stated either by the prosecutrix, or her sister PW7, or her brother PW2, or even her mother PW5, that the said clothings did receive the semen marks at the time of the commission of the offence.

62. The defence taken by the accused was of false implication on account of some alleged financial transaction between his family and the family of the victim. The accused claimed that the family of the victim gave a loan of Rs.50,000/- to them, which they were not able to pay on time, and to put pressure on them the case had been planted on him. Pertinently, no such defence was put to the prosecution witnesses, particularly PW1, PW2 and PW5. For the first time, the said defence was set up by the accused while recording his statement under Section 313 Cr.P.C. The accused did not lead any evidence in support of this defence. Thus, this defence of the accused stood falsified and was of no avail.

63. The accused has not been able to explain why the prosecutrix and her family members would falsely implicate him in such a serious offence. The accused was known to the family of the prosecutrix- being a neighbor. In that capacity, he appears to have known of the parents of the prosecutrix being out of town, thereby leaving the minor children unprotected. It appears he was also aware of the fact that PW2 Rahul- the elder brother, was

away to participate in Budh Bazar and the prosecutrix was home only with her younger sibling. He seized the opportunity and committed the heinous crime.

64. Section 29 of the POCSO Act raises a statutory presumption against the accused, who is prosecuted for committing, or abetting, or attempting to commit any offence, inter alia under Section 5 of the said Act "*that such person has committed or abetted or attempted to commit the offence, as the case may, unless contrary is proved*." Section 30 of the POCSO Act relates to raising of a statutory presumption against the accused with regard to the mental state.

65. Thus, it was for the accused to rebut the mandatory statutory presumption under Section 29 and 30 of the POCSO Act, which, he has miserably failed to do.

66. The accused also claimed an alibi. In response to question No.27, he stated that he was not even in Delhi on the particular day and that he had gone to his maternal uncle for purchase of items which he sells at his general store. Once again, this defence was not put to any of the prosecution witnesses. In support of this plea, the accused examined DW1–Sh. Bajrangi, his maternal uncle.

67. DW1 stated that in the year 2012, the accused came to him for work as a fruit vendor in Allahabad. The accused went to him on 22.02.2012 and he remained with him in Allahabad throughout the season of Guavas i.e., for 2 months. He changed the date when the accused allegedly went to him as 26.01.2013, and claimed that he stayed with him till 22.02.2013. He stated

that during this time, he learnt the business of selling guavas as he wanted to set the same in Delhi. He claimed that when he was returning, he gave him 150 Kg. of guavas to sell in Delhi.

68. Firstly, we may observe that the statement of DW1 is at variance with the defence taken by the accused, wherein he stated that he had gone to his maternal uncle "*for purchase of the items which we sell at our general store."* On the other hand, his uncle DW1 stated that the accused stayed with him to learn the business of guavas, as he wanted to set up that business in Delhi– meaning thereby, that the accused was not selling guavas at his general store.

69. The cross examination of DW1 completely discredits him. He could not give the address where he was residing when the accused allegedly visited him. He could not tell the name of the current English month and whether the month was September, October or March. Yet he gave the exact date of his arrival as 26.01.2013, and of his departure as 22.02.2013. He stated that the accused came to him at Allahabad only once and he had met the accused in Delhi twice. The accused remained with him for 60-65 days. We may observe that the period 26.01.2013 to 22.02.2013 is less than 1 month.

70. On further cross examination, he stated that the accused came to Allahabad by Prayag Raj Express in December 2013 and remained with him for 2 months. He stated that the accused never came to him in Allahabad prior to December 2013. Pertinently, the incident is of February, 2013.

71. It is clear to us that DW1– being the maternal uncle of the accused, is an interested witness and his interest lies in saving and protecting the accused. His testimony is completely discredited, since he has contradicted himself on several aspects taken note of hereinabove. Thus, the accused failed to establish the alibi set up by him.

72. In the light of the aforesaid discussion, we are of the view that the prosecution has been able to conclusively establish the charge against the accused of his having raped the prosecutrix on the night of 20/21-02.2013 at her residence, beyond reasonable doubt.

73. The impugned judgment, in our view, suffers from serious infirmities. The approach of the Ld. ASJ in appreciation of evidence has led to grave miscarriage of justice. The approach of the Ld. ASJ is not judicious, as in the formation of his opinion, he has got influenced by wholly irrelevant and minor embellishments and inconsistencies, which are bound to creep-in in any case. The Ld. ASJ has failed to appreciate that the core of the case of the prosecution had remained intact, and has been completely established to the hilt by the credible testimonies of the prosecutrix which stood corroborated by PW2, PW7, and by the medical evidence brought on record. The accused has not been able to probablise the defence set up by him either by way of cross examination of the prosecution witnesses, or by leading any definite evidence.

74. Consequently, we set aside the impugned judgment and hold the respondent accused guilty of having committed the offence of aggravated sexual assault upon the prosecutrix since the prosecutrix, at the relevant

point of time was a child below 12 years of age. The respondent accused is, thus, convicted for the offence under Section 5 read with Section 6 of the POCSO Act.

(VIPIN SANGHI)
JUDGE

(I.S.MEHTA)
JUDGE

OCTOBER 12, 2018

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

Publisher has only added the Page para for convenience in referencing.

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