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

Judgment reserved on: 01.08.2018

% Judgment delivered on: 08.01.2019

\+ **Crl. A. No.592/ 2018**

CHAND BIBI ..... Appellants

Through: Mr. Roshan Santhaila and Mr. Chandra Suman Kumar, Advocates

versus

STATE & ANR. ..... Respondents

Through: Ms. Kusum Dhalla, APP for State
Mr. Ibad Mushtaq and Mr. Jawad Tariq, Advocates

\+ **Crl. A. No.594/ 2018**

STATE ..... Appellant

Through: Mr. Rajat Katyal, APP for State with Mr. Ashray Behura, Advocate

versus

AKRAM ..... Respondent

Through: Mr. Ibad Mushtaq and Mr. Jawad Tariq, Advocates

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

J U D G M E N T

VIPIN SANGHI, J.

1. The present appeals have been preferred by the complainant- mother of the victim (Crl. A No.592/ 2018) and the State (Crl A No.594/ 2018) upon grant of leave to assail the judgment dated 04.01.2017 rendered by the learned Additional Sessions Judge-01, (Designated Special Court Under the POCSO Act' 2012) South East District, New Delhi in Case No. 1385/16, Sessions Case No.212/13, arising out of FIR No. 673/2013 registered at Police Station- Govindpuri under Sections 376 IPC and Section 6 of the POCSO Act.

2. By the impugned judgment, the Trial Court has acquitted the Respondent/ Accused- Akram, inter alia, on the premise that the testimony of the prosecutrix was untrustworthy due to many variations, contradictions and inconsistencies. The trial court held that the accused was able to discharge his onus by casting serious doubts on the case of the prosecution, and raising doubts about possibility of his false implication.

3. The case of the prosecution is that on 25.09.2013 at 11:13 PM, vide DD. No. 102B, the police received an information on telephone that about 4/5 days back, rape had been committed upon a girl aged 7 years. W/ SI Seema (PW-6) reached the address where the complainant- Chand Bibi (PW2) met her and got recorded her statement. In her statement to the police, the complainant alleged committal of rape upon her daughter by the accused. She stated that on 22.09.2013, at about 06:00PM, when she went to the market to buy vegetables, her daughter aged 7 years was playing outside their house and the accused- Akram upon finding the prosecutrix alone, took her to the roof of the building where he used to reside and committed rape

upon her. She stated that her daughter did not tell her anything for 3 days, and instead kept weeping and waking up during the nights due to fear of the occurrence which had happened with her.

4. On the statement of the complainant, the case was registered and investigated. The prosecutrix and the accused were got medically examined. Samples were collected during examination of the accused and the victim, which were also seized. The accused was arrested and produced before the Court. The statement of the victim was also got recorded before the learned Magistrate under section 164 Cr.P.C. Upon completion of investigation, the charge- sheet for the offences punishable under section 376 IPC and Section 6 of the POCSO Act was filed. The court framed charge against the accused under section 376 IPC and section 6 POCSO Act, to which the accused pleaded not guilty and claimed trial.

5. To prove the charge, the prosecution examined 13 witnesses in all, including PW1- victim/ prosecutrix; PW2 Chand Bibi- the complainant and mother of the prosecutrix; PW3 Dr. Hari Prasad- the doctor who examined the accused; PW5 Dr. Kavita Kaniwal- the doctor who examined the victim/ prosecutrix; PW6 Sushma- counsellor who examined the victim/ prosecutrix; PW12 Neeta Khaturia- School Principal; and PW13 W/SI Seema- IO.

6. The statement of the accused was recorded under Section 313 Cr.P.C and the evidence led by the prosecution was put to the accused. The accused denied the same. He alleged false implication on account of a dispute with the complainant- mother of prosecutrix. He led defence evidence of three

witnesses, viz. Hazi Mohammad (DW-1), Rehmat Ali (DW-2) and, Kalaam (DW-3). The trial court, as aforesaid, has acquitted the respondent accused, and thus, the present appeals.

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

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

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

> *"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:*

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 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;

(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";

(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;

(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.

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

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

9. We proceed to examine the issue whether the impugned judgment calls for interference by us in the present appeal in the light of the above parameters.

Submissions on behalf of the Complainant & of the Ld. APP

10. The submission of Ld. Counsel for the complainant and the learned APP is that the learned ASJ has grossly erred in appreciation of the evidence in this case. They have argued that the date of birth of the prosecutrix was established on record as 14.03.2007. This has been accepted by the trial court. Thus on the date of occurrence, the prosecutrix was six and a half years old only.

11. Ld. Counsels submit that the prosecutrix PW-1 and her mother/complainant PW-2 were consistent in their statements, and the statement of PW-1 stands corroborated by the statement of PW-2, and also by the earlier statement of PW1 recorded under Section 164 Cr.P.C.; her MLC, and; the evidence led by the Counsellor Sushma PW-6.

12. Ld. Counsels submit that the MLC of the prosecutrix Ex PW-5/A corroborates her statement. It is argued that the trial court has neglected the observation of Dr. Kavita Kaniwal (PW-5) that the victim was having difficulty in walking. The Ld. ASJ has failed to appreciate the medical opinion which records- *"no external injury marks seen,* ***hymen congested****, appears intact,* ***vagina congested****"* (emphasis supplied). In her cross examination, PW-5 explained that *"****It is not necessary in every case that hymen will be ruptured on penetration. Hymen will remain intact if the penetration of penis is not beyond hymen****. I did not prescribe any medicine to patient."* (emphasis supplied)

13. Ld. Counsels further submits that the Ld. ASJ disregarded the medical literature by authoritative authors relied upon by the prosecution. Reliance is placed on Modi's "*A Textbook of Medical Jurisprudence and Toxicology*" 24th edition page 668 wherein the Ld. Author observed-

> *"in small children, the hymen is not usually ruptured,* ***but may become red and congested along with the inflammation and bruising of the labia.*** *If considerable violence is used, there is often laceration of the fourchette and the perineum." (*emphasis supplied)

14. Reliance is also placed on Parikhs's textbook of "*Medical Jurisprudence, Forensic Medicine and Toxicology*" 6th edition page 5.38, wherein the Ld. Author observes:

> "***in young children as the vagina is very small and hymen deeply situated, the adult penis cannot penetrate it. In rare cases of great violence, the organs may be forcibly introduced, causing rupture of the vaginal vault and associated visceral injuries. Usually, violence is not used and the penis placed either within the vulva or between the thighs. And as such, only redness and tenderness of the vulva may be caused. The hymen is usually intact****……. There may be no signs or very few signs of general violence, since the child has no idea of the act is also unable to offer resistance."* (emphasis supplied)

15. Thus, the statement of PW-5 in the initial part of her statement that if a man aged 20/22 years has intercourse with a child aged about 7 years, hymen cannot remain intact is, in fact, contrary to the medical literature, and was liable to be ignored. But her opinion that the hymen was congested is evidence of penetrative sexual assault.

16. In this regard, ld. counsels place reliance on ***Nirmal Kumar v. State***, 2002 (2) RCR (Cri) 341. Reference is also made to the statement of the counselor Ms. Sushma, Counselor working with Sehyog Charitable trust (NGO), who was examined as PW-6). The evidence of PW-6 shows that the prosecutrix suffered bleeding from her private parts. She, inter alia, stated: "*... Prosecutrix was bleeding from her private parts and was under severe pain and she was not inclined to talk."*

17. Ld. Counsels submit that the Ld. ASJ has acquitted the accused only on the account of minor inconsistencies found in the statement of PW-1 and PW-2. He failed to appreciate that minor inconsistencies are common and natural, and unless the inconsistencies shake the core of the case of the prosecution, the same would not be material to the decision of the case. The trial court also failed to raise the mandatory legal presumption against the accused of commission of offence under sections 29 and 30 of the POCSO Act. It was for the accused to dislodge the said presumption, which he failed to do. It is argued that in the statement of the accused recorded under section 313 of Cr.P.C, he nowhere mentions that he was not present at the spot of the incident, or the room where the offence was allegedly committed was not his room. The alibi set up by the accused – through the mouth of DW-2 and DW-3 was not taken in his statement recorded under Section 313 Cr.P.C. and was not proved. There is no plausible explanation offered by him as to why the complainant and the prosecutrix would falsely implicate him in such a case – even at the cost of facing ignominy, harassment and embarrassment for the prosecutrix, who was not even 7 years of age on the date of occurrence.

18. Ld. Counsels places reliance on ***Hari Om v. State***, 167(2010) DLT 682 and ***Brij Lal v. State***, 2017 (1) JCC 583 to submit that in such cases, false implication is not likely to be made, as it involves the honour and reputation of the child victim. The parents would not drag a minor child into such a case – unless it is true, for no rhyme or reason. The parents are not likely to subject their own child to the trauma of police interrogation, medical examination, and court exposure involving the recording of the child's statement and cross examination, by foisting a false allegation against the accused, without any reason.

Submissions on behalf of the Accused-

19. Ld. Counsel for the respondent supports the impugned judgment. He submits that there are serious contradictions in the statements of the prosecution witnesses, which make the story of the prosecution doubtful. He submits that the statement of PW-6 Ms. Sushma, Counselor, that the prosecutrix was bleeding from her private parts, and was under severe pain is contradicted by the testimony of PW-5 Dr. Kavita Kaniwal. In her cross examination, PW-5 – the examining doctor stated:

> *"I did not notice any burn injury on the legs of the patient/prosecutrix during my examination. During my examination of the patient, I did not find any cut marks from a knife on the private parts/vagina of the prosecutrix. I did not find any injury marks or black marks on the legs or the waist of the prosecutrix during her examination."*

Had the prosecutrix suffered any bleeding from her private parts, the same would have been noticed, and would have been recorded.

20. DW-1 the landlord had disclosed the previous acrimony between the complainant and the accused. Ld. Counsel for the accused further submits that the accused was falsely implicated. He places reliance on the testimony of DW-2 and DW-3.

21. Ld. Counsel submits that there are serious contradiction in the statements of the prosecutrix PW-1, her mother/ complainant PW-2, and the I.O. SI Seema PW-13, which shows that these witnesses gave different versions of the incident at different points of time. We shall deal with this submission a little later.

DISCUSSION

22. The initial statement of the complainant – Chand Bibi which forms the rukka Ex. PW2/A may first be seen. She, inter alia, stated that on the day of the incident i.e. 22.09.2013, in the evening at about 06.00P.M., she had gone to the bazaar to get vegetables and the prosecutrix was playing at home. Above her room on the second floor, the accused lived. Finding the prosecutrix alone, he seized the opportunity and took her to the terrace and raped her. The prosecutrix did not narrate the incident to her due to fear but she kept on crying in the night. Even after she slept, she would repeatedly wake up due to fear. She further stated that when she inquired from her daughter – the prosecutrix, on the date of the complaint i.e. 25.09.2013, the prosecutrix narrated the entire incident to her and she even identified the accused as the person who had taken her to the terrace and raped her. What emerges from the rukka Ex. PW2/A is that in the very first statement of the complainant, she stated that the prosecutrix kept crying on the day of the

incident; she would wake up from her sleep due to fear repeatedly and; she did not narrate the incident to her on the same day. What further emerges is that on the date of the complaint i.e. 25.09.2013, the prosecutrix on the asking of the complainant – her mother, narrated the entire incident and also identified the accused as the person who had taken her to the terrace and raped her. It is well settled that delay in making of complaint in such like cases is not fatal, or looked upon with same suspicion, as in other cases. What is relevant is that on the date the complainant learnt of the incident, she did not thereafter wait to report the matter to the police.

23. The medical examination of the prosecutrix Ex. PW5/A reveals the following important aspects. Firstly, the history given and recorded is of sexual assault by neighbor of around 30 years of age on Sunday i.e. 22.09.2013 at 06.30PM. Secondly, it also records that the child is having difficulty in walking and micturition i.e. urination. The hymen was found congested, though it appeared to be intact. The vagina was congested and the doctor also raised a doubt that she could be having vaginitis – which is inflammation of the vagina and which causes discharge, itching and pain. Firstly, we may observe the fact that the prosecutrix was having difficulty in walking and urination, coupled with the fact that the hymen was found congested, the vagina was found congested, and there was a possibility of her suffering from vaginitis, are all pieces of evidence which corroborate the statement of the prosecutrix of her being subjected to sexual assault. As pointed out by learned counsels for the appellants, in the case of a rape of a minor, who is not even 7 years old, rupture of hymen is not normal. *Modi's Textbook of Medical Jurisprudence and Toxicology* extracted hereinabove

records that in small children, the hymen is not usually ruptured but may become red and congested along with the inflammation and bruising of the labia. This position is also noted in *Parikhs's textbook of Medical Jurisprudence, Forensic Medicine and Toxicology.*

24. We may next refer to the statement of the prosecutrix recorded contemporaneously under Section 164Cr.P.C. Ex. PW4/A. A perusal of the said statement shows that she was innocent and oblivious even about her age; and where she had been taken to. However, she gave her name; her father's name; class she studied in correctly, and also that she understood the difference between speaking truth and lie; that she was making her statement voluntarily; that she was under no pressure or coercion from any person to make her statement, and; that she wanted to get her statement recorded.

25. Pertinently, the Ld. MM PW- 4, who recorded the statement under Section 164 Cr.P.C., recorded the fact that the complainant – mother was present with the prosecutrix during recording of statement as the prosecutrix was unable to sit down due to infection in her thigh, and the prosecutrix was also crying. This recording also corroborates the recording made in the MLC that the prosecutrix was having difficulty in walking. The prosecutrix in her statement names her two friends – Ansha and Tannu, with whom she was playing on the fateful evening. She stated that she was playing with her friends on the terrace. Thereafter, they came down. She describes the person who dragged her to the room, as the person wearing a red colored shirt. She states that the said person burnt her foot. He bolted the room from inside and tied her hands and legs, whereafter he removed her clothes. She further stated that the person cut her with a knife at her "*susu wali*

jagah", and that the man also removed his clothes. She goes on to describe the act done by the person – that he inserted his penis in her "*susu wali jagah*" i.e. the vagina. She states that she suffered pain. She states that the man had stuffed her mouth with a cloth. She states that the man threatened her that he would kill and throw her, in case, she made a police complaint. She responded to the query – whether she knew the man, by stating that he stayed above her house. She did not know his name, but stated that he is called *master*. She further stated that the police had apprehended him. They had brought the accused to her and she had identified him. This statement of the prosecutrix substantially corroborates her statement made before the Court which we shall extract shortly.

26. At the time when her statement was recorded before the Court on 11.03.2014, she was again asked several preliminary questions by the Ld. ASJ in order to understand her maturity, and whether she was a competent witness. On this occasion, she was aware of the fact that she had come to the Court; she was also aware of her age, and; she was also aware that she had been brought to the Court to record her statement. The statement of the prosecutrix recorded before the Court – in so far as it is relevant, reads as follows:

> *"It was the evening time I alongwith Ansha and Tannu was playing on the terrace. My mother had gone to the market to take the vegetables. While playing the accused took me to his room the accused tied my hands and legs and also burnt the upper side of my right foot.*
>
> *Thereafter, the accused inserted his private parts into my private part (apna shushu karne wala mere shushu karne wale me daal diya). Thereafter, the accused intimidated me by*

threatening that in case I shared the incident to my mother after two days. Thereafter, the police came to our house as well as to the house of the accused and the police inquired about the incident from me. The police apprehended the accused and asked me by showing the accused if he was the person who had committed abovementioned act with me. I had identified the accused who was apprehended by the police and is present in the court today."

27. In her statement recorded before the Court, she narrated that she was playing with the same two friends Ansha and Tannu on the terrace. She also narrated that her mother had gone to the market to take vegetables. She also states that while playing, the accused took her to his room – whom she identified in Court correctly, and that the accused tied her hands and legs and also burnt the upper side of her right foot. Pertinently, the prosecutrix also showed to the Court the scar mark on the upper side of her right foot stating that this was the scar mark on account of the burns given by the accused. She also describes the incident of rape in her testimony before the Court and that, in case, the prosecutrix spoke about the incident, he would kill her. She explains that she did not share the incident with her mother for two days due to fear. She also states that the police came to her house and to the house of the accused and enquired about the incident from her. The police apprehended the accused and she identified him before the police. She also states that she was got medically examined and she returned late in the night at about 11 p.m. She also speaks about her statement recorded under Section 164 Cr.P.C. and exhibits the same as PW1/A.

28. The accused has sought to raise a doubt on the statement of the prosecutrix, inter alia, on the plea that even though the prosecutrix claimed

that her foot had been burnt by the accused, there was no burn injury on her foot noticed by the doctor PW-5 who examined her while preparing the MLC.

29. We may deal with this aspect at this stage itself. The consistent position which emerges from the statement of the complainant recorded in the rukka as well as before the Court, and from the statement of the prosecutrix recorded under Section 164 Cr.P.C. and before the Court, is that the prosecutrix, out of fear, did not narrate the incident to her mother for few days. It also emerges that she was weeping and was waking up in the night repeatedly due to fear. It has also been established from the MLC, as well as the statement recorded under Section 164 Cr.P.C., that the prosecutrix was not in a position to walk when she was taken to the hospital for her medical examination; when she was counseled by the counselor PW-6, and; also before the Ld. MM for recording of her statement under Section 164 Cr.P.C.

30. The statement of the complainant recorded in the rukka shows that there was no mention of burn injury given to the prosecutrix by the accused on her foot. The possibility of the prosecutrix not having disclosed the said injury to the mother PW-2 at that stage cannot be ruled out, since she was averse to even talk about her traumatic experience. It is also possible that she may have mentioned the same to the mother but that being a small injury in comparison to the offence of rape, it may have receded into background in her mind when she recorded her statement forming the rukka. The primary and central allegation made against the accused was of rape. This, in our view, offers an explanation as to why the MLC is silent on the injury that the prosecutrix claims to have suffered in her foot on account of her foot

being burnt by the accused during commission of the offence. Pertinently, the Ld. ASJ who recorded her statement in Court saw the scar for herself. The possibility of the burn injury caused on the foot of the prosecutrix being missed out during conduct of the MLC, cannot be ruled out. Thus, the said omission cannot be treated as an improvement made by the prosecutrix while recording her statement before the Court, and would not be a reason enough to discredit her. One cannot lose sight of the fact that the prosecutrix was not even 7 years of age at the time of the incident. She was obviously in a state of fear and shock and may not have expressed and articulated all her injuries before the doctor who examined her. It appears that the mother was either not aware of the burn injury suffered by her daughter in her foot as given by the accused, or may have been so overwhelmed by the injury caused by the sexual assault that the same was not mentioned by her to the examining doctor. For this reason, it may have escaped the attention of even the examining doctor PW-5 who prepared the MLC. We may also add that PW-5 does not appear to be amongst the most competent in the field, since she initially stated in her testimony that "*If a male aged around 20/22 years commits intercourse with a girl aged 7 years, in normal circumstances the hymen cannot remain intact*". This statement does not reflect well on her professional knowledge and competence in her own filed, as her statement is contrary to well established medical opinion. One can also not lose sight of the fact that the prosecutrix and her mother come from a very poor strata, and their ability to appreciate and articulate the relevance and importance of each and every injury suffered by the prosecutrix at the hands of the accused, would also not be the same, as that of another person who is better placed in terms of financial, social and

educational background. The way PW-2 – the mother of the prosecutrix conducted herself in taking four days to get her child – the prosecutrix, to speak up, and in not becoming suspicious despite noticing blood stains on her undergarment, also reflects on her levels of awareness. Thus, we cannot rule out the possibility of the burn injury on the foot of the prosecutrix going unnoticed by PW-2 and by the examining doctor PW-5 when she prepared the MLC.

31. Pertinently, when the prosecutrix was cross examined on this aspect, she again stated that the accused had burnt the upper side of her right foot by putting a hot knife on her right foot. He got the knife heated on the gas before putting it on her foot. She denied the suggestion that the accused had not burnt her foot by the hot knife, nor the knife was heated on the gas before putting it on her foot. She also denied that the suggestion that the police had tutored her to make the statement in the Court. She also denied the suggestion that her mother had asked her to falsely implicate the accused on account of the quarrel due to the waste water coming from the room of the accused from the pipe. The prosecutrix, thus stood her ground.

32. In any event, even if the said part of the statement of the prosecutrix is to be considered as an improvement that, by itself, is no ground to reject her statement altogether since that part of her statement can be separated from the rest of it. In ***Rameshwar s/o Kalyan Singh v. The State of Rajasthan***, AIR 1952 SC 54, the Supreme Court, inter alia, observed:

> *"12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires*

*confidence**. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.** (Vide: Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516)".* (emphasis supplied)"

33. Thus, the entire testimony of the prosecutrix could not have been discarded. Pertinently, the Trial Court does not even come to the conclusion that the prosecutrix was a tutored witness. There are no indications found from her demeanor, her statement, her cross examination, or the statement of the other prosecution witnesses of her having been tutored. Thus, we reject this submission of the respondent.

34. The statement of PW2 – the complainant is relevant with regard to the condition in which she found the prosecutrix after the incident on the fateful evening, and about the behavior and the condition of the prosecutrix following the incident. In her statement she states that when she looked for her daughter after returning from the bazar, she did not find her despite her being called by her name. She started going upstairs and she had covered 5 or 6 steps when she saw the prosecutrix coming down from the staircase by sitting slowly on the staircase. The manner in which the prosecutrix was seen coming down was not normal as the prosecutrix, who was above 6 years of age, would normally have been walking down the steps and not coming down by sitting on the stairs. She would come down sitting on the steps, only if she has suffered some injury on her foot or legs. PW2 stated that she picked up the prosecutrix into her lap and took her to the room. The prosecutrix was weeping a lot. Despite being put on the bed and covered by a blanket, she continued to cry and was not responding while she was

cooking food for her children. The prosecutrix continued to weep, she went to sleep only to wake up repeatedly due to fear and to start weeping loudly again. She appeared to be in a state of shock and was not responding to the queries of PW2. Her trauma continued for 2 days, whereafter she disclosed the incident to PW2 and identified the accused as the perpetrator of the crime. In her cross examination, PW2, inter alia stated:

> *"I had not seen any injury on the person of my daughter nor I tried to see nor she disclosed anything about the injury. My daughter was wearing baniyan and panty on that day. I do not remember the colour of her clothes as the incident had happened six months back. I had not noticed any blood oozing out from the private part of my daughter nor I noticed if her clothes were soaked with blood or not. I never tried to check the blood though my daughter was weeping throughout. I had changed the clothes including the panty on Wednesday and washed the clothes.* ***There were blood stains on the panty of my daughter.*** *I tried to inquire from my daughter about the same but she was not in a position to tell as she was traumatized and weeping. I did not check the private part of my daughter to ascertain about the blood. I did not take my daughter to any doctor on the day of the incident. It is wrong to suggest that the scar mark shown by my daughter due to the burn given by the accused is a scar mark due to old injury. It is wrong to suggest that my daughter did not disclose the injuries given by burns by the accused to her. It is wrong to suggest that I have falsely implicated the accused though my daughter on account of quarrels due to the falling of the waste from the waste pipe*."(emphasis supplied)

35. The conduct of PW2 shows that she could not imagine, and did not suspect that her daughter might have been subjected to sexual assault on the fateful evening. Though she found blood stains on the panty of her daughter and she inquired about the same from her daughter, she got no response as

the prosecutrix was in no position to tell her, out of her trauma. She states that she did not check the private parts of the prosecutrix to ascertain blood and she did not take her daughter to the doctor on the day of the incident. Once again, to us, it appears that the mother of the prosecutrix, on account of her backwardness and penury remained oblivious of the condition of her daughter – the prosecutrix, and exhibited naivety. It appears that it was beyond her comprehension that her 6 year old daughter may have been subjected to sexual assault.

36. PW6 – the Counselor is a completely independent witness. In her statement she states that on 26.09.2013, as per the instructions of the I.O., she reached the Police Station. She was accompanied by SI Seema to the house of the victim where she met the victim. The victim/ prosecutrix was bleeding from her private parts and was under severe pain. She was not inclined to talk. During conversation with the prosecutrix, the prosecutrix stated that she used to play with the other children on the terrace and about 2 days prior to the incident; the accused had hanged her from the terrace. Thereafter, the accused had intimidated her not to state the same to anybody. She was very scared as the accused had hanged her. On the day of the incident also the accused had hanged her from the terrace, due to which she became scared. Thereafter, he took her into the room and removed the panty of the prosecutrix and kept knife on her private parts and under intimidation, he committed rape with the prosecutrix and after committing rape, he left the prosecutrix. Thereafter, the prosecutrix came down weeping from the stairs. In her cross examination on behalf of the accused, she stated that she found that the panty of the prosecutrix was getting wet due to blood from her

private parts time and again. She herself got the panty of the prosecutrix changed. The prosecutrix was complaining of severe pain in her abdomen. She denied the suggestion that she had deposed falsely in the Court. Even if the narration of the incident by the prosecutrix to PW-6 is discarded as *here – say*, the fact that the prosecutrix was bleeding from her private parts is spoken of by PW-6 in her capacity as an eye witness.

37. PW6 exhibited the Confidential Report Ex. PW6/A prepared by the counselor on 26.09.2013 which, inter alia, mentions the fact that the prosecutrix was having an infection. The "Details of Report" in the said Confidential Report also narrates the incident which, in its material part, is in consonance with the statement of the prosecutrix made under Section 164 Cr.P.C. and before the Court. The accused has not explained why, PW6 – an independent witness, would depose falsely, inter alia, with regard to the physical condition of the prosecutrix seen by PW6 herself during her visit at the house of the prosecutrix on 26.09.2013.

38. The statement of the prosecutrix, thus, stood more than sufficiently corroborated and would have been enough to secure the conviction of the respondent accused. The POCSO Act raises a presumption in Section 29 that when a person is prosecuted for committing or abetting or attempting to commit an offence under Sections 3,5,7 and Section 9 of the said Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

39. In the present case, the offence of aggravated penetrative sexual assault, as defined under Section 5 is alleged against the accused, and he was being prosecuted for the same. Thus, a legal presumption arose under Section 29 that he was guilty of the offence. It was for him to rebut the presumption by proving to the contrary. The Trial Court has held that the accused has been able to rebut the presumption by raising doubts on the case of the prosecution. Thus, we may now examine the reasoning of the Trial Court which led the Trial Court to hold that the prosecution had failed to establish the charge against the accused beyond all reasonable doubt.

40. Firstly, we may observe that the Trial Court was completely oblivious of the legal presumption that the Court is bound to raise against an accused being tried, inter alia, for an offence under Section 5 of the POCSO Act. There is not a whisper in the impugned judgment about the same. In fact, a perusal of the impugned judgment shows that the evidence in the case has not been appreciated keeping in view the legal presumption raised under Section 29 and 30 of the POCSO Act. This lacuna is fatal to the sustainability of the impugned judgment.

41. The reasoning found in the impugned judgment reads as follows:

> *"9.1 As per victim testimony made during cross-examination blood has oozed out from her private part and the police had also collected her undergarments having blood stains. The prosecution has examined the counsellor who was called to counsel the victim as PW6. As per this witness on 26.09.2013 she went with police to the house of victim and the prosecutrix was bleeding from her private parts and was under severe pain. But the mother of the victim with whom the girl remained for almost four days has not noticed any blood on her private parts*

nor the doctor who examined her on 25.09.2013. The blood stained garments of the victim has not been produced in the trial. The testimony of the witnesses is also having variations about the place of incident. In the statement made to the police it was stated that the victim was taken to roof but in the court it is stated that she was taken to a room.

9.2 The doctor who examined the victim medically has appeared in the court as PW5. She deposed that she prepared the MLC of the victim and opined that the hymen of the prosecutrix congested, appears intact, vagina congested. She in her cross-examination stated that "If a male aged around 20/22 years commits intercourse with a girl aged 7 years, in normal circumstances the hymen cannot remain intact. I did not notice any bum injury on the legs of the patient/prosecutrix during my examination. During my examination of the patient, I did not find any cut marks from a knife on the private parts/vagina of the prosecutrix. I did not find any injury marks or black marks on the legs or the wrist of the prosecutrix during her examination."

9.3 It is submitted by the learned counsel for complainant that as per medical literature the hymen in case of rape upon a child usually remains intact and the fact that in the MLC doctor observed that the hymen appears intact does not make the case false. But in view of the testimony of the doctor who examined the victim personally and has specifically stated about the status of hymen, her version will prevail upon general observations. Thus the medical evidence also is not corroborating the case and version of the victim. The defence witnesses examined by the accused have claimed that the accused was with them on 22.09.2013 and they all were playing cricket but considering their testimonies that they were not able to tell the dates of main festivals in that year it may be possible that they have just deposed in the court being friends of the accused.

10. The accused is required to cast a doubt on the case and to raise a possibility of false implication. In the facts of present

case, uncorroborated testimony of victim who has improved her case does not inspire the confidence and cannot be said reliable and trustworthy and so is not sufficient to believe that the accused committed penetrative sexual assault upon her. Considering the testimonies of prosecution witnesses having inconsistencies and contradictions which go to the root of matter it can be said that the accused is able to discharge his onus and have raised a doubt on the case of prosecution. The inconsistencies and contradictions observed as above raise doubt that no such offence has occurred as deposed by the witnesses. Thus, the accused is entitled for acquittal as the charge against him is not proved. Accordingly the accused Akram is acquitted from the charges framed against him."

42. The aforesaid reasoning given by the Trial Court, in our view, borders on perversity and the Trial Court has miserably failed to appreciate the evidence led by the prosecution in the case in the right perspective. The approach of the Trial Court is hyper technical, and ignores the well settled principle that minor variations in the statements of the witnesses - which do not affect the crux of the case of the prosecution, are natural and not sufficient to discredit the prosecution witnesses. While observing that a child witness is susceptible to tutoring, and his evidence must be evaluated more carefully and with greater circumspection, the ld. ASJ has failed to state as to what is there in the evidence to even remotely suggest that the child witness PW1 was tutored; or that her statement was not corroborated. In a recent decision delivered by this Court in ***State of NCT OF Delhi v. Dharmender***, Crl. A. 1184/2017, decided on 23.03.2018, this Court had occasion to deal with the law on the subject of reliability of the testimony of a child witness. We may extract the relevant paragraphs from ***Dharmender*** (supra) here under:

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

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

47. The Supreme Court, inter alia, considered the question whether the law requires corroboration of the statement of the victim/ prosecutrix in such like cases. The Supreme Court observed that the Evidence Act does not prescribe that the statement of the victim/ prosecutrix in the case of rape requires corroboration. The Supreme Court referred to Section 114 (b) of the Evidence Act – which states that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, and Section 133 of the Evidence Act – which states that an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the

uncorroborated testimony of an accomplice. The Supreme Court observed that a woman, who has been raped, is not an accomplice. She is the victim of an outrage. If she consented, there is no offence unless she is a married woman, in which case questions of adultery may arise. However, adultery presupposes consent and so is not on the same footing as rape. The Supreme Court, inter alia, observed as follows in its decision:

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

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

> *"****There is no doubt that the uncorroborated evidence of an accomplice is admissible in law..... But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the***

uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence*.....*

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed..... If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated." (emphasis supplied)

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

"That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is ***where this class of offence is sometimes tried by a judge without the aid of a jury. In these cases it is necessary that the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case.*** *I am of opinion that the learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration.*

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

> ***him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand****". (emphasis supplied)*

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

51. The Supreme Court then considered the nature and extent of corroboration required when it is not considered safe to dispense with it. Once again, the Supreme Court referred to ***Baskerville*** *(supra). The Supreme Court held that it is not independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant (who is treated like an accomplice) is true, and that it is reasonably safe to act upon it. The independent evidence must not only make it safe to believe that the crime was committed, but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. However, this does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. All that is necessary is that there*

should be independent evidence which will make it reasonably safe to believe the witnesses story that the accused was the one, who committed the offence.

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

53. The Supreme Court then proceeded to consider whether a previous statement of an accomplice/ complainant/ prosecutrix/ victim could be accepted as corroboration? In this regard, the Supreme Court drew the attention to illustration (j) to Section 8 of the Evidence Act, which reads - "The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

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

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

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

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

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

57. The Supreme Court held that the testimony of the mother provided independent corroboration connecting the accused with the crime in the facts of the case, and considering the conduct of the victim/ prosecutrix and her mother from start to finish, the Supreme Court held that no corroboration beyond the statement of the child to her mother was necessary.

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

> *"11. ... ... In discarding the evidence of the brother of the deceased namely Ajay Singh the learned Additional Sessions Judge was influenced by the tender age of Ajay (about 14 years) and was of the view that he was likely to be tutored. We do*

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

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

60. In ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat****, (2004) 1 SCC 64, the child was an eye witness to the murder of the two deceased persons. Relying on the testimony of the child witness, the Trial Court convicted the accused under Section 302 IPC and, accordingly, sentenced them. Before the Supreme Court, the appellant placed reliance on* ***Arbind Singh v. State of Bihar****, 1995 (4) SCC 416 to contend that where the Court finds traces of tutoring, corroboration is a must before the evidence of the child witness could be acted upon. The Supreme Court referred to* ***Dattu Ramrao Sakhare v. State of Maharashtra****, (1997) 5 SCC 341, wherein it had been held:*

> *"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof.* ***The evidence of a child witness and credibility thereof would depend upon the***

circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. *" (emphasis supplied)*

61. The Supreme Court went on to observe:

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

62. While dealing with the merits of the case before it, the Supreme Court held that there was no reason for false implication by the child witness. The Trial Court on careful examination was satisfied about the child's capacity to understand and to give rational answers. That being the position, it cannot be said that the child witness had no

maturity to understand the import of the questions put to her, or to give rational answers. The child witness had been cross-examined at length and she stood her ground. The Supreme Court held that the evidence of the child witness was credible, which revealed her truthful approach and that her evidence had the ring of the truth. Consequently, the Supreme Court accepted the said evidence of the child witness and dismissed the appeal.

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

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

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

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

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

what others tell him and thus a child witness is an easy prey to tutoring*."*

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

10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the crossexamination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he

was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, AIR 2009 SC 2292).

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

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

Punjab, (2006) 13 SCC 516)". (emphasis supplied)

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

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

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

43. The failure of the prosecution in not examining the children with whom the prosecutrix was playing may, at the highest, be treated as a lapse on the part of the prosecution. It is a well known and well recognized fact that people in society stay away, and do not like to get embroiled in cases as

witnesses – to avoid harassment or face the wrath of the perpetrator of the crime. Since the other two – with whom the prosecutrix was playing were also children, their parents may not have been willing to let them be examined and be subjected and exposed to harassment, trauma and threats. However, the failure of the prosecution to cite them as witnesses, by itself, is not sufficient to disbelieve the case of the prosecution. It was not even the case of the prosecution that the other two children – who were consistently named by the prosecutrix as her friends, and with whom she was playing before the incident of rape occurred, were eye witness to the incident of rape. Thus, their non-examination is not fatal to the case of the prosecution and is not a circumstance which raises a doubt on the truth of the same.

44. The ld. ASJ observes that even though the prosecutrix claimed that she had blood oozing out from her private parts; that her undergarments with the blood stains were collected by the police, and; that her bleeding was noticed by the counselor PW6 on 26.09.2013, her mother had not noticed any blood on her private parts. This is not true. As noticed above, PW2 in her cross examination, inter alia, stated that she had changed the clothes of the prosecutrix, including panty on Wednesday and washed the clothes. She stated: "*There were blood stains on the panty of my daughter*". She states that she tried to inquire from the prosecutrix about the same, but she was not in a position to tell as she was traumatized and weeping. She did not check the private parts of her daughter to ascertain about the blood. Thus, the Trial Court has proceeded on a factually wrong premise that the mother of the prosecutrix PW2 had not noticed any blood.

45. So far as the doctor PW-5 who examined the prosecutrix on 25.09.2013 is concerned, though she did not find an external injury mark, she did find the hymen congested and the vagina also congested. No doubt, the MLC does not mention the presence of blood on the private parts of the prosecutrix but that, in our view, is not sufficient to discredit the statement of PW6, who is an independent witness and had no reason to falsely implicate the accused. The prosecutrix was medically examined after 4 days of the occurrence of the incident. It could well be that she was not bleeding from her private parts at that point of time. It appears that she had a fluid discharge from her private parts, which led to PW-5 suspecting vaginitis. It is well settled that the failure of the police in carrying out proper investigation, or failure of the prosecution in properly prosecuting the case, is not sufficient to discredit the case of the prosecution and, if on the basis of the evidence brought on record, the guilt of the accused is established in accordance with law, such failure would not be a reason to reject the case of the prosecution.

46. The Trial Court has also sought to raise an issue with regard to the place of the incident. He observes that as per the statement of the prosecutrix, she had been taken to a room where she was raped, whereas, according to the police the incident took place on the roof. In this regard we may, firstly, notice the statement of the prosecutrix recorded under Section 164 Cr.P.C. Ex. PW1/A. She stated that the accused took her to the room and bolted the same from inside. She did not state that the incident of rape took place on the open terrace. Even when her statement was recorded before the Court, she clearly stated that while she was playing, the accused

took her to his room where he tied her hand and legs and also burnt the upper side of her right foot. During her cross examination, it was not suggested to the prosecutrix that there was no room on the terrace which was occupied by the accused, or she had never been in that room. It was not suggested to her that she had only been on the terrace on the roof, and not the room.

47. Though the Ld. ASJ has not particularized as to which of the witnesses of the police stated that the incident took place on the roof, a careful examination of the testimonies of the prosecution witnesses shows that it was PW11 SI Rambir Singh, who, inter alia stated that during his cross examination *"It was roof of the top floor where the incident had taken place. I had informed the SHO that I had gone to the roof of the fourth floor where the rape was committed"*.

48. Pertinently, in the said statement made during his cross examination, PW 11 SI Rambir Singh did not state that he was either informed by the complainant, or by the prosecutrix, or by any other person that the incident had taken place on the roof of the top floor. He was not an eye witness to the incident. Thus, his statement to the aforesaid effect is neither here, nor there. His statement has to be seen in the light of the site plan Ex. PW13/B, prepared by the I.O. PW13 W/SI Seema. The said site plan Ex. PW13/B marks the place of incident at Point A, which is a room situated on the terrace. Thus, the testimony of PW11 SI Rambir Singh that the incident occurred on the roof of the top floor has to be appreciated in the light of the fact that on the terrace/ roof itself, the room of the accused was situated.

Unfortunately, this simple aspect has not been appreciated by the Trial Court and, inter alia, on that basis, the case of the prosecution has been doubted.

49. Ld. ASJ has also relied upon the testimony of PW5 – the doctor who prepared the MLC of the victim. She, inter alia, during her cross examination stated that if a male aged 20/22 years commits intercourse with a girl aged 7 years, in normal circumstances, the hymen cannot remain intact. This statement of PW5 has been preferred by the Ld. ASJ in contrast to authoritative works on medical jurisprudence relied upon by the prosecution and taken note of hereinabove, as well as the further statement of PW-5 herself.

50. In our view, this approach of the Ld. ASJ was wholly incorrect. We fail to appreciate as to how the Ld. ASJ could have ignored the subsequent statement of PW-5 and the medical jurisprudence placed before him, which shows that the rupture of the hymen of a child of 7 years would normally not take place in the case of rape, unless the rape is committed violently. The said medical literature also shows that rape of a minor child of that age is more likely to result in a congested hymen and congested vagina – which is the case in hand.

51. So far as defence evidence is concerned, the same has been rejected by the Ld. ASJ and, in our view, rightly so. DW-1 is the landlord. He merely states that there used to be some quarrel between the accused and the complainant regarding the waste in the pipe dropping in front of the room of the complainant. Even if that be so, it could not be a reason to falsely implicate the accused in such a serious case. This does not explain the

medical condition of the prosecutrix and her consistent statement. DW-2 Rehmat Ali is the friend of the accused. He claims that the accused was with him till 09.30 P.M, on 22.09.2013. Pertinently, that was not the defence set up by the accused either during cross examination of PW1 or PW2, or in his statement recorded under Section 313 Cr.P.C. His testimony stands completely discredited. He was an interested witness and his statement was not corroborated with any independence evidence. DW 3 Kalaam is another friend of the accused. He has deposed in the same manner as DW-2, that the accused was with them till 10.00 P.M. For the same reason, his testimony is unworthy of reliance. It is rejected.

52. For all the aforesaid reasons, we are of the considered view that the impugned judgment cannot be sustained and the evidence led by the prosecution conclusively establishes the guilt of the respondent accused. The impugned judgment borders on perversity and has led to serious miscarriage of justice. Accordingly, we set aside the impugned judgment and convict the respondent accused for the offences as charged.

(VIPIN SANGHI)
JUDGE

(I.S. MEHTA)
JUDGE

JANUARY 08, 2019