$~3.

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

\+ **Date of Decision: 08.05.2018**

% **CRL. A. 366/2018**

STATE ..... Petitioner

Through: Mr. Rajat Katyal, APP along with Inspector Yogeshwar Singh, PS-Kalkaji, for the State.

versus

BITTU MANDAL ..... Respondent

Through: Mr. Nitin Rai Sharma, Advocate.

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

J U D G M E N T

VIPIN SANGHI, J.

1. The State has preferred the present appeal upon grant of leave to assail the Judgment rendered by the Ld. ASJ-01, South East District, New Delhi in Sessions Case No. 29/13 arising out of FIR No. 410/11 registered at PS Kalkaji, under sections 376/363 IPC titled ***State Vs. Bittu Mandal***. By the impugned judgment the Ld. ASJ has acquitted the accused/respondent of the charge.

2. The background facts of the present case have been taken note of in the judgment. We reproduce the same as under:

a

"1. The facts of the case as per the final report are that on 09.11.2011 at about 11.37 AM an information on telephone was received by the police that one girl aged 11-12 years is saying that some boys has made wrong act with her. The information was entered in the register at serial no. 11A and inquiry was given to WSI Kusum Dangi who along with W/Ct. Seema reached to the place of occurrence where she met the victim (name is withheld as per law) who stated that she is 11 years old and is student of 4th class and is eldest to her one brother and one sister. She stated that when she was coming from her school on 03.11.2011 one boy named Bittu, who was known to her earlier and residing in her neighbourhood, near petrol pump of subzi mandi and asked her to go with him for outing tomorrow and told her not to come in school uniform and to bring extra pair of cloth in bag. She stated that on 04.11.2011 he met her at the school gate at the time of closing of school and they both went towards Kalkaji Mandir. They sat on footpath near Kalkaji Mandir for some time and then he took her in a nearby park in a jhuggi, there she changed her cloths. They remained in the jhuggi where no one was coming. She stated that he said to her that he will marry her and that they sat by holding hands of each other and when it was becoming dark he took her to bushes and they sat there hiding them. She stated that they felt hungry and he brought chowmin and returned in half an hour and they ate it. She stated that he removed her salwar and she opposed many a times but he broke the string of salwar by pulling it and also removed his pant and did intercourse forcibly with her. She felt pain and when she cried he shut her mouth. He did intercourse two times with her. She stated that he left her at Sri Lal Chowk in the morning at 7-8 AM and asked her to go home and not to tell the facts to anyone otherwise he will kill her. She got frightened and after reaching home she narrated the incident to her mother on asking. On the statement of the victim case was registered and investigation was started and scene of crime was inspected and site plan was prepared. Victim was got examined medically and all the samples were seized. Search for the accused was made and he was arrested and was got medically examined. During

the investigations statement of the victim was also got recorded u/s 164 CrPC."

3. The accused was charged with commission of offences punishable under sections 376/363 of IPC. The accused pleaded not guilty and hence the matter went to trial. By the impugned judgment the trial court has acquitted the accused/respondent. We consider it appropriate to extract the relevant portion of the impugned judgment before we proceed to discuss the submissions and examine the correctness of the reasoning given by the learned trial court.

"*8. Thus, for the offence of 'kidnapping' and 'rape', determination of the age of the victim girl at the time of incident is very important. The prosecution to prove the age of the prosecutrix has called the record from her school which is produced by PW1. As per the record produced by the witness the victim was admitted in the school in class 1st on 10.07.2008 and her date of birth is 06.06.2000. The witness stated that the date of birth of victim was mentioned in the school record on the basis of affidavit given by her father. The father of the victim is examined as PW5 and he has not whispered a single word in his statement about the date of birth of victim. No other document in regard to the date of birth of victim is brought on file.*

9. It is held by the Hon'ble Supreme Court in case Satpal Singh v. State of Haryana (2010) 8 Supreme Court Cases 714 that "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."

10. The prosecution is not able to corroborate the entry of date of birth in the school as no oral or documentary evidence is brought on file in this regard. On the basis of the evidence adduced by the prosecution it can not be said safely that the prosecution has proved that the date of birth of the victim is correctly entered in the school record particularly in view of the statement of the victim where she stated that she celebrates her birthday on 06th March and she do not know the year of her birth. Thus it is not proved that the victim was below the age of 16 or 18 on the date of occurrence.

11. The victim deposed in the trial that "At the time of leaving the school, accused Bittu met me on the gate of school. Accused Bittu took me with him. We went on foot upto some distance and thereafter, he hired an auto and reached at Kalkaji Mandir and took me to the park near the Kalkaji Mandir. In the park he took me inside a Jhuggi. Accused Bittu asked me to change my clothes in the Jhuggi. He went out from the Jhuggi and I changed my clothes. It was a dawn time, I was feeling hungry. The accused Bittu brought me into the bushes and went to take the Chowemin. Accused brought Chowemin after 1/2 an hour and we both ate chowemin. The accused pulled my lower (Salwar) which I objected to but the accused broke (Kamarband). The accused removed his pant and forcefully inserted his penis into my vagina. I cried a lot in pain. The accused put his hand on my mouth and thereafter, the accused had sexual intercourse with me twice in the night. In the morning of 05.11.2011 at about 07.08 A.M. the accused took me from there and left me at Lal Chowk and threatened me to kill if I would report incident to anybody. I reached home. My parents inquired from me and I accordingly narrated the entire incident to my mother. My father took me to the police where the police recorded my statement." She deposed that the police also took her to the place of incident and she pointed out the said place to the police.

12. The version of the victim as disclosed by her in her statement made u/s 164 CrPC recorded by PW3 was that she used to go to school in Kalkaji and on 04.11.2011 when she came out from her school after school time one boy Bittu met her outside the school who was residing in her neighborhood and due to this she used to treat him as a brother and on that day she accompanied him for her home at his request but he took her in a park. She stated to him that her parents will be angry but he said that he knew a new way to home and she believed him as she was treating him as a brother. There was a jhuggi in the park and Bittu kept her sit in the same and that she tried to ran away but he gave her beatings and closed her mouth. She stated that in the night he also bring food for her. She stated that thereafter he torn her cloths when she raised objection to it. She stated that he made sexual physical relation with her against her wish. She stated that on the next day he left her Sri Lal Chowk and went from there. Thus the testimony given by the victim in the court during the trial have many variation from her earlier statement. As per her statement made before learned Magistrate she tried to run away from the park but the accused gave her beating. As per this statement she was left in the park when the accused went to bring food. She has not explained if she was restrained by the accused in the park forcibly and without her wishes then as to why she did not go away from there when the accused went to bring food. Till that time no rape was committed by the accused with her and she was under no threat. The victim in her deposition made in the court has not deposed that she was beaten by the accused and she tried to run from there and that the accused torn her cloths. She in her earlier statement has not stated that she was raped twice by the accused.

13. In the deposition the victim stated that her father took her to the police where the police recorded her statement. In her earlier statement she has not stated anything in this regard. As per police version the police officials reached to the place of occurrence i.e park and her statement was recorded there. As per statement of father of the victim she took him to the place where the accused had committed rape upon her and that from

a

b

c

d

e

f

g

h

> *the park itself he got made a phone call at number 100 from the cell phone of some other person. The police has not examined the owner of the phone by which the call was made to the police. The call was made intimating the police that one girl is stating that some boys has did wrong act with her. The examination of the caller to explain the difference in the information and the case of victim is necessary and in the absence of his examination the facts remained unexplained leaving the case of the prosecution doubtful and giving occasion that the plea of the accused that the girl was raped by some boys who had come to park possible. The victim's undergarment and micro-slides were sent to FSL and after there examination the blood and semen found on it as observed could not be connected with the accused.*
>
> *14. Considering the above stated lacunas in the case of the prosecution the inconsistent, uncorroborated testimony of victim is not found trustworthy and reliable. On the basis of unreliable and inconsistent testimony of the victim the accused can not be held guilty. Accordingly the accused Bittu Mandal is acquitted from the charge framed against him as the prosecution is not able to prove its case.*"

4. Mr. Rajat Katyal, learned APP submits that the impugned judgment is perverse and suffers from manifest errors. He submits that the approach of the Ld. ASJ is misdirected; his appreciation of the evidence is laconic; and; his conclusions are contrary to the evidence brought on record.

5. Mr. Katyal submits that the victim testified in Court as PW-2, and in her testimony she has stated that on 03.11.2011, when she was coming from the school, accused Bittu met her on the way near Petrol Pump Sabzi Mandi and asked her to bring one more pair of clothes the next day in her school bag, and that they will go for an outing. On 04.11.11 she alongwith her sister Nisha were coming to the school but due to injuries sustained by her sister,

she returned home and the prosecutrix went to school. At the time of leaving the school, accused Bittu met her on the gate of school. Accused Bittu took her with him. They went on foot upto some distance and thereafter he hired an auto and reached at Kalkaji Mandir and took her to the park near the Kalkaji Mandir. In the park, he took her inside a jhuggi. Accused Bittu asked her to change her clothes in the jhuggi. He went out from the jhuggi and she changed her clothes. It was dawn time. She was feeling hungry. The accused Bittu brought her into the bushes and went to take chowemin. Accused brought chowemin after half an hour and they both ate chowemin. The accused pulled her lower (salwar), which she objected to, but the accused broke the string (kamarband). The accused removed his pant and forcefully inserted his penis into her vagina. She cried a lot in pain. The accused put his hand on her mouth and thereafter the accused had sexual intercourse with her twice in the night. In the morning of 05.11.11 at about 07.08 AM, the accused took her from there and left her at Lal Chowk and threatened to kill her if she reported the incident to anybody. She reached home. Her parents inquired from her and she narrated the entire incident to her mother. Her father took her to the police where the police recorded her statement Ex. PW 2/A bearing her signature at point A. The police got her medically examined vide MLC Ex. PW 2/B. The police also took her to the place of incident. She pointed out the said place to the police. The police took her before a magistrate where she made her statement Ex. PW-3/B.

6. Mr. Katyal submits that the prosecutrix was categorical in her testimony and the same inspired confidence. It was natural and there was no reason to reject the same. The same was sufficient to establish the guilt of

the accused, and there was no need to look for corroboration. In any event, there was ample evidence to corroborate her testimony, including the medical evidence of the prosecutrix and the accused. He submits that the learned ASJ has acted with perversity in not believing the testimony of the prosecutrix despite ample corroboration.

7. Mr. Katyal has drawn our attention, firstly, to Ex PW-12/A, DD No. 11A recorded on 05.11.11 at 11.27 at PS Kalkaji wherein information was lodged-as received by phone, that an 11-12 year old girl is saying that some boys have done wrong act with her. On receipt of DD No. 11A, PW-12- the I.O., along with Lady Ct. Seema reached the place of incident where prosecutrix met them with her father PW-5. The prosecutrix gave her statement to PW-12. She prepared the rukka vide Ex. PW 12/B.

8. Mr. Katyal submits that the victim was got medically examined on the same day i.e. 05.11.11 at 3:30 PM. The MLC of the victim is Ex PW-2/B and it records the following history given by the prosecutrix:

> *"Brought by police. According to 'A', she met the accused Bittu(16 yr/M) at around 12:30 PM yesterday after her school. Bittu was known to her and he asked her to go to a temple with him. Instead they went to a park in some unknown location and he asked her to wait there in a small hut. She waited there till 8:30 PM. She tried to run away from there but Bittu prevented her to do so. At around 9:30 PM they had some food and after that Bittu allegedly raped her twice. Next morning, he dropped her at Sial Chowk and asked her to go to home."*

9. Upon her examination, the doctor recorded the following injuries and observations:

a

"O/E – Small fresh scratch mark seen over left breast.

L/E- Small cut mark over post fourchette.

b *Erythema present over B/L labia major*

Hymen Torn

Tenderness present over post fourchette.

White discharge"

c

10. Mr. Katyal submits that the Ld. ASJ has failed to appreciate that the MLC of the prosecutrix has corroborated her version, since fresh injury marks were found present on the body of the prosecutrix and her hymen was found torn.

d

11. Mr. Katyal submits that the accused was arrested from his house on the same day, i.e. 05.11.2011 at 5:30 PM vide Ex. PW-12/C; his personal search was conducted vide Ex. PW-12/D; and his disclosure statement was recorded vide Ex. PW-12/E. The accused Bittu's medical examination was thereafter got conducted vide EX PW-6/A. Upon examination the doctor viewed:

e

f *"External injury: 1. A reddish scratch abrasion, tender, of 1 cm running obliquely downward and to the left, present over right cheek 1 cm away from the right ala of nose. The age of the wound is about one day.*

2. Multiple linear scratch abrasions, dark brown in colour running in various directions present over the right lateral side of ... of neck over an area of 5 cm x 5 cm. The age of the wound is about 5-7 days."

g

h

12. The doctor also opined that there is nothing found to suggest that the person is incapable of performing sexual intercourse under normal circumstances.

13. Mr. Katyal submits that the fresh reddish scratch abrasion- which was tender and only one day old corroborates the version of the prosecutrix that, she was forcible raped by the accused. The said injury demonstrates the resistance put up by the prosecutrix during her rape.

14. Mr. Katyal submits that the vaginal swab and underwear of the prosecutrix were sealed at the hospital and seized by IO PW-12 vide Ex. PW 8/A; and the accused's blood in gauze, penile swab, and underwear were seized vide Ex. PW-8/B. The site plan was prepared at the instance of the prosecutrix vide Ex.PW-12/F.

15. All the exhibits were sent to FSL through Ct. Brahm Singh PW-7 on 08.11.2011 and the report Ex. PW 12/I conclusively found human semen on the vaginal swab as well as the underwear. Blood was detected on the prosecutrix's underwear. Mr. Katyal submits that the presence of human semen on the vaginal swab and the underwear of the prosecutrix also corroborates the statement of the prosecutrix about her rape by the accused. The same also corroborates the fresh rupture of the hymen of the prosecutrix.

16. Thereafter, the statement of the victim was got recorded u/s 164 Cr.P.C. vide Ex. PW-3/B on 08.11.11 by Ld. MM (PW-3)

17. Mr. Katyal submits that the prosecutrix was consistent in her two aforesaid statements in all material particulars. Mr. Katyal submits that PW-4– the mother of the prosecutrix and PW-5– the father of the prosecutrix had

deposed on the same lines as the prosecutrix and, thus, the testimony of the prosecutrix is further corroborated by the testimony of these two witnesses. He submits that the Ld. ASJ failed to appreciate that the sole testimony of the victim is sufficient to prove the case of the prosecution and convict the accused. He submits that minor inconsistency and discrepancies does not demolish the prosecution case. He relies on ***RajKumar @ Raju Vs. State of Rajasthan (2013) 5 SCC 722, Narender Kumar Vs. State (NCT of Delhi) AIR 2012 SC 228.*** He submits that the Supreme Court has held that a victim- being a child of tender age, is incapable of having any malice and would not testify against the accused to falsely implicate him. In support of his contentions, Ld. Counsel relies upon***;Bharwada Bhogiabhai and Hirjibhai Vs State of Gujarat (1983) 3 SC 217***; ***State of UP Vs. Krishna Master & Ors AIR 2010 SC 3071*** and ***Mohd. Iqbal Vs. State of Jharkhand (2013) 14 SCC 481.***

18. Mr. Katyal submits that to determine the age of the prosecutrix for the offence of 'kidnapping' and 'rape', prosecution had led in evidence, the certificate issued by the school principal of the prosecutrix (Ex. PW-1/A) and a copy of the school admission register (Ex. PW-1/B) which were duly proved by Ms. Taranjeet Kaur, PW-1, who deposed that as per the school record her date of birth is 06.06.2000. He submits that the Ld. ASJ has wrongly held that it was not proved that the victim was below the age of 16, or 18 on the date of occurrence. He submits that the parents of the prosecutrix, i.e. PW-4 and PW-5 have also materially corroborated the same in their respective testimonies.

19. On the other hand, Mr. Sharma, Ld. Counsel for the respondent submits that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. He submits that as per the prosecution, the alleged offence took place on 04.11.11. The police was first informed of the offence on 05.11.11 over the phone, pursuant to which DD No. 11A was recorded at 11.27 AM, which records that a girl aged 11-12 years has claimed that "some boys" have done wrong act with her. Ld. Counsel submits that thus, the prosecutrix was raped by several persons, and not by just the accused.

20. Ld. Counsel relies upon the cross examination of the IO of the case PW-12, Sub Inspector Kusum Dangi. In her cross examination, she deposed that DD No. 11A was received by her around 11:30 AM. When she reached the spot with SI Janak, the prosecutrix and her father met her there. She did not verify the contents of DD No.11A. She did not specifically mention in the chargesheet regarding contents of DD No. 11A that rape was committed by several persons, and not by one person.

21. Ld. Counsel further submits that the testimony of the prosecutrix cannot be relied upon as the same has been materially improved in Court. Ld. Counsel points out that in her statement before the Magistrate PW-3, she nowhere mentioned that she was raped twice by the accused, as stated in her testimony before the Court. He also points out that in her initial statements recorded in the MLC Ex PW2/B, and under Section 164Cr.PC Ex PW-3/B, the prosecutrix has not mentioned the fact that the accused had threatened her not to disclose what had happened. He submits that it is only in the Court that she mentions that she was threatened by the accused. He further submits

that these contradictions show that testimony of the prosecutrix in Court has been improved, and thus, she should not be relied upon.

22. Ld. Counsel further submits that the testimony of the parents of the prosecutrix i.e. PW-4 and PW-5, are also full of contradictions and cannot be relied upon. He submits that there is no reliable evidence on the point of the age of the prosecutrix, and the witnesses have made contradictory statements on the said point. Ld. Counsel points out that the mother of the prosecutrix, PW-4, stated that her daughter is aged 11 years. In her cross examination conducted on 12.11.13, she has stated that her marriage was solemnized about 20 years back, and after 2 ½ years of marriage she was blessed with a baby girl, namely, 'A'. She further states that her daughter had also told her that the accused had made her consume something, after which she became unconscious. This is not so stated by the prosecutrix. Ld. Counsel argues that the testimony of the mother is full of contradictions, hence her statements cannot be relied upon. Ld. Counsel therefore submits that the prosecution has failed to prove the age of the prosecutrix to be below 16, or 18 years, as on the date of the incident. He submits that having regard to the above said inconsistencies, the testimony of the prosecutrix and her parents should be disregarded.

23. We have heard the learned counsels and carefully examined the evidence brought on record. We have also perused the impugned judgment and scrutinized the reasoning adopted by the learned ASJ while deciding the case before him.

24. The prosecution examined a total of 13 witnesses, the star witnesses being PW-2– the prosecutrix, and the other material witnesses being PW-4– the mother of the prosecutrix, and PW-5– the father of the prosecutrix.

25. PW-4 in her testimony states that on 04.11.2011 both her daughters aged about 11 and 9 years had gone to school. Since her younger daughter had sustained injuries, so she came back home, leaving the prosecutrix– who went to school. Generally, her daughter used to come back home at about 1 PM from school, but on the said day, she did not come back. She waited for her and they all went to look out for her daughter throughout the night but she could not be found. The next morning, i.e. on 05.11.2011, her daughter came back home at about 8 AM. Upon inquiry her daughter told her that when she came out of the school, their neighbor Bittu Mandal met her and he asked her to take a different route for home and when they were walking on the said route, her daughter questioned as to where he is going. The accused suggested that they should go to Kalkaji Mandir. Her daughter also told her that the accused took her to the bushes near the Kalkaji Mandir and kept her there the whole night and that the accused had committed rape with her daughter twice. On repeated inquiries her daughter narrated the same incident. Accordingly, her husband reported the matter to the police in the police station. The police recorded the statement of her daughter and got her medically examined. The medical examination confirmed the rape having been committed with her daughter.

26. PW-5 in his testimony has stated that, as usual, his daughter prosecutrix aged about 11 years and her sister aged about 7 years had gone to the school on 04.11.2011 but on the way his younger daughter sustained

injuries on her legs so she returned home and his daughter prosecutrix went to the school. Generally, his daughter used to return home after her school at about 1:00/1:15 PM but on 04.11.2011 when he came back home at about 2 PM, his daughter- prosecutrix had not come from school. His wife informed him about the prosecutrix not coming from the school. He went to her school and inquired from the chowkidar in the school who told him that the school is already closed and no child is present in the school. He searched for his daughter in the neighborhood including parks etc., but she could not be located. They kept on searching for her till midnight but she could not be found. His daughter returned home at about 8/8:15 AM on the following day i.e. 05.11.2011. On inquiry, she told that their neighbour accused Bittu had taken her from outside the school to Kalkaji Park where he committed rape upon her in the night. On sustained inquiry and on being slapped by his wife, his daughter repeated the same version. His daughter had also taken him to the place where the accused had committed rape with her. From the park itself, he called at 100 from some other person's cell phone. The police came to the park and the police inquired from them and took them to the police station. Police recorded the statement of his daughter and also made inquiries from him. The police also got his daughter medically examined. After her medical examination, the police registered the FIR, and recorded his statement to this effect.

27. The statement of the accused was recorded under section 313 CrPC. The incriminating material evidence was put to him. He claimed false implication. He claimed that the prosecutrix was his good friend. She had gone with him to Kalkaji Mandir on her own without any pressure, duress

a

etc. He did not commit any rape upon her. She changed her clothes in MCD Park and hid her school dress along with her bag near bushes. When they came from Kalkaji Mandir after offering prayer, they found that the bag was missing. Consequently, the prosecutrix refused to go to her home and threatened him that she will kill herself if he insisted that she should go home. In the night when they sat in the park, three to four miscreants had come, who beat him up badly and tied his hands with his shirt. Thereafter, they took the prosecutrix to the bushes where they committed wrong act with her. After spending the night, in the morning, somehow, he made her understand and he dropped her near her house. When she reached her house she was badly beaten up by her parents and they falsely registered the case against him, instead of other men. He stated that the prosecutrix has given her statement under the fear of her parents.

28. The accused examined himself as a defense witness. In his statement u/s 315 CrPC, the accused stated that on 03.11.11, prosecutrix had made a call to him and asked him to meet her in front of her school next morning. Initially he resisted, however, after her much persistence he was ready to meet her. On the next morning when he was going to drop his younger brother to his school, on the way prosecutrix met him and she asked him to meet her. He once again resisted. However, after dropping his younger brother to his school i.e., Govt. Boy's Senior Secondary School DDA Flats, Kalkaji, while returning home, prosecutrix again met him in front of the school. When she met him at her school gate she sent her younger sister back to home on some false pretext, and after that she insisted to go for an outing with him. She also told him that she brought her dress which was

lying in her school bag. Then they went to Kalkaji Mandir. Before going to Kalkaji Mandir, she changed her school dress in metro park near Kalkaji temple and kept her school dress in her bag. Thereafter, they went to Kalkaji Temple and lotus temple. After returning from the said places they again came to the abovesaid park where she did not find her school bag in the park. Then she refused to go to her house. They sat in the park till evening and in the evening, he made her understand to go to her house, but she did not mend her ways. In the night, when they were in the park she asked for some food stuff on which he brought some noodles and she ate the same. After having noodles, four five boys had approached them and out of the five, two boys took the prosecutrix behind the bushes and did sexual assault upon her. The other three boys had beaten him on his face and stomach and also tied him with the tree. In the morning, he freed himself and they went home. After that the father of the prosecutrix had lodged a false case against him.

29. We have captured the relevant parts of the testimony of the prosecutrix PW-2 in para 5 above. We may, at this stage notice the statement given by the prosecutrix u/s 164 CrPC vide Ex. PW-3/B.

30. She has stated that on 04.11.11, when her school got over and she came out, she met a boy named Bittu outside her school. Bittu used to reside in her colony, hence she used to consider him like a brother. That day when he met her, on his insistence, she accompanied him to go to her house. But he took her in a park. She told him that her parents will be angry, but he told her he is taking her home through a new route. She fell for his talks because she used to consider him as her brother. There was a hut (jhuggi) in the park,

in which Bittu made her sit. She was trying to scream and run away but Bittu beat her a lot and grabbed her mouth preventing her from screaming. In the night he even brought food for her. Then he tore her clothes. She asked him not to do that, but he forcefully tore her clothes. Then he, against her will, made physical contact with him. The next day, he dropped her at the Silal Chowk, Kalkaji. Thereafter he went away.

31. We find that the testimony of PW-2 is consistent with her earlier statement Ex. PW-3/B in all material particulars. The minor differences in the two statements are that while making her statement under Section 164 Cr.P.C., she did not state that the accused had threatened her not to report what had happened to anyone, but she stated so in her testimony; she did not state the fact that they took an auto after walking for some distance to Kalkaji Mandir while recording her statement u/s 164 CrPC, which she stated when her testimony was recorded in the Court. She did not state that she changed her clothes inside the jhuggi when her statement was recorded u/s 164 CrPC which she stated while recording her statement in Court, and; she did not state the fact that she was raped twice while recording her statement u/s 164 CrPC, which she stated in her testimony recorded in Court. Pertinently, in her statement Ex PW- 2/A given to the police on 05.11.11 she mentions that the accused had raped her twice that night. Also, in the MLC of the victim that *"At around 9:30 pm they had some food and after that Bittu allegedly raped her twice."* Thus, her omission to mention about being raped twice, when her statement was recorded under Section 164 CrPC appears to be an inconsequential lapse and of no avail to the accused. The minor differences in the two statements are inconsequential.

They only touch upon the details of the surrounding circumstances which are not the crux of the case of the prosecution. It cannot be said that the prosecutrix improved upon her earlier statement to fill up any lacuna or deficiency in her earlier statement without which, the accused could not be found guilty.

32. The MLC of the prosecutrix Ex. PW-2/B records the injuries over her left breast; small cut mark over post fourchette (which is a thin fold of skin at the back of the vulva); erythema (which is superficial reddening of the skin, usually in patches, as a result of injury or irritation causing dilatation of the blood capillaries) present over B/L labia major; hymen torn and tenderness present over post fourchette. The MLC of the accused Bittu Ex. PW-6/A also records a reddish scratch abrasion, tender, of 1 cm running obliquely downward and to the left, present over right cheek 1 cm away from the right ala of nose. The age of the wound is about one day.

33. Thus, we find that the testimony of the prosecutrix is not only consistent, but also materially corroborated by her medical condition recorded in the MLC PW-2/B.

34. Pertinently, the MLC of the accused falsifies the testimony of the accused that some boys had beaten him up badly and raped the prosecutrix, since no other injury was found on his face or stomach. Prosecutrix has been consistent throughout the investigation and trial on the point that only the accused raped her and there was no one else. Hence, the recording in DD No. 11A that the girl was raped by some boys is immaterial, and does not go to the root of the matter. It needs to be emphasized that DD entries are

recorded after the information has travelled from one person to another- generally over telephone/ mobile phone lines, which may not always transmit the information with complete accuracy. Human intervention leaves scope for inaccurate recording when information is transmitted from one person to another, and from that another to yet another- in a chain. Thus, no capital can be made out of the said recording in the DD entry by the accused. The defence of the accused is also not supported by his conduct. He did not report the crime to the police- neither of his being beaten up, nor of the prosecutrix being gang raped, till he was apprehended on the next day. Else, first thing after freeing himself, he would have reported the incident to the police and not left the prosecutrix to fend for herself, who he described as her friend, and with whom he, admittedly, spent the night.

35. Pertinently, the vaginal smear and the underwear of the prosecutrix were sent for FSL examination and the same were examined. The FSL report Ex. PW12/I states that human semen was found on the underwear of the prosecutrix and the vaginal swab of the prosecutrix, which further corroborates the fact that the prosecutrix had sexual intercourse as alleged by her. Blood was detected on the underwear of the prosecutrix, which suggests that her hymen was ruptured in the act. We may also note here that in the said report the description of the underwear of the prosecutrix is given as “one dirty torn underwear”. This fact also substantiates the claim of the prosecutrix that while forcing himself upon prosecutrix, the accused tore her clothes.

36. The prosecutrix was of tender age at the relevant time and incapable of nurturing any grudge against the accused. On the contrary, she stated that she was not taken by the accused forcibly– whom she treated like her brother. No evidence was produced by the accused, nor any suggestion was made to the prosecutrix during her cross examination that something serious had happened between the day of the incident, and recording of her evidence as a witness in Court, to suggest that the prosecutrix was out to implicate the accused falsely in a serious case. The aforesaid factors were considered by the Supreme Court in ***Krishna Master*** (supra).

37. In ***Bharwada Bhoginbhai Hirjibhai (***supra), Supreme Court held:

> ***"9.*** *In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of*

problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :

"(1) The female may be a 'good digger' and may well have an economic motive — to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

*(8) She may do so upon being repulsed." [*see ***Bharwada Bhoginbhai Hirjibhai*** (supra)]

38. In ***Narender Kumar*** (supra), Supreme Court held:

"20. *It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under*

a

> *the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.*
>
> ***21.*** *A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (siccircumstantial), which may lend assurance to her testimony. (Vide Vimal Suresh Kamble v. Chaluverapinake Apal S.P. [(2003) 3 SCC 175 : 2003 SCC (Cri) 596 : AIR 2003 SC 818] and Vishnu v. State of Maharashtra [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217 : AIR 2006 SC 508] .)*
>
> ***28.*** *The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."*

39. It is clear from the testimony of the prosecutrix–which is completely reliable, that the sexual intercourse with the accused was not consensual and that he forced himself upon her, against her will. This is also corroborated by the medical evidence taken note of hereinabove. Thus, the accused did commit rape upon the prosecutrix– irrespective of her age.

40. Ld. ASJ has held that it cannot safely be said that the prosecution has proved the date of birth of the victim is correctly entered in the school record, particularly in view of the statement of the prosecutrix where she stated that she celebrates her birthday on 6th March, and she does not know

a

the year of her birth. Ld. ASJ has further held that that it is not proved that the victim was below the age of 16 or 18 years.

b

41. To prove the age of the prosecutrix, the prosecution led in evidence Ex. PW-1/A and Ex PW-1/B, the certificate and admission record from the school of the prosecutrix PW-1 Taranjeet Kaur, Teacher, MCD Primary School, Transit Camp, Govind Puri, Delhi, stated that as per the school records, the prosecutrix was admitted to the school on 10.07.2008 in class 1st and as per her school record, her date of birth is recorded as 06.06.2000 on the basis of affidavit given by her father, PW-5. Ex. PW-1/A states that the prosecutrix was a student of class 4th as on 30.01.2012. Pertinently, no cross examination of PW-1 was done on behalf of the accused despite opportunity being given, and her testimony went unchallenged.

c

d

e

42. The first information with regard to this incident was received vide DD No 11A, dated 05.11.2011 at 11.27 AM on the basis of a phone call which reported that one girl aged 11-12 years is saying that some boys have done wrong act with her. Pertinently, in her statement to the police Ex PW-2/A, the prosecutrix mentions her age to be 11 years; in her MLC Ex PW-2/B her age is recorded being 11 years; in the FIR Ex PW-10/A, the year of birth of the prosecutrix is noted as 2000; in her statement recorded under Section 164 CrPC– on being asked about her age by the Magistrate, she again states it to be 11 years. The father of the prosecutrix PW-5 stated in his testimony that his daughter was aged 11 years at the relevant time. In his cross examination by the amicus curae for accused, on the aspect of the age of the prosecutrix , PW-5 has stated thus:

f

g

h

> *"I do not have any birth certificate of my daughter 'A' (name withheld). I had given the affidavit at the time of admission of my daughter to the school. My daughter 'A' was born in the native village. In the affidavit, the age was recorded at my instance. I had not got attested the said affidavit from any Magistrate/Gazetted Officer. It is incorrect to suggest that I had not given the actual date of birth of my daughter in the said affidavit. It is incorrect to suggest that my daughter was major at that time."*

43. Thus, the spontaneous and contemporary statement made by the prosecutrix and her father was that she was 11 years of age on the date of the incident. Learned counsel for the accused has sought to place reliance on the testimony of PW-4– the mother of the prosecutrix recorded during her cross examination on 12.11.2013. On the said date, she stated that her marriage was solemnized "about 20 years back" and after 2 ½ years of marriage she was blessed with baby girl namely 'A' (name witheld). It is argued that the said statement of PW-4 puts the age of the prosecutrix at 17 ½ years. Firstly, PW-4 has only given an approximation. Secondly, the testimony of the witness PW-4 was recorded on 12.11.2013, whereas the incident took place on 04.11.2011. Even if, for the sake of argument, the age of the prosecutrix were to be taken as 17 ½ years as on 12.11.2013, on 04.11.2011 she would be 15 ½ years i.e., well below the age of 16 years.

44. In our view, the approach of the learned ASJ in disregarding the evidence led by the prosecution with regard to the date of birth of the prosecutrix is completely erroneous. The age of the prosecutrix was consistently disclosed by her as well as by her parents as between 11-12 years on the date of the incident: in the DD Entry No. 11A dated 05.11.2011; in the statement of the prosecutrix recorded by the police

Ex.PW-2/A; in the MLC of the prosecutrix Ex.PW-2/B; in the FIR Ex.PW-10/A– wherein the year of birth was noted as 2000; in her statement recorded under Section 164Cr.P.C, Ex. PW 3/B; in the statement of PW-4–the mother and; in the statement of PW-5–the father of the prosecutrix. Pertinently, PW-1 was not cross examined on behalf of the accused with regard to her date of birth being recorded as 06.06.2000 in the school record–first attended by her. The school record produced by the prosecution related to the first school attended by the prosecutrix when she took admission in class-I. At that time, the father of the prosecutrix could not have imagined that in future his daughter would be subjected to rape, and therefore, he cannot be assumed to have wrongly disclosed the age of the prosecutrix. In the year 2011, when the incident took place, she was studying in 4th Class. It would be outrageous to claim that she was 16 years or more at that point of time. The class she was studying in i.e, the 4th Class was also age appropriate with her disclosed age as 11 years.

45. We had occasion to deal with a similar laconic approach of the same learned ASJ in ***State of NCT of Delhi vs. Dharmender,*** CRL.A. 1184/2017, decided on 23.03.2018. In that case also the learned ASJ held that the prosecution had not established the age of the victim to be less than 18 years at the relevant time. Some of the relevant portions from the said judgment are extracted herein below;

> *"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:*

> *"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 not carry any conviction and weight or its probative value may be nil. ... (SCC p. 138, para 40)

***

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)

a

***

145. (4) The probative value of documents which, however ancient they may be, do not disclose
b *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 whether the entry contained therein has any
c *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)*
d *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*
e *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*
f *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*
g *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*
h *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

a

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.

b

c

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."

d

e

f

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*

g

h

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.***
>
> *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 evidence to raise a doubt with regard to the entry made in the school record of the date of birth of the victim."*** (emphasis supplied)

46. Pertinently, in ***Dharmender*** (supra), the same learned ASJ had banked on the Rule i.e, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, to return the finding that the certificate from the school first attended had not been produced. Firstly, we may observe that in the present case, the certificate produced is from the first school attended by the prosecutrix; since she took admission in the first grade in the year 2008. Secondly, in ***Dharmender*** (supra), we rejected the said approach of the learned ASJ by observing as follows;

a

"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.—*
>
> *(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*

b

c

d

e

f

g

h

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 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.

> *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."*

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.

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.*

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 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."

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.

> ***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.***
>
> *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 that a prudent man, ought under the circumstances of the particular case, to act upon the supposition that it exists..... ....*
>
> *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. 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."(*emphasis supplied*)*

47. We may also refer to our decision in ***The State Govt of NCT of Delhi vs. Sonu Kumar***, CRL. A. 1137/2017, decided on 07.03.2018. In the said case as well, the same learned ASJ, held that the prosecution had failed to

prove that the prosecutrix was a minor. We set aside the said judgment by inter alia observing as follows:

> *"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".*
>
> *24. The aforesaid reasoning adopted by the learned ASJ shocks the conscience of this Court in the factual background of this case.*
>
> *x x x x x x x x x*
>
> ***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.

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.

*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 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)*

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:*

> *"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***

a

> ***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)*

b

c

> ***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.***

d

> *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."(*emphasis supplied*)*

e

48. We may observe here that firstly, the affidavit at the time of admission in the school in the year 2008 had been given by the father of the prosecutrix and not by a stranger who may not be aware of her 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 prosecutrix recorded in the school record by the school authorities in the discharge of the official duty. Thirdly, the date of birth of the prosecutrix was disclosed by the father as 06.06.2000 much before the incident took place and thus, there was no occasion for the father to falsely declare the date of birth of his prosecutrix. 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

f

g

h

prosecutrix recorded in the school register as 06.06.2000 was not correct. In view of the same, we fail to understand how the Ld. ASJ returned the finding that the age of the prosecutrix– as being below the age of 16 years, is not proved. We do not agree with the reasoning of the Ld. ASJ and hold that the prosecutrix was a minor below the age of 16 years at the time of the incident.

49. The offence of kidnapping from lawful guardianship is defined under section 361 IPC which states that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. As per the testimony of the prosecutrix, on 03.11.11 the accused met the prosecutrix and asked her to bring another pair of clothes in her bag the next day and told her that they will go for an outing. On 04.11.11, the accused again met the prosecutrix and thereafter both of them went together to Kalkaji Mandir. In her cross examination for the accused it is recorded:

> *"Bittu met me outside the gate when I came out from the school. Accused Bittu did not catch hold of my hand. (Vol. He had already asked me to come alongwith a pair of clothes). He did not take me forcefully."*

50. In view of these statements made by the prosecutrix, it is clear that the accused enticed her, on the pretext of going for an outing, and she went with him. The statement is also suggestive of the fact that no deliberate false implication of the accused has been done in this case. We may also observe that in the present case, the prosecutrix was a minor girl, below the age of 16

a

years. Thus, even if we take it that the prosecutrix consented to go along with the accused, it does not come to the rescue of the accused as the prosecutrix was below the age of consent and the same– even if given, would be immaterial in this case and the accused would still be held liable for kidnapping. It is immaterial whether the prosecutrix voluntarily accompanied the accused or not, since she was below the age of discretion and her "will" or consent was not enough for the accused to fall for it, considering that he was a fully matured man.

51. The observations made by the learned ASJ in paragraph 13 as extracted hereinabove, demonstrate a completely erroneous approach in the matter of appreciation of evidence. The earlier statement of the victim under 164 CrPC was not her deposition before a Court, and she was not expected to state that her father had taken her to the police, where the police recorded her statement. Therefore, omission of the prosecutrix in stating so in her statement recorded under Section 161 & 164 Cr.P.C., or in the MLC, is not a reason to doubt her testimony. Her testimony is duly corroborated in this regard by the statement of the police witnesses. It was wholly immaterial to require examination of the person whose mobile phone was used by the father of the prosecutrix, to call number 100. It is not the case of the prosecution that the said person was known to the father of the prosecutrix. Merely because the mobile phone of a stranger was used to call the police, is not a reason to require his production as a prosecution witness. The factum of the call being made is duly established by the DD entry; by the statement of the police witnesses; and the proceedings undertaken in pursuance of the said call. The observation that the samples drawn from the undergarment

and micro slides could not be matched with the blood and semen of the accused, is also no reason to doubt the case of the prosecution. This is so, because the report of the FSL does not state that the DNA samples drawn from the vaginal swab/microslides and from the underwear of the prosecutrix sent to the FSL, do not match the DNA profile generated from the blood sample of the accused. On this aspect, the DNA report is neither inculpatory, nor exculpatory.

52. For the aforesaid reasons, we are of the considered view that the impugned judgment is liable to be set aside. Accordingly, we set aside the same. We are also satisfied that the prosecution has been able to prove the charge against the accused, under Section 363 IPC and Section 376 IPC, beyond all reasonable doubt. Accordingly, we convict the respondent accused under the said provisions of IPC.

VIPIN SANGHI, J.

P. S. TEJI, J.

MAY 08, 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.

b

c

d

e

f

g

h