

(2018) 08 DEL CK 0073

In the Delhi High Court

Case No : Criminal Appeal No. 510 OF 2018

State Govt Of Nct Of Delhi

APPELLANT

Vs

Khursheed

RESPONDENT

Date of Decision : 07-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 376

Protection of Children from Sexual Offences Act, 2012 — Section 4, 5, 6, 29, 30

Code of Criminal Procedure, 1973 — Section 53A, 164, 313, 391

Indian Evidence Act, 1872 — Section 157

Citation : (2018) 08 DEL CK 0073

Hon'ble Judges : VIPIN SANGHI, J;P.S.TEJI, J

Bench : Division Bench

Judgement

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1. The State has preferred the present appeal upon grant of leave to assail the judgment dated 24.11.2016 rendered by the learned Additional Sessions,,,,

Judge-01, South East District, New Delhi in Case No. 1808/ 16, Sessions",,,,,

Case No. 209/ 13, arising out of FIR No. 369/ 2013 registered at Police",,,,,

Station- Badarpur under Sections 376 IPC and Section 4 of the POCSO Act.Â Â,,,,

2. By the impugned judgment, the Trial Court has acquitted the Respondent/ Accused- Khursheed, inter alia, on the premise that the testimony of the",,,,,

prosecutrix was untrustworthy due to various improvements, contradictions and inconsistencies in the same.Â The trial court held that the accused",,,,,

has cast serious doubts on the case of the prosecution and raised a possibility of false implication. Â Â,,,,

3. The case of the prosecution is that on 15.10.2013 at 6:15 PM, W/SI Krishna vide DD 39A, met with the complainant- Sheela Devi (PW8) and her",,,,,

daughter aged 8 years- prosecutrix (PW1), at PS Badarpur. The complainant stated that she lived with her 2 daughters and 3 sons in a rented",,,,,

accommodation at H. No. 316, Ajju Colony, Badarpur, New Delhi. On the said day, when the complainant returned home from her job around 3:00",,,,,

PM, her daughter- prosecutrix, who was a student of 4th class in a government school was missing from their house. She started searching for her",,,,,

daughter and upon suspicion, she went to the nearby room of Khursheed and pushed open the door of his room. She found that the accused",,,,,

Khursheed had put the prosecutrix on the floor and had removed her lower clothes. She added that,,,,,

Khursheed had also removed his own pant and was lying over the prosecutrix. The complainant pushed him away, upon which he ran away from the",,,,,

spot after wearing his pant. She further stated that she was informed by the prosecutrix herself that the accused- Khursheed had taken her to his,,,,,

room on the pretext of giving her a toffee, but instead, committed rape upon her and when she started raising noise, the accused had put his hand on",,,,,

her mouth.,,,,,

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 by the doctor during examination of 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 Sections 4 of the POCSO Act was filed before the Additional",,,,,

Sessions Judge, Saket Court, New Delhi. 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.Â,,,,,

5. To prove the charge, the prosecution examined 11 witnesses in all, including PW1- victim/ prosecutrix; PW2 Dr. Piyush Sharma- the doctor who",,,,,

examined the accused; PW4 Dr. Monica Gupta- the doctor who examined the victim; PW8 complainant- mother of the prosecutrix, and; PW11 W/SI",,,,,

Krishna- IO.Â,,,,,

6. The statement of the accused was recorded under Section 313 Cr.P.C and the evidence brought on record by the prosecution to prove the charge,,,,,

was put to the accused. The accused denied all evidences put to him while recording his statement under s. 313 Cr.P.C. The accused did not lead any,,,,

evidence in his defence and alleged that he was falsely implicated in the case on account of a dispute with the complainant- mother of prosecutrix.,,,,

The trial court, as aforesaid, has acquitted the respondent accused, and thus, the present appeal.Â",,,,

7. We are mindful of the principles applicable to examination of a judgment of acquittal in appeal.Â 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:",,,,

â??â?| â?| â?| 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.Â 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.Â Para 70 of the said judgment reads:",,,,

70.Â 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 reachedâ?"one that leads to acquittal, the other to convictionâ?"the High Courts/appellate courts must rule in" ,,,,
favour of the accused. ,,,,

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

10. Hearing in the appeal commenced on 15.05.2018.Â During the course of hearing, it was brought to the notice of the court that the FSL report" ,,,,
bearing report No. FSL 2013/DNA-8323, DNA No. 1411/13, dated 15.05.2014, suggested that the DNA profile generated from the semen found on" ,,,,
the underwear of the prosecutrix did not match the DNA profile generated from the blood sample of the accused. We felt something amiss about the ,,,,
said report, since the evidence in the case Â including the statements of the prosecutrix PW1 and her mother eye witness PW-8, and the medical" ,,,,
evidence i.e. the MLC of the prosecutrix Ex.PW-4/A pointed towards the guilt of the accused, but the said FSL report date 15.05.2014 pointed to his" ,,,,
innocence. Pertinently, the said FSL report was not even exhibited before the Trial Court , though found on record.Â Consequently, vide our order" ,,,,
dated ,,,,

15.5.2018, we directed the Director FSL to remain present in Court on 16.05.2018. The Director was directed to produce the original complete record" ,,,,

pertaining to report No. FSL2013/DBA-8323, DNA No. 1411/13 dated 15.05.2014." ,,,,

11. On 16.05.2018, the Director Ms. Deepa Verma and Dr. Dhruv Sharma, Assistant Director (Biology), Head of Division appeared before the Court alongwith the original record pertaining to this case on 16.05.2018. After hearing the Id. Counsels, on 16.05.2018, we passed the following order: During the course of the hearing of the appeal, after examining the evidence brought on record by the prosecution, we were left with a strong feeling that there was something amiss about the report obtained from the FSL with regard to the DNA profiling. Pertinently, the same was not even exhibited in the present case, though found on record. The evidence in the case points to the guilty of the accused, whereas, the unexhibited FSL report seeks to suggest that the DNA profile generated from the semen found on the underwear of the prosecutrix did not match the DNA profile generated from the blood sample of the accused.

Mr. Mahajan has brought to our notice another instance where the initial report generated by the same officer, namely, Ms. L. Babito Devi dated 16.04.2014 bearing report No. FSL 2013/DNA-3915 DNA No. 688/13 in respect of case FIR No. 313/12 dated 08.11.2012 registered at PS Mahendra Park gave a negative report and on the second occasion when the Trial Court directed the conduct a fresh test by another officer, the DNA profile of the underwear of the deceased matched with the DNA profile generated from the blood gauge of the accused. On this occasion, the report was generated by Mr. A. K. Srivastava, Deputy Director. He also points out that there is an issue raised with regard to the qualification of Ms. L. Babito Devi in Nisha Thakur versus UPSC in W.P.(C) 11818/2015. The above aspects raise concern, compelling us to adopt the course of action that we have adopted.

Consequently, while deciding to proceed with the hearing of the appeal in the absence of the exhibited FSL report, we considered it necessary to summon the Director, FSL with the original complete record pertaining to report No. FSL 2013/DNA-8323, DNA No. 1411/13 dated 15.05.2014. The Director, Ms. Deepa Verma and Dr. Dhruv Sharma, Assistant Director (Biology), Head of Division are present in Court. They have also produced the original record pertaining to this case available in their office. We may observe that the work-sheets are available in the said file in a yellow envelope, the seal whereof has been broken. On our query, we are informed by

Dr. Dhruv Sharma that the seal was broken after receipt of notice of",,,,,

this Court so as to study the case. We had not asked the Director, FSL or any other officer to, in any way, tamper with the record maintained by it.",,,,,

The FSL routinely deals with samples produced in sealed condition so as to maintain its sanctity. We are, therefore, surprised that the sealed envelope",,,,,

containing the work sheets should have been opened in such a casual manner. We have, therefore, decided to retain the work-sheets contained in the",,,,,

yellow envelop in this Court. The Court Master shall have the said envelop sealed during the course of the day with the seal of the High Court.,,,,,

They shall be separately preserved with the Deputy Registrar (Criminal).Â,,,,

Mr. Mahajan on instructions from the IO, who is present in Court, states that preserved samples, which are lying in the sealed cover in the malkhana,",,,,

have been brought to the Court today.Â,,,,

Mr. Dhruv stated that the Y-filer test was not conducted on the sample in the present case since the same was not considered necessary on the basis,,,,

of the result generated.,,,,,

With a view to give yet another opportunity to FSL, Delhi, to demonstrate their competence and to come clean in the matter, we are inclined to give",,,,,

one more opportunity to the FSL, Delhi to undertake fresh and detailed examination of the preserved sample and to generate a fresh DNA analysis",,,,

report on that basis.Â,,,,

At the same time, we have made it clear to Director, FSL, Delhi that the entire sample which is preserved should not be utilised and destroyed, since",,,,,

the same should be available, in case, further testing is required to be undertaken at some other laboratory within or outside the country.",,,,,

To ensure that the entire sample is not taken and destroyed, we have requested Mr. Rajat Katyal, Additional Public Prosecutor to be present with the",,,,,

IO at the FSL when portion of the preserved sample is drawn and the remaining is resealed and returned to the IO. He has graciously agreed to do,,,,

so.Â,,,,

Mr. Dhruv Sharma has submitted that the blood samples of the prosecutrix and of the accused would also be required to be able to prepare a proper,,,,

report. Mr. Mahajan states that the whereabouts of the prosecutrix are known. Let the blood samples of the prosecutrix and the accused be got,,,,

collected at the appropriate Government hospital. The same be transmitted to FSL in a sealed condition in compliance of the due procedure. This,,,,

exercise should be undertaken by tomorrow morning itself.Â,,,,

Since the preserved sample has been brought to Court, let the IO, Mr. Katyal and the officers of the FSL proceed forthwith for drawing a portion of" ,,,,

the preserved sample today itself from the Court to FSL, Delhi.Â" ,,,,

The blood samples of the prosecutrix and the accused shall be provided by tomorrow morning. The FSL should immediately undertake the process of,,,,

testing the samples and it is hoped that that the report would be available within a week.Â,,,,

The original record produced by the FSL has been returned except the work-sheets which have been preserved by this Court.Â,,,,

List the matter for that purpose on 25th May, 2018. The hearing of the appeal shall proceed independentlyâ??" ,,,,

Â,,,,

12. Thus, we called for a fresh DNA report from the FSL, after drawing a sample from the residue of the semen stained underwear of the" ,,,,

prosecutrix, and after obtaining a fresh blood sample from the prosecutrix and the accused.Â This exercise was directed to be undertaken while" ,,,,

making it clear that the hearing in the appeal shall proceed, since the FSL Report found on record dated 15.05.2014 had not been led in evidence." ,,,,

13. On the date of hearing fixed in the matter i.e. 18.05.2018, the respondent moved an application i.e. CrI.M.A. No. 9662/2018 under Section 391" ,,,,

Cr.P.C. for adducing additional evidence and to bring on record the FSL report No. FSL2013/ DNA-8323, DNA No.1411/2013 dated 15.05.2014" ,,,,

prepared by Ms. L. Babyto Devi, Senior Scientific Officer (Biology).Â We issued notice on this application to the State.Â Ld. Additional Standing" ,,,,

Counsel, Mr. Rajesh Mahajan accepted notice.Â We adjourned the matter for consideration to 25.05.2018." ,,,,

14. On 25.05.2018, the Director FSL and Dr. Dhruv Sharma, Assistant Director, Biology, FSL produced a fresh DNA report before the court bearing" ,,,,

No. FSL 2018/B-4392, which also bore No. FSL 2018/B-4392 (FN) dated" ,,,,

24.05.2018 in a sealed cover and the same was taken on record.Â We directed that a copy of the same be provided to Ld. counsels.Â,,,,

15. We directed Dr. Dhruv Sharma, Assistant Director, Biology, FSLÂ and L.

Babyto Devi (wrongly typed as L. Babyto Ravi) to be present as",,,,

court witnesses for their examination on 29.05.2018.Â,,,,

16. Between 29.05.2018 and 30.05.2018 six prosecution witnesses were examined, and cross examined viz. SI Rajiv (PW-12), SI Ved Prakash",,,,

(PW13) and HC Mansukh (PW-14), W/Ct. Manorma (PW-15), Constable Amrender Singh (PW-16) and Constable Aleem Khan Ali (PW-17) and",,,,

they tendered and exhibited their respective affidavits towards examination-in-,,,

chief asÂ Ex. PW-12/A, Ex. PW13/A, Ex. PW14/A, Ex. PW-15/A, Ex. PW16/A, Ex. PW17/A respectively.Â The documents produced by them",,,,

with their respective affidavits were also exhibited.Â They are formal witnesses who were instrumental, inter alia, in the process of collection of",,,,

fresh samples etc. for conduct of fresh DNA examination at FSL, Rohini, Delhi.Â We shall refer to their evidence a little later.",,,,

17. On 29.05.2018, Ms. L. Babyto Devi was examined asÂ CW-1.Â",,,,

Dr. Dhruv Sharma was examined as CW-2.Â,,,,

18. In her statement, CW-1 identified her signatures on the report bearing No. FSL 2013/DNA-8323, DNA No. 1411/13, dated 15.05.2014, which was",,,,

exhibited as Ex. CW1/A.Â The worksheets in support of the report Ex. CW1/A, which were contained in the file produced before the Court on",,,,

16.05.2018, and were directed to be kept in a sealed cover, were exhibited by CW-1 as Ex. CW-1/D.Â She stated that the said worksheets Ex. CW-",,,,

1/D (comprising of 8 sheets) were prepared in respect of the examination of the sample, in respect whereof the report Ex. CW1/A was prepared.",,,,

19.Â In her cross- examination, on behalf of the accused she, inter alia, stated that:",,,,

Â "First the semen or the blood detection test is conducted. If semen or blood is found, then the DNA testing is done. The determination of",,,,

the semen is conducted by a test which is called as Acid Phosphatase Test.Â If Semen is detected, slide is prepared to confirm the presence of the",,,,

Semen/ spermatazao.Â..Â,,,,

Â".In the present case, I adopted the organic differentiation method, which is a standard procedure.....",,,,

Â".After confirmation of the semen, we do the isolation of the DNA to extract the DNA for testing and to separate male and female DNAÂ..",,,,

source of exhibit-3 i.e. blood sample of victim.Â,,,,,

I have seen Ex. CW-1/A.Â When the board comprising me and the other two officers conducted the examination, the profile generated from the",,,,,

underwear of the prosecutrix was the same as one generated using minifiler kit, when the test was conducted and the report Ex. CW-1/A prepared.Â",,,,,

However, the profile generated from the blood sample, using the minifiler test, of the accused was different on the two occasions.Â In the first",,,,,

occasion, in respect whereof Ex. CW-1/A report was prepared, the two profiles did not match.Â However, on the present occasion, the profiles",,,,,

matched.Â Â Thereafter, Y-Filer test was conducted and once again, the profiles matched and when advance identifier plus kit was used and test",,,,,

was conducted, once again the DNA profiles of the underwear of the prosecutrix and the blood sample of the accused matched on all the 16 markers.",,,,,

22. CW-2 was cross examined on behalf of the accused.Â He, inter alia stated:",,,,,

?The semen detection was carried out to arrive at the conclusion in my report and it is so mentioned in the report.Â The parcels containing Ex.2,,,,,

was sealed with the seal of the court as mentioned in the report and the sample received was sealed and the seal was intact. On an average, it takes",,,,,

around two weeks to two months to conduct such a test.Â However, the test can be completed in three days as well.",,,,,

It is correct that the 9 markers used in the minifiler test remain the same as in the 16 marker identifier plus test, which additionally has 7 more",,,,,

markers.,,,,,

?I cannot say why there is a discrepancy between the Ex. CW-1/A and Ex. CW-2/A. Both used different exhibits.Â It is correct that the exhibits of,,,,,

the underwear was the same.Â However, fresh blood sample of the accused was taken for the DNA profiling of the accused.",,,,,

23. He denied the suggestions that he or the Board had not conducted the tests; that he did not have sufficient time to conduct the test properly; that,,,,,

he has deliberately given a contrary report to the initial report; that the report (Ex.CW-2/A) is a fabricated and false report; that the sample was,,,,,

tampered with; that the sample Ex.CW-2/A was in a damaged or degenerated condition; that the sample was degenerated when it was examined, or; ",,,,,

that he was deposing falsely.Â He also stated that since the sample consisted of

cloth and was kept in dry condition, the same would not degenerate",,,,,
in a period of 4½ years.,,,,,

24. Since Ms. Babyto Devi had been examined as CW-1, and she exhibited her report Ex.CW-1/A, CrI.M.A. No.9662/2018 was disposed of as",,,,,
infructuous.Â Â,,,,,

25. Since the prosecution had led additional evidence and the court had examined two Court witnesses, the supplementary statement of the accused",,,,,
was recorded under Section 313 Cr.P.C. on the same day, i.e. 30.05.2018.Â All the additional evidence was put to the accused.Â He admitted that",,,,,
he was taken to the hospital by PW-12 and PW-16 for taking his blood sample.Â To all other questions, except the second last one, he stated â??I do",,,,,
not knowâ??.Â In response to the second last question, i.e. whether he had anything further to say, he claimed false implication and he stated that he is",,,,,
innocent.Â When he was lastly asked, whether he would like to lead any defence evidence, he declined to do so.",,,,,

26. Thereafter we proceeded to hear further submissions of learned counsels, and reserved judgment.",,,,,

Submission of parties,,,,,

27. The submission of Mr. Rajesh Mahajan, learned ASC is that the learned ASJ has grossly erred in appreciation of the material evidence in the",,,,,
case.Â He submits that the prosecutrix was only 8 years and 8 months old on the date of the incident and belonged to the lower strata of the,,,,,
society.Â This aspect has been completely ignored by the Ld. ASJ while scrutinizing the statements of the prosecutrix. He submits that the statement,,,,,
of the prosecutrix recorded under Section 164 Cr PC (Ex. PW-11/D), and the statement of the prosecutrix recorded before the court are",,,,,
consistent.Â Minor variations, which were inconsequential and did not shake the core of the prosecution's case have been blown out of proportion",,,,,
and cited as reasons to discredit the prosecutrix, whose statement was duly corroborated by eye-witness account of her mother PW8, and the medical",,,,,
evidence i.e. her MLC.Â The prosecutrix was also not confronted with the minor and natural variations in her statement.Â There was no reason to,,,,,
disbelieve the statement of the prosecutrix.Â Mr. Mahajan submits that the said evidence, by itself, was sufficient to find the accused guilty.Â Â Â",,,,,

28. Mr. Mahajan has referred to the MLC of the victim Ex. PW-4/A to submit that

the trial court has erroneously neglected the opinion of PW4- Dr.,,,,

Monica Gupta, who had observed that the hymen of the victim was not intact and that she, in fact, had fresh bruises on her thigh. Ld. Counsel submits",,,,

that the MLC of the accused Ex. PW 2/A shows that the accused was in an inebriated condition at the time of his examination by PW2 which was,,,

done within a few hours of the crime being witnessed by PW-8, the mother of the prosecutrix, and the police being called.Â",,,,

29. Mr. Mahajan submits that scientific evidence is used as corroborative evidence.Â If the victim is credible, reliable and trustworthy, no",,,,

corroboration is necessary.Â However, in the present case, the statement of the victim is corroborated by her mother PW-8, who is an eye witness",,,,

as well as the MLC of the prosecutrix. In support of his submission that an expert report is merely advisory in nature, and the court must form its",,,,

opinion with respect to other corroborative evidence available on record Mr. Mahajan places reliance on State of HP. v. Jai Lal and ors., (1999) 7",,,,

SCC 280; State of Haryana v. Bhagirath, (1999) 5 SCC 96; Vishnu alias Undrya v. State of Maharashtra, (2006) 1 SCC 283; Madan Gopal Kakkad v.",,,,

Naval Dubey and anr., (1992) 3 SCC 2004; Dayal Singh and ors. v. State of Uttaranchal, (2012) 2 SCC 583.",,,,

30. Mr. Mahajan submits that the second FSL report Ex. CW-2/A was called for by this court only to ascertain whether the first report Ex. CW-1/A,,,,,

had been correctly made, as the said report Ex. CW-1/A pointed in the opposite direction when compared to the other evidence available on record.",,,,

The unexhibited FSL report dated 15.05.2014 (which was subsequently exhibited as Ex. CW-1/A) suggested that the accused was not guilty of the,,,,

offence, whereas the other evidence in the case including testimony of the prosecutrix; the testimony of PW-8, and; the MLC of the prosecutrix all",,,,

established beyond reasonable doubt the commission of the crime by the accused.Â Mr. Mahajan submits that Ex. CW-2/A has put the matter to rest,,,,,

inasmuch, as, the DNA found in the semen present in the underwear of the prosecutrix completely matched with the DNA of the accused.",,,,

31. Mr. Mahajan submits that even when the initial test was conducted and report Ex. CW-1/A was generated, semen was found on the underwear of",,,,

the prosecutrix.Â However, the male profile of the DNA generated from the semen on the underwear, and the male profile generated from the blood",,,,

sample of the accused did not match at all.Â On the second occasion, when the fresh blood sample of the accused was drawn and the tests were",,,,

reconducted by the board comprising of three scientists including CW-2, the male profile of the DNA found in the semen on the underwear was found",,,,

to be identical with DNA profile generated at the time of preparation of Ex. CW-1/A.Â However, on this occasion, the male profile of the DNA",,,,

generated from the blood sample of the accused was found to be completely matching with the male profile of the DNA drawn from the semen found",,,,

on the underwear of the prosecutrix.Â He submits that the allelic data in the 2 reports with respect to the samples of semen taken from the",,,,

underwear of the prosecutrix is the same, but it is completely different in respect of the blood samples of the accused." ,,,,

32. Mr. Mahajan, therefore, submits that at some stage i.e. when the blood sample of the accused was drawn at the hospital, or when the same was",,,,

unsealed at the FSL, the said sample of the accused was compromised, which led to an erroneous report on the first occasion vide Ex. CW-1/A.Â",,,,

Pertinently, the male profile of the DNA generated from the semen stained underwear of the prosecutrix has remained the same on both occasions",,,,

i.e. when the report Ex. CW-1/A was prepared, and when the subsequent report Ex. CW-2/A was prepared by the FSL.Â Thus, Mr. Mahajan",,,,

submits that the first report Ex. CW-1/A is liable to be rejected as the same was founded upon a compromised sample of the blood drawn from the",,,,

accused.Â",,,,

33. He argues that the second FSL report dated 24.05.2018, must be preferred over the first FSL report, as the former is founded upon a blood sample",,,,

which does not appear to belong to the accused.Â Thus, it is not a case of two interpretations, or even two different expert reports on the same",,,,

samples, but a case of two reports- the first being founded upon a partially incorrect data/ sample viz. the blood sample which as it now transpires, ",,,,

was not of the accused. He submits that the second FSL report Ex. CW-2/A is supported by the evidence of the prosecutrix PW-1 and eye-witness- ,,,,

PW8, which are both reliable and trustworthy. Mr. Mahajan further argues that if the direct evidence is satisfactory and reliable, the same cannot be",,,,

rejected based on medical expert report. Reliance is placed on Anil Rai v. State of Bihar, (2001) SCC (Cri) 1009; Punjab Singh v. State of Haryana, ",,,,

AIR 1984 SC 1233. He also places reliance on Piara Singh and ors. v. State of Punjab, AIR 1977 SC 2274 to submit that where multiple contradictory",,,,

reports have been produced before the court by two or more equally competent medical experts, then the court must consider the report which",,,,

supports the direct evidence in the case.Â",,,,

34. Mr Mahajan submits that the trial court failed to raise the statutory presumption against the accused of his involvement in the commission of the",,,,

offence under sections 29 and 30 of the POCSO Act. Reliance is placed on M. Narsinga Rao v. State of Andhra Pradesh, AIR 2001 SC 318;"",,,,

Shamnsahib M. Multtani v. State of Karnataka, AIR 2001 SC 921; Dhanvantrai B. Desai v. State of Maharashtra, AIR 1964 SC 575; M/s Sodhi",,,,

transport Company v. State of UP, AIR 1986 SC 1009.Â He submits that the accused failed to rebut the statutory presumption by leading any",,,,

evidence, or by probablising a defence.Â Â",,,,

35. Mr. Mahajan draws the attention of the court to Section 53A of Cr PC, which permits the medical examination of an accused in a rape case, and",,,,

also permits the drawing of materials/ samples from the person of the accused for DNA profiling.Â He submits that the accused could not have",,,,

objected to his blood samples being drawn and, as a matter of fact, he has not objected to the same on any occasion.Â",,,,

36. On the other hand, Ms. Mallika Parmar learned counsel for the respondent-Khursheed firstly submits that as per the arrest memo, the",,,,

respondent- Khursheed was arrested at 7:30PM from his own house No. 316, Ajju colony, Badarpur, New Delhi. She argues that if the respondent",,,,

had, in fact, committed the offence, he would have absconded, instead of waiting for the police to arrest him from his own house.Â This reflects on",,,,

the clear conscience of the accused.,,,,

37. Ms. Parmar submits that there are many inconsistencies in the case of the prosecution.Â She submits that in her complaint/ rukka forming basis",,,,

of the FIR Ex. PW-5/A, the mother of the prosecutrix PW-8 stated that when she returned to her room at about 3:00 p.m. and did not find the",,,,

prosecutrix, she searched for her in the nearby areas and she noticed that the room of the accused was closed.Â She stated that she had some doubt,"",,,,

so she pushed the door of the room of the accused and she saw that the accused had laid prosecutrix on the floor and he had removed the lower",,,,

clothes worn by the prosecutrix.Â He had also lowered his own pant and he was lying on top of the prosecutrix.Â He had covered the mouth of,,,,
the prosecutrix with one hand.Â Â,,,,

38. However, in her testimony, PW-8 stated that on the date of occurrence when she was searching for her daughter the prosecutrix, she noticed that",,,,
on one room, on which, usually there was a lock in the day time, on that day there was no lock outside the door of the room and therefore she got",,,,
suspicious.Â She pushed the door.Â However, it was found to be locked from inside.Â Thereafter, she pushed the window of the room and due to",,,,
force, the window got opened and she saw the accused lying over the prosecutrix.Â After seeing PW-8, the accused opened the door of the room",,,,
and ran away from the spot.Â Â,,,,

39. Ms. Parmar submits that the sequence and version narrated by PW-8 while recording her testimony was at variance with that in her statement,,,,
recorded by the police in the rukka Ex. PW-8/A.Â PW-8 had claimed that a piece of the glass window had broken and she had also got injured in her,,,,
finger, but no broken glass piece was recovered, and there is no evidence of any injury suffered by PW-8.",,,,

40. Ms. Parmar further submits that the prosecutrix gave a different version of the incident when her statement was recorded before the court as,,,,
PW-1.Â She stated that her mouth was closed by the accused with his hand when he took her forcibly into his room.Â He removed his hand after,,,,
entering the room.Â She voluntarily stated that the accused slapped her and closed her mouth with a cloth which is worn on head.Â He tied her,,,,
hands at the back and also tied her legs.Â He used his 3-4 gamchas for this.Â The prosecutrix stated that she opened the door after releasing herself,,,,
and opening her hands using the teeth while the accused hid himself behind the chowki.Â,,,,

41. Ms. Parmar submits that the version given by the prosecutrix with regard to gamchas being used to tie her up was introduced for the first time by,,,,
the prosecutrix when her statement was recorded before the court.Â No such statement was made by the prosecutrix either under Section 164 Cr,,,,
PC, or by the complainant while recording the rukka Ex. PW-8/A.Â No gamcha was found by PW-11/I.O. as narrated by her in her cross",,,,
examination recorded on 02.09.2016. Â,,,,

42. Ms. Parmar submits that the recovery of the undergarment of the prosecutrix is doubtful.Â Ms. Parmar further submits that when the statement,,,,
of the prosecutrix was recorded before the court on 21.01.2016, she stated that her mother had thrown awayÂ the frock and ghagri that she was",,,,,
wearing at the time of the incident, as all the buttons of the same were broken and the clothes were torn.Â However, the I.O. stated that the clothes",,,,,
worn by the prosecutrix at the time of the offence were taken by the complainant and handed over to the doctor. She improved her statement by,,,,
stating that only the underwear of the prosecutrix was handed over by the complainant to the doctor.Â No blood stain was found on the underwear of,,,,
the prosecutrix when it was handed over to the doctor.Â She submits that had penetrative sexual assault been perpetrated on the prosecutrix, there",,,,,
would have been blood stains on the underwear of the prosecutrix, which was not the case.Â Â",,,,,

43. At one place, the prosecutrix described her dress as frock as ghagri, while at a later stage (when her cross examination was conducted on",,,,,
19.02.2016), she stated that the frock and ghagri which she had described in her previous deposition, were her school uniform.Â The shirt was of sky",,,,,
blue colour and ghagri (skirt) was of blue colour.Â Thus, there were variations and contradictions in the statements of the prosecutrix, on material",,,,,
aspects.,,,,,

44. Ms. Parmar submits that since there are two reports prepared by the FSL one which points to his innocence, and the other to his guilt, the one in",,,,,
his favour ought to be relied upon, as the accused is entitled to the benefit of the doubt.Â Â Â Â Â Â",,,,,

45. Ms. Parmar points out that the prosecutrix in her statement recorded before the court had stated that her mother tutored her to depose the facts as,,,,
she was not remembering the same completely.Â She stated â??My mother told me to depose the facts as I was not remembering the same,,,,,
completely.Â Thus, the prosecutrix PW-1 was a tutored witness who did not depose the facts on her own recollection.Â She cannot be relied upon",,,,,
as she is not credible.Â Â",,,,,

46. Ms. Parmar has further argued that a presumption under Sections 29 and 30 of POCSO Act cannot be raised against the respondent/ accused,",,,,
because the prosecution is bound to establish its own case first, before the onus

is shifted upon the accused. In this regard, she places reliance on",,,,

Sahid Hossain Biswas v. State of West Bengal, (2017) 3 CALLT 243 (HC), wherein it was held that "It is, therefore, an essential prerequisite",,,,

that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption (u/s 29, 30) is",,,,

triggered in to shift the onus on the accused to prove the contrary".,,,,

Discussion,,,,,

47. On the aspect of age of the prosecutrix, the prosecution has proved the discharge summary of Safdarjung Hospital Ex PW 3/B, which shows the",,,,

date of birth (D.O.B.) of the prosecutrix as 20.02.2005 at 10:15am. The prosecution examined Mrs. Neelam Sharma- PW3, who deposed that she had",,,,

examined the original birth certificate of the prosecutrix issued by Safdarjung Hospital at the time of giving her admission in school. She has further",,,,

affirmed the D.O.B of the prosecutrix as 20.02.2005 as per the school records. She produced the school admission record Ex PW 3/A, which show",,,,

her date of birth to be 20.02.2005. Moreover, the accused has not disputed the age of the prosecutrix. Thus, the date of birth of the prosecutrix has",,,,

been established by the prosecution to be 20.02.2005 conclusively.Â Thus, she was 8 years and 8 months old on the date of the incident.Â",,,,

48. We now proceed to deal with the submission of Ms. Parmar with regard to the contradictions and variations in the statements made by the",,,,

prosecutrix and by her mother PW-8 from time to time.Â",,,,

49. The case was registered vide FIR No.369/2013 (Ex. PW-5/A) on the complaint (Ex. PW-8/A) made by PW-8 mother of the prosecutrix at the",,,,

police station.Â Â",,,,

50. Her initial statement Ex. PW-8/A Â the rukka, inter alia, states that on the date of the incident i.e. 15.10.2013, when she did not find the",,,,

prosecutrix in her room on her return at around 3:00 p.m., she started searching for her in the rooms nearby.Â She saw the room on the left side",,,,

wherein the accused resides, was closed.Â She got suspicious and she pushed the door, which opened.Â She saw that the accused had laid the",,,,

prosecutrix on the floor and he had removed her lower clothes.Â He had also lowered his own pant and he was lying on top of the prosecutrix.Â He",,,,

had placed his hand on the mouth of the prosecutrix.Â She pushed the accused and removed him from over the prosecutrix.Â The accused pulled up",,,,

his pant and pushed PW-8 and ran away.Â She stated that the prosecutrix informed her (PW-8) that Khursheed uncle had brought her to his room on,,,,

the pretext of giving her toffee and he had removed her pant and underwear and then laid her on the floor.Â Khursheed then opened his pant and,,,,

lowered the same and then he laid over the prosecutrix.Â Thereafter, the accused had inserted his penis into the vagina of the prosecutrix, and he",,,,

â??urinatedâ? which caused severe pain to her.Â When she tried to shout, the accused shut her mouth with his hand to prevent her from doing so.Â",,,,

51. The prosecutrix was examined at AIIMS vide MLC Ex. PW-4/A.Â She was accompanied by her mother PW-8.Â The history given to the,,,,

doctor was of sexual assault at 3:00 p.m. in the same afternoon by a neighbour in the house.Â The internal examination of the prosecutrix was,,,,

conducted after the consent of the prosecutrix and her mother were taken.Â The hymen was not found intact.Â Bruises were found on her,,,,

thighs.Â Specimens were collected from the vaginal secretion.Â The undergarment of the prosecutrix was collected and vaginal smear made.Â The,,,,

statement of the prosecutrix was thereafter got recorded under Section 164 Cr PC on 17.10.2013 vide Ex. PW1/A.Â The learned Magistrate put,,,,

some initial questions to the prosecutrix.Â She was asked whether she understood the importance of telling the truth in the proceedings before the,,,,

court.Â She responded by saying: â??Haan, jhoot bolte hai tho kaua kaatha hai, isliye sach boloâ?.Â She was then asked â??Are you making the",,,,

statement under any force, coercion or any undue influence.â?Â To this, she responded in the negative.Â The prosecutrix did not understand the",,,,

meaning of oath and, therefore, her statement was recorded without oath. In her said statement, she, inter alia, stated that she was sleeping with her",,,,

younger brother on the day of the incident.Â The uncle in the neighbourhood lured her to his room by promising a toffee.Â She stated that she did,,,,

not go.Â He then took her by force into his room.Â He removed her underwear.Â He also removed his clothes and did â??gandi bateinâ?.Â She,,,,

was asked as to what was the â??gandi baatâ??.Â The prosecutrix responded that he was inserting his penis inside her.Â The Magistrate noted her,,,,

conduct that while saying so, she put her hand between her legs.Â She stated that when she asked him to the effect",,,,

â??Uncle, what are you doing?â?, he shut her mouth and she could not even breathe.Â She stated that from the penis of the accused paani/ fluid",,,,

came out â??lachak-lachak on her shirt and her legs.Â The accused told her that he loves children.Â When she started to run, he caught hold of her",,,,,

and tore her clothes.Â Then her mother came and she saw that her underwear was taken out.Â,,,,

Thereafter, â??uncle ran away from the roomâ??"",,,,,

52. The statement of the prosecutrix was recorded before the court, firstly, on 02.04.2014.Â Her statement recorded on the said date read as follows:"",,,,,

â??I alongwith my younger brother were sleeping in our room. My parents had gone to their respective workplaces and my other siblings were also,,,,

outside.Â The accused came to my place and he asked me to accompany him on the pretext that he would give me a toffee.Â I refused the,,,,

same.Â Thereafter, the accused brought me forcefully to his room.Â The accused removed my kachchi (undergarment) and also removed his pant",,,,,

and thereafter, the accused forcefully inserted his penis into my vagina ?apne shushu karne wali chiz mere shushu karne wale me daal diya.Â When",,,,,

I objected to and cried in pain, the accused put his hand on my mouth.Â I was saying that ?mujhe chor do but the accused did not let me go.Â I",,,,,

started weeping.Â In the process of scuffling, my frock was torn and I had also sustained injuries.Â Thereafter, my mother came there and she",,,,,

rescued me.Â I alongwith my mother reached to the police station.Â The police took me to the hospital where my medical examination was done.Â,,,,

While the accused was doing the wrongful act with me, some water like liquid substances had fallen upon my clothes.Â One Aunty had brought me",,,,,

to the court and I had narrated the incident in the court also.Â,,,,

At this stage, the screen is removed and the accused Khurseed is shown to the witness whom the witness correctly identifies as the same person who",,,,,

committed the aforesaid act with her.,,,,,

Further examination is deferred for want of case propertyâ??"",,,,,

53. A perusal of this statement would show that in all material respects the same is exactly same as the one she had made before the learned,,,,

Magistrate under Section 164 Cr PC vide Ex. PW-1/A.Â The only three things which she added in her statement recorded on 02.04.2014 before the,,,,

court were that she told the accused â??muje chod doâ?, but the accused did not let her go; that she started weeping, and, that she also sustained",,,,,

injury.Â These three additions, by no stretch of reason, can be described as

improvements, which shake her credibility and render her statement" ,,, ,,,

doubtful.Â These are mere elaborations which she narrated before the court and were omitted in her narration before the Magistrate while recording ,,, ,,,

the statement under Section 164 Cr PC.Â The first two additions do not impinge one way or another, on the culpability of the accused.Â The third" ,,, ,,,

was, even otherwise, corroborated by the MLC of the prosecutrix Ex.PW4/A. The examination of the prosecutrix PW-1 was deferred on 02.04.2014" ,,, ,,,

for want of case property.Â It was thereafter continued on 21.01.2016 i.e. nearly one year and nine months later.Â On the said date, i.e. 21.01.2016, " ,,, ,,,

the prosecutrix identified her underwear/ panty as Ex. P-1.Â She also identified her signatures on Ex. PW-1/A, her statement recorded under Section" ,,, ,,,

164 Cr PC.Â She stated that her mother had thrown her frock and ghagri, which she was wearing at the time of the incident in the garbage as all the" ,,, ,,,

buttons were broken and the clothes were torned.Â She did not state that her underwear was also thrown away.Â ,,, ,,,

54. The prosecutrix was partially cross-examined on 21.01.2016 and further cross examined on 19.02.2016.Â On 19.02.2016, she, inter alia, stated" ,,, ,,,

that the accused had closed her mouth forcibly while taking her into his room.Â He removed his hand after entering the room and he slapped her and ,,, ,,,

closed her mouth with the cloth which is worn on the head.Â He tied her hands at the back and also tied her legs, for which he used 3-4 gamchas.Â" ,,, ,,,

She stated that the house of the accused was not checked by the police.Â She denied that no gamcha was used, or that she was deposing falsely at" ,,, ,,,

the instance of her mother.Â She stated that her mother came after one hour from the time when ,,, ,,,

â??uncle took herâ?.Â She stated that there was a window in the house of the accused and there was a glass pane in the same.Â She denied the ,,, ,,,

suggestion that when her mother came, the door of â??Khursheed uncleâ??s house was openâ?.Â She volunteered that when her mother pushed the" ,,, ,,,

window, she received injuries also.Â She volunteered that a small piece of the window was broken, and that her mother did not show the broken" ,,, ,,,

window to the police.Â The mother also did not show the injury to the doctor as she had put medicine herself.Â She stated that she opened the door ,,, ,,,

after releasing herself and after opening her hands using her teeth.Â She stated that the â??Uncle hid himself behind the chowki. She initially stated ,,, ,,,

that her mother called police on number 100, but again stated that the mother did not call police as she was not having mobile phone, "we went to",

the police station. She stated that when her mother arrived, she was in school uniform. She denied that the incident did not happen, or that she",

was deposing on her being tutored by her parents. She stated that her mother told her to depose the facts as she was not remembering the same,

completely. She denied the suggestion that false allegations have been made against the accused in order to take money from him as her parents,

were in need of money to purchase a plot in Delhi. During her re-examination, she clarified that the frock and ghagri which she had mentioned in",

the previous deposition were her school uniform. The shirt was of sky blue colour and ghagri (skirt) was of blue colour. ,

55. We may make some general observations about the statements of the prosecutrix recorded on different occasions. Firstly, PW-1, throughout",

describes the accused as "uncle". This itself is reflective of her innocence, and lends credibility to her statements. If she had been tutored,"

she would most likely, not be tutored to call the accused- who is her alleged exploitor,"

"uncle". Secondly, in her earliest statement i.e. the one recorded under Section 164 Cr.P.C. Ex.PW1/A, in response to the question "Do you",

understand the importance of telling the truth in the proceedings before the court? She very innocently states "Haan, jhoot bolte hai tho kaua",

kaatha hai, isliye sach bolo". This statement is also reflective of the innocence, spontaneity and truthfulness of the prosecutrix. A tutored",

witness would lack such spontaneity, and would answer such questions very formally, as tutored. Thirdly, she graphically describes the process of",

ejaculation of the semen by the accused by stating "nunu me se lachak lachak nikla, meri shirt par, tang par gira diya tha". A child under 9",

years would not know, and would not describe this phenomenon. She even asked the accused "uncle what are you doing?", since she did not",

understand the said act of the accused. It would be completely outrageous to imagine that the parents of a girl child only 8 years and 8 months old,

would tutor her about sexual intercourse in such graphic detail.,

56. In respect of the statement of the prosecutrix recorded before the court, we may, firstly, observe that her examination in chief was consistent with",

her version stated before the Magistrate under Section 164 Cr PC.Â Her cross examination took place, as noticed herein above, nearly two years",,,,

after her examination in chief, and nearly 26-27 months after the date of the incident.Â As noticed herein above, the prosecutrix was only 8 years and",,,,

8 months of age at the time of the incident.Â Thus, some amount of fading of her memory was only to be expected.Â In fact, in her cross",,,,

examination, she herself stated that her mother had reminded her of the incident, since she could not completely remember the same.Â However, she",,,,

was categorical in her denial that she had made false allegations against the accused in order to take money from him.Â,,,,

57. The initial statement of the mother found in the rukka Ex. PW-8/A- that she pushed the door of the accused and it opened, cannot be said to be",,,,

contradictory with the statement of the prosecutrix recorded under Section 164 Cr PC, or with her statement recorded before the court.Â The",,,,

statement of PW-1 before the Magistrate Ex. PW-1/A is a summary statement.Â Her statement recorded before the court is a more elaborate",,,,

one.Â In the said statement, she elaborates that the mother first pushed the window in the room of the accused and, in that process, the window was",,,,

slightly broken and she even hurt her finger.Â Mere absence of this part of the statement either in the rukka, or in the earlier statement of PW-1",,,,

recorded under Section 164 Cr PC, does not render her statement unbelievable.Â The same is only an elaboration of the facts as they transpired and",,,,

nothing turns - one way or another, on the said facts.Â The prosecutrix and her mother were dealing with a very grave and serious situation, and the",,,,

fact that the window pane had slightly broken, or that the mother had got slightly injured on the finger was the least of their concerns.Â Similarly",,,,

whether, or not, any gamchas were used by the accused to tie the prosecutrix is neither here nor there, for the reason that it does not impinge on the",,,,

nature and gravity of the offence.Â It is nobody's case that if the prosecutrix was not tied, the penetrative sexual assault would not be culpable.",,,,

58. Even if one were to assume that, that part of the statement of the prosecutrix was imaginary or an exaggeration, the same does not appear to be",,,,

deliberately designed to implicate the accused, as it does not impinge on the charge against the accused. The prosecutrix was consistent with regard to",,,,

the incident which happened.Â Pertinently, both in her statement recorded under

Section 164 Cr PC Ex. PW-1/A and before the court, she narrated",,,,,

in her own innocent words that the accused ejaculated on her clothes and her legs.Â What emerges from the statements of PW-1, both recorded",,,,,

under Section 164 Cr PC, as well as before the court is that the prosecutrix was a completely innocent child.Â",,,,,

59. The cross examination of the prosecutrix conducted on behalf of the accused, firstly, focused on the aspect that the prosecutrix was staying in a",,,,,

populated accommodation which had a large number of rooms adjacent to each other and even her aunt (mausi) resided in the neighbourhood and that,,,,

she attended to the children in the absence of the mother PW-8.Â We are, however, not impressed with this line of argument of the accused for the",,,,,

reason that the time of occurrence was at 3:00 p.m. in the afternoon, when there may not have been much activity around the room of the prosecutrix,",,,,

or the accused.Â Â The prosecutrix stated that she was sleeping with her brother in her room and it could well be that the other residents were also,,,,

either resting or busy in their own chores in their rooms.Â It was not suggested to the prosecutrix during her cross examination that she was with her,,,,

aunt (mausi) on the particular day, and at the particular time.",,,,

60. PW-8 the mother of the prosecutrix deposed that on the date of the incident, the prosecutrix had come back from school.Â Thereafter, she came",,,,,

from her work place and did not find the prosecutrix.Â She asked her sons, who informed her that the prosecutrix had left the house after leaving her",,,,,

school bag.Â That was when she started searching for the prosecutrix, and she found that on the door of the accused, no lock was put as it usually",,,,,

was during the day.Â She got suspicious and pushed the door.Â However, it was locked from inside.Â She pushed the window of the room and due",,,,,

to force the window opened and she noticed the accused lying on top of her daughter.Â After seeing PW-8, the accused opened the door of the room",,,,,

and ran away from the spot. That is when the prosecutrix, while weeping, narrated the incident to her.Â PW-8 was cross examined at length.Â",,,,,

However, she stood her ground.Â In fact, it came out in her cross examination that after her children including the prosecutrix, returned from school",,,,,

at 1:00 p.m., she would drop them for tuition at 3:00 p.m. and they would come back at 5-5:30 p.m.Â This statement of PW-8 explains as to why",,,,,

PW-8 returned to her around 3:00 p.m. and looked for the prosecutrix.Â Â Â Â Â Â

Â Â,,,,

61. PW-8 in her testimony stated that when she tried to open the door of the accused, the same was locked.Â However, the accused opened the" ,,,,

same after seeing her and ran away from the spot.Â In our view, this statement is not inconsistent with the statement of the prosecutrix who was" ,,,,

only 8 years and 8 months old.Â The crux of the statements made by the prosecutrix and her mother is the same, namely, that the accused took the" ,,,,

prosecutrix to his room on the pretext of giving her a toffee; he removed her lower clothes; he lowered his own pant; he lay on her and inserted his" ,,,,

penis into her vagina;Â he shut the mouth of the prosecutrix with his hand to prevent her from shouting or crying for help; PW-8 arrived at 3:00 p.m.," ,,,,

and started looking for the prosecutrix; she got suspicious about the accused and she tried to open his door, but it did not open; she pushed the window" ,,,,

and saw the accused and the prosecutrix, whereafter the door was opened and the accused ran away.Â It is not material as to who opened the door" ,,,,

whether it was already open, or it was opened by the accused, or it was opened by the prosecutrix.Â This is for the reason that there is no denying" ,,,,

that the incident took place, as is evident from the testimonies of PW-1, PW-8 and the MLC of the prosecutrix PW4/A.Â" ,,,,

62. We do not find any merit in the submission of Ms. Parmar premised on the contradiction in the statements of PW-1 and PW-8 on the one hand," ,,,,

that the frock and ghagri were thrown away as they were torn, and the statement of the I.O. PW11 on the other hand, that the frock and ghagri were" ,,,,

handed over to the doctor at the time of conduct of the MLC.Â Pertinently, the MLC shows that the doctor was handed over only the underwear of" ,,,,

the prosecutrix.Â The same does not record that her frock and ghagri were handed over.Â Neither PW-1, nor PW-8 claimed that the frock or" ,,,,

ghagri were handed over to the police or to the doctor.Â Moreover, the prosecutrix had clarified in her cross examination conducted on 19.02.2016," ,,,,

that when she used the word frock and ghagri, she meant her school uniform consisting of her shirt of sky blue colour, and ghagri (skirt) of blue" ,,,,

colour.Â Pertinently, the I.O. PW-11/ SI Krishna, inter alia, deposed that the prosecutrix was sent for her medical examination along with lady" ,,,,

constable Sunita (PW-10).Â After the medical examination of the prosecutrix, lady constable Sunita handed over to her the exhibits of the prosecutrix" ,,,,

in a sealed condition vide Ex. PW-10/A. Ex. PW10/A, the seizure memo is in respect of only the underwear of the prosecutrix, apart from the",,,, vaginal swab and the sample seal. It does not talk about the other clothes of the prosecutrix. PW-10 has corroborated the statement of PW-11 on,,, the aforesaid aspect. Pertinently, PW-11 never claimed that the complainant PW-8 handed over all the clothes worn by the prosecutrix at the time",,,, of the offence. She stated that she did not remember how many clothes were handed over to the doctor by the complainant and stated that only the,,, underwear of the prosecutrix was handed over by the complainant to the doctor. This statement is consistent with the recording made on the MLC,,, and Ex. PW-10/A. Thus, the submissions of Ms. Parmar aimed at creating a doubt about the recovery of the undergarment of the prosecutrix, and",,,, about the other clothes of the prosecutrix not being seized or exhibited, have no merit. " ,,,,

63. In her cross examination, PW-11 stated that on the fateful day, the prosecutrix had not gone to her school. This statement of PW-11 is neither",,,, here nor there, since she was not an eye witness and was not personally aware of the said aspect. PW-8 clearly deposed that the prosecutrix had",,,, gone to the school on the said date and her time of return was 1:00 p.m. The prosecutrix also stated so in her statement. This also explains the,,, reason why she was wearing her school uniform when she was taken away by the accused. Thus, there is no inconsistency in the case of the",,,, prosecution on this account. " ,,,,

64. So far as the submission of Ms. Parmar that the accused was arrested from his room, and he did not flee is concerned, we do not find any merit in",,,, this submission. The accused was found to be in an inebriated condition upon his medical examination. That could explain his conduct in not,,, fleeing from his room. Moreover, there is no definite reaction that all human beings would have to a given situation. Thus, the fact that the",,,, accused did not flee from his room and was arrested from his room does not absolve him of the crime.,,,,

65. We are appalled at the manner in which the Trial Court has proceeded to appreciate the evidence in the present case. The learned ASJ has,,, ignored the fact that the hymen of the prosecutrix was not intact. He completely overlooked the fact that she had fresh bruises mark on her,,,

thigh.Â These injuries clearly corroborate the otherwise natural and credible statement of the prosecutrix.Â Â,,,,

66. The medico- legal literature supports the case of the prosecution that the bruises suffered by the prosecutrix on her thighs were as a result of,,,,

sexual assault upon her by the accused.Â Parikh?s Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology 6th Edition Page 5.38,",,,,

authored by Dr. C.K. Parekh states:,,,,

â??in young children as the vagina is very small and hymen deeply situated, the adult penis cannot penetrate it.Â In rare cases of great violence, the",,,,

organ may be forcibly introduced, causing rupture of the vaginal vault and associated visceral injuries.Â Usually, violence is not used and the penis",,,,

placed either within the vulva or between the thighs.Â And as such, only redness and tenderness of the vulva may be caused.Â 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",,,,

resistanceâ??. (emphasis supplied),,,,,

67. To claim that the complainant PW-8 would falsely implicate the accused to extract money from him by making such a serious allegations against,,,,

him Â which also involve her own 8 year old daughter is outrageous.Â This bald submission which is not probablised, much less established with",,,,

cogent evidence, has repeatedly been rejected by Courts.Â In this regard, reference may be drawn to the decisions in Hari Om v. State (NCT), 2010",,,,

Cri LJ 1281 and Brijlal v. State (NCT), 2017 (1) JCC 583.Â We may usefully quote the observations made by the court in the said decisions.Â In",,,,

Harim Om (supra), it was held:",,,,

â??18. The prosecutrix being a young girl aged at about 8-9 years at the time of this incident, it is not likely that her parents would have implicated the",,,,

appellant in a false case of rape of their daughter, conscious as they would be that reporting of such a matter to the police, particularly when the",,,,

parents of the prosecutrix as well as the appellant were living in the jhuggies situated in the same locality, was bound to expose their daughter to",,,,

scrutiny and questions not only by the police and courts but also by their neighbours and relatives. They could not have been ignorant of the fact that,,,,

they may even have difficulty in finding a suitable match for their daughter once it is known that she had been subjected to rape in her childhood.,,,,,

Therefore, if they, despite realizing these consequences do report the matter to the police, it would be only if what they were reporting was absolutely",,,, true and correct. In fact, some of the parents even refrain from reporting such incident lest their child not face embarrassment on account of the",,,, incident becoming public and her marriage being jeopardised on account of the prospective in-laws becoming aware of the incident, at the time of her",,,, marriage. The parents of the prosecutrix knew that if they report the matter to the police, they will have to take their child first to the police station",,,, then to the hospital and, thereafter, in the court and the child will be made to repeat the horrible incident at every place, at the cost of considerable",,,, discomfort and embarrassment to her. Therefore, unless an incident of this nature has actually happened with their child, they would not take such a",,,, step.â??",,,,

68. In Brij Lal (supra), it was held:",,,,

â??6.Â On perusal of various statements made by the child witness at different stages of the investigation/trial, it reveals that her version is",,,, consistent throughout. In all her statements, she has implicated the accused with certainty and has attributed specific role to him. No ulterior motive",,,, was assigned to the child witness to level serious allegations of sexual assault. In the absence of any prior animosity or enmity, the child victim is not",,,, expected to level all such allegations suddenly against an individual aged around 47 years residing in her neighbourhood since long. Unless such an",,,, incident really happens, the victim or her parents would be highly reluctant to rope in an innocent person for the ghastly crime to put the honour of their",,,, child at stake. There are no cogent reasons to disbelieve the statement of the child witness. It is true that the Court must be extremely cautious and",,,, careful in placing reliance on the testimony of a child witness as there are chances of coaching or tutoring. A child witness is prone to tutoring and",,,, hence the court should look for corroboration. In the instant case, nothing has emerged to infer if 'X' was a tutored witness.â??",,,,

69. Pertinently, apart from vaguely claiming that the complainant falsely implicated him to extract money, the accused has not even claimed that a",,,, specific demand was ever made by the complainant or her husband for money, which he declined, and whereafter he was falsely implicated.Â The",,,, accused has not chosen to lead any evidence to probablise the said defence.Â",,,,

70. We also find merit in the submission of Mr. Mahajan that the Trial Court failed to raise the statutory presumption under Section 29 and 30 of,,,,,

POCSO Act, which the Trial Court was bound to raise in view of the mandatory nature of the language used in the said provisions.Â The offence",,,,,

with which the accused is charged falls under Section 6 of POCSO Act which prescribes the punishment for aggravated penetrative sexual assault.Â,,,,,

Aggravated Penetrative Sexual Assault is defined in section 5 of POCSO Act. A person is said to have committed aggravated penetrative sexual,,,,,

assault, inter alia, when the assault is committed on a child below 12 years of age Â which the prosecutrix was at the relevant time.Â Penetrative",,,,,

Sexual Assault is defined in section 3 to mean, inter alia, where the accused penetrates his penis, to any extent, into the vagina, mouth, urethra or anus",,,,,

of a child or makes the child to do so with him or any other person.Â The accused was charged of having committed penetrative sexual assault on,,,,,

the prosecutrix, by inserting his penis into her vagina.",,,,,

71. We do not agree with the submission of Ms. Parmar that in the facts of the present case, the presumption under Section 29 and 30 of the POCSO",,,,,

Act could not be raised.Â This is for the reason that there were definite and clear statements made by the prosecutrix before the Magistrate (under,,,,,

Section 164 Cr PC) and before the Court, and PW-8 the mother also made definite and clear statements against the accused of his having committed",,,,,

aggravated penetrative sexual assault on the prosecutrix, and of her witnessing the same.Â Moreover, there was medical evidence to corroborate",,,,,

their said statements, which showed that the hymen of the prosecutrix was not intact, and the prosecutrix had bruises mark on her thighs.Â The said",,,,,

evidence was sufficient to raise the statutory and mandatory presumption against the accused and, thus, it was for the accused to establish his",,,,,

innocence in the face of such incriminating evidence.Â,,,,,

72. The impugned judgment shows that the approach of the Trial Court borders on perversity.Â The learned ASJ doubted the statement of the,,,,,

prosecutrix, since she did not state before the police that her clothes were torn by the accused.Â We fail to understand as to how the said omission",,,,,

on the part of the prosecutrix renders her statement doubtful.Â As noticed above, the prosecutrix narrated the entire incident, in her own innocence",,,,,

Â to the point of even describing the ejaculation of the semen by the accused on

her clothes and legs.Â The learned ASJ, in one stroke, observes that",,,, there are variations, improvements, contradictions and inconsistencies, which go to the root of the matter, rendering the prosecutrix",,,, unworthy and unreliable because she admitted that she has stated that the facts as told by her mother.Â Unfortunately, there is absolutely no",,,, application of mind by the learned ASJ to the so called variations, improvements, contradictions and inconsistencies. Apart from making a bald",,,, observation that they go to the root of the matter, it is not explained as to how the said finding has been returned.Â We have already noticed herein",,,, above that none of the so-called variations, improvements, contradictions and inconsistencies go to the root of the matter.Â They are natural",,,, particularly when one considers the small age of the prosecutrix at which the said incident took place, and the time lag between her initial statement",,,, and her cross examination.Â The fact that she was reminded of the incident by the mother does not lead to the inference that she was tutored by the",,,, mother.Â It only shows that her fading memory was refreshed by the mother, and when she made her statement before the court, she remembered",,,, the incident in substantial detail.Â Â",,,,

73. It is truly shocking and absurd for the Trial Court to observe that though the hymen of the minor child was found to be torn, but it was not stated",,,, whether it was old torn or fresh torn.Â Â The Trial Court was completely blind to the fact that the victim was a child of barely 8 years and 8",,,, months, and for the hymen of such a small child to be torn, itself was abnormal.Â In fact, medical literature shows that even in cases of penetrative",,,, sexual assault of minor children, often the hymen does not rupture.Â In this regard, we may quote an extract from A Textbook of Medical",,,, Jurisprudence and Toxicology, 24th edition page 668 authored by Jaising P Modi:",,,, in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia.Â If",,,, considerable violence is used, there is often laceration of the fourchette and the perineum".",,,, 74. The Trial Court proceeds on the basis that the prosecution had not produced witness to establish that the clothes of the prosecutrix and her vaginal",,,, smear were having semen marks pertaining to the accused.Â Pertinently, he does

not observe that no semen marks were found on the underwear of" ,,,,
the prosecutrix Â being mindful of the fact that the unexhibited FSL report on
record (now exhibited as CW-1/A), did mention the presence of semen" ,,,,
on the underwear.Â Â ,,,,

75. The learned ASJ has observed that it is settled principle of law that the child
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.Â We have ,,,,

found that the same Id. ASJ has, in several decisions, parroted these principles,
and beyond stating the principle, he does not undertake the exercise of" ,,,,

careful evaluation of the evidence of the child witness with greater
circumspection, to find out whether as a matter of fact, the child witness
appears" ,,,,

to be tutored, or not. Same is the position in the present case.Â While dealing
with another decision of the same Id. ASJ, we had occasion to consider" ,,,,

several aspects in relation to the statement of the child witness in State Of Nct
Of Delhi v. Dharmender, CRL.A. 1184/2017, decided on 23.03.2018" ,,,,

arising from a decision rendered by the same ASJ. ,,,,

76. In Dharmender (supra), we took note of several decisions of the Supreme
Court.Â In Rameshwar v. State of Rajasthan, 1952 (3) SCR 377, 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.Â A woman, who has been raped, is not an accomplice. She is a
victim of an outrage.Â The rule of corroboration of the statement of" ,,,,

the prosecutrix is not a mandatory rule, but a rule of prudence and caution,
which could be dispensed with in the facts and circumstances of the given" ,,,,

case.Â 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.Â He may dispense with the need for corroboration if he
thinks that it is safe to do so.Â The tender years, coupled with other" ,,,,

circumstances appearing in the case, for example, his/ her demeanour, and
unlikelihood of tutoring and so forth may render corroboration unnecessary," ,,,,

but that is a question of fact in every case.Â On the nature and extent of
corroboration that the court may look for, the Supreme Court observed that" ,,,,

all that is required is that there must be some additional evidence rendering it

probable that the story of the complainant is true, and that it is reasonably" ,,,,
safe to act upon it.Â All that is necessary is that there should be independent
evidence which would make it reasonably safe to believe the witness? ,,,,
story, that the accused was the one who committed the offence.Â The
corroborative evidence could be circumstantial in nature, and it is not" ,,,,
necessary that it has to be direct evidence.Â The Supreme Court observed, 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"". ,,,,

77. The Supreme Court also considered whether previous statement made, inter
alia, by the complainant/ prosecutrix/ victim could be accepted as" ,,,,
corroborative.Â The Supreme Court referred to illustration (j) to Section 8 and
Section 157 of the Evidence Act, and concluded that where the" ,,,,
conditions prescribed in the said section are fulfilled, the earlier statement of the
prosecutrix/ victim would be legally admissible as corroboration.Â ,,,,
The Supreme Court also considered the question whether the mother of the
victim/ prosecutrix can be regarded as an â??independent witnessâ?, and" ,,,,
held that there is no legal bar to exclude the mother of the prosecutrix/ victim
from being considered as an independent witness, merely on account of" ,,,,
their relationship.Â ,,,,

It observed; ,,,,

â??â?| â?| 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 anyoneâ? . ,,,,

78. We also noticed the judgment of the Supreme Court in Prakash & Anr. ,,,,
v. State of Madhya Pradesh, (1992) 4 SCC 225.Â The Supreme Court held that
merely because the witness was a boy of 14 years, it will not be" ,,,,
proper to assume that he is likely to be tutored.Â At the same time, the Court
has to be satisfied that there is likelihood of the child witness being" ,,,,
tutored. ,,,,

79. In Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64, the
Supreme Court held that there was no reason for false implication by" ,,,,
the child witness. The Supreme Court accepted the evidence of the child witness
as credible and truthful.Â Â ,,,,

80. We also took note of the decision of the Supreme Court in *State of Madhya Pradesh v. Ramesh & Anr.*, 2011 (3) Scale 619. In this decision the earlier judgment of the Supreme Court in *Mangoo & Anr. v. State of Madhya Pradesh*, AIR 1995 SC 959 was referred to wherein it was observed; "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." (emphasis supplied)

81. In *State of Madhya Pradesh (supra)*, reference was also made to *Panchhi & Ors. v. State of U.P.*, AIR 1998 SC 2726, wherein the Supreme

Court held 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. (emphasis

supplied)

82. Similarly, in *State of U.P. v. Krishna Master & Ors.*, AIR 2010 SC 3071, the Supreme Court held;

"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.â?? (emphasis supplied)Â,,,,,

83. In the same decision, the Supreme Court further held:",,,,,

?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)Â,,,,,

84. The aforesaid settled legal principles have not been adhered to by the Id. ASJ and he has only rendered lip service to these principles without,,,,,

actually appreciating the evidence in the light of these principles.Â We may observe that there is hardly any discussion and appreciation of evidence,,,,,

in the impugned judgment, the relevant part whereof runs into just about 2 Â½ pages.",,,,,

85. Thus, in our considered view, in the face of the evidence led by the prosecution, the charge against the accused was established beyond all",,,,,

reasonable doubt.Â The impugned judgment proceeds on palpably wrong conclusions on facts; it is based on erroneous view of the law- as the,,,,,

presumptions under Sections 29 and 30 POCSO Act were notÂ raised against the accused; the impugned judgment- if not set aside would lead to,,,,,

grave miscarriage of justice to the victim; the approach of the Id. ASJ in dealing with the evidence is patently illegal, and; the Trial Court has ignored",,,,,

the medical evidence Ex.PW-4/A and misread and misappreciated the evidence led by the prosecution.,

86. We may now proceed to consider the effect of the two FSL reports being led in evidence.Â Ms. L. Babito Devi, CW-1 has proved the FSL",

report dated 15.05.2014 bearing report No. FSL 2013/DNA-8323- DNA No. 1411/13 prepared by her, as Ex. CW-1/A.Â She has also exhibited the",

allele data Ex. CW-1/B on the basis of which Ex. CW-1/A has been prepared.Â The work sheets in respect of the test conducted by her, comprising",

of eight sheets is exhibited as Ex. CW-1/D. On the basis of which Ex. CW-1/A was prepared. During her cross examination on behalf of the accused, she stated that first semen or the blood test is conducted. If semen or blood is found, then the DNA testing is done. The determination of the semen is conducted by a test which is called Acid Phosphatase Test. If semen is detected, slide is prepared to confirm the presence of semen/ spermatozoa. She states that after confirmation of the semen, the DNA is isolated to extract the same for testing and to separate male and female DNA. She states that she used the mini filer test in the present case. During her cross examination by the Court, she stated that semen was found in the sample. She also states that she would have conducted Y filer test, but the same was not conducted since the profile did not match. CW-1 admitted that human semen was found on Ex. 2, which was the underwear of the victim. The same is also reflected in CW-1/A. Thus, the presence of semen on the underwear of the prosecutrix was clearly established even when Ex. CW-1/A was prepared.

87. From the evidence of CW-1, it emerges that the DNA drawn from the semen found on Ex. 2 the underwear of the prosecutrix, did not match with the DNA drawn from the blood sample of the accused. The conclusion drawn in Ex. CW-1/A read as follows:

DNA profile (STR) were performed on exhibits 2 (underwear of victim), 5 (Blood in gauze of accused) is sufficient to conclude that DNA profile generated from the source of exhibit 5 (Blood in gauze of accused) is not matching with DNA profile generated from the source of exhibit 2 (underwear of victim).

Note Remnants of the exhibits have been sealed with the seal of BD FSL DELHI.

88. Upon our passing the order dated 16.05.2018, the exercise of drawing a fresh blood sample from the accused was undertaken. We may observe that though the blood sample of the prosecutrix was taken, it was the blood sample of the accused alone which was used in the conduct of the fresh DNA test by the FSL.

89. In this respect, the prosecution has examined PW-12 SI Rajiv, who states in his examination in chief on affidavit that on 16.05.2018, pursuant to

the order passed on the same day by this Court in the present appeal, he accompanied the accused Khursheed from his house to AIIMS, New Delhi",,,,

for taking his blood sample.Â He states that in his presence Dr. Umesh Mandloi,",,,

JR, took the blood sample of the accused and sealed the same with the seal of AIIMS HOSP ND CMO and handed over the same to Const.",,,,

Amrinder No.3428/SE, PS Badarpur.Â Const. Amrinder handed over the blood sample and sample seal to him.Â He exhibited the seizure memo",,,,

prepared in this respect as Ex. PW-12/B Colly.Â He stated that he deposited the duly sealed blood sample and sample seal in malkhana on,,,,

17.05.2018 in intact condition and the relevant entry was made in the register No.19 in mud No.2795/2018.Â The relevant entry in the malkhana,,,,

register was exhibited by PW-14 as PW14/B.Â He also stated that the sample was not tampered with till it remained in his custody.,,,,

90. PW-12 SI Rajiv was cross examined, wherein he stated that he reached the house of the accused at around 9:00 p.m. on 16.05.2018.Â He",,,,

deposited the samples in the malkhana on the intervening night of 16/17.05.2018 at around 12:30 a.m.Â He denied the suggestion that he never visited,,,,

the house of the accused or accompanied him to AIIMS, New Delhi.Â He also denied the suggestion that no blood sample of the accused were",,,,

taken in his presence by Dr. Mandloi.Â He also denied the suggestion that no sample was deposited by him in the malkhana.Â He also denied the,,,,

suggestion that the sample was tampered with.Â Â Â,,,,

91. The prosecution has also examined Const. Amrinder as PW-16.Â He stated in his examination in chief on affidavit that pursuant to the order,,,,

dated 16.05.2018 passed by this court in this appeal, he accompanied the accused Khursheed with SI Rajiv from his house to AIIMS, New Delhi for",,,,

taking his blood sample.Â One sealed parcel/ exhibit along with one sample seal of AIIMS HOSP ND CMO was received by him from Dr. Umesh,,,,

Mandloi JR,,,,

AIIMS Hospital, who took the blood sample of the accused and the same wasÂ handed over by him to SI Rajiv, PS Badarpur, who prepared the",,,,

seizure memo and took the same in his possession.Â The seizure memo bears the signatures of both SI Rajiv and Const. Amrinder and the,,,,

statements of PW-12 and PW16 are corroborated thereby. PW-12/B also contains the MLC form of the accused Khursheed dated 16.05.2018,,,,

which shows that the time of examination was 16.05.2018 at 11:19 p.m. It also bears the endorsement of Dr. Mandloi that the patient's blood,,,,

sample has been taken. PW-16 stated that the sample was not tampered with till it remained in his custody. ,,,,

92. PW-16 Const. Amrinder corroborated the statement of PW-12. In his cross examination, he stated that he stated he reached the house of the" ,,,,

accused at around 9:30-10:00 p.m. on 16.05.2018. He denied the suggestion that he did not accompany the accused from his house to AIIMS, New" ,,,,

Delhi, or that no blood sample of the accused was taken. Pertinently, the accused admitted while recording his supplementary statement under" ,,,,

Section 313 Cr PC that he was taken to the hospital by PW-12 and PW-16 for taking his blood sample. Thus, the suggestion given on behalf of the" ,,,,

accused to the contrary are meaningless. ,,,,

93. The prosecution also produced PW-13 SI Ved Prakash, who took the prosecutrix with a lady constable to AIIMS for drawing the blood sample of" ,,,,

the prosecutrix. The prosecution also examined lady Const. Manorama, who accompanied PW-13 Ved Prakash as PW-15. She has corroborated" ,,,,

the statement made by PW-13 in all respects. ,,,,

94. The prosecution also examined PW-14 HC Mansukh, who was posted as Head Constable and working as MHCM (CP), PS Badarpur. He" ,,,,

stated that one seizure memo along with one sealed exhibit containing the blood sample of prosecutrix, sealed with the seal of AIIMS HOSP ND" ,,,,

CMO dated 16.05.2018, and one sample seal of AIIMS HOSP ND CMO was deposited by SI Ved Prakash and received vide entry No.2796 in" ,,,,

register No.19. He exhibited seizure memo Ex. PW-14/B Colly and copy of the relevant entry in the register No.19 as part of Ex. PW-14/B. He" ,,,,

stated that one seizure memo along with one sealed exhibit containing blood sample of accused Khursheed, sealed with seal of AIIMS HOSP ND" ,,,,

CMO dated 16.05.2018, and one sample seal of AIIMS HOSP ND CMO was deposited by SI Rajiv and received vide entry No.2795 in register" ,,,,

S. No.,LOCI,"Exhibit 2

(Underwear of the

prosecutrix) *,"Exhibit 4

(

Blood sample of

accused taken on

16.05.2018)", "Blood in gauze

of accused

(2013)**

1. ^,D8S1179,"14, 15","14, 15",^

2. ^,D21S11,"29, 32.2","29, 32.2","29, 29

3. ^,D7S820,"8, 9","8, 9","8, 10

4. ^,CSFIPO,"9, 11","9, 11","10, 14

5. ^,D3S1358,18,18,^

6. ^,TH01,"6, 9.3","6, 9.3",^

7. ^,"D13S317

^ ^ ^ ^ ^ ^ ^ ^,"8, 9","8, 9","10, 11

8. ^,D16S539,"12, 13","12, 13","10, 12

9. ^,D2S1338,23,23,"22, 22

10. ^,D19S433,"13, 14","13, 14",^

11.

^,"VWA,"14, 16","14, 16",^

12.

^,"TPOX,"10, 11","10, 11",^

13.

^,"D18S51,"11, 16","11, 16","10, 11

14.

^,"D5S818,13,13,^

15.

^,"FGA,"22, 23","22, 23","21, 21

16.

^,"AMELOGENIN,"X, Y","X, Y","X,Y

* the readings are identical in respect of the nine markers which are common to

the earlier

performed minifiler test (on the basis of which Ex.CW1/A was prepared) and the subsequently

performed identifier plus test (on the basis of which Ex.CW-2/A was prepared). These

nine markers (LOCI) are shown in bold.

** is in respect of report on the basis of which Ex. CW-1/A was prepared.

" , , , ,

113. The reports prepared by the FSL could have serious consequences both for the victim and the accused. A false report in favour of the , , , ,

accused would lead to grave miscarriage of justice for the victim and for the society at large, as the rule of law would stand subverted with the" , , , ,

acquittal of an offender, who deserves to be brought to justice. On the other hand, a false report against the accused can lead to an even more" , , , ,

grave miscarriage of justice, as an innocent person may get falsely implicated. " , , , ,

114. Looking to the fact that we have come across several such cases from time to time, we are of the view that the said incorrect reports cannot be" , , , ,

passed off as mere bonafide and genuine mistakes. The possibility of either the samples being compromised, or the reports being manipulated to suit" , , , ,

one or the other party, cannot be ruled out. The involvement of outsiders/ touts is highly probable in a case like the present, where the accused hails" , , , ,

from a humble background and would not have had the wherewithal of directly approaching the investigating officers, or the police officials, or the" , , , ,

officers of the FSL for seeking favours. " , , , ,

115. In this background, we are of the considered view that the irregularities which has come to light particularly in respect of reports prepared by Ms." , , , ,

L. Babito Devi, need to be thoroughly investigated by a competent investigating agency like the Central Bureau of Investigation (CBI). " , , , ,

116. We are mindful of the fact that the CBI is the premier investigating agency in the country and is involved in investigation of several serious cases, , , , ,

having all India ramifications. We are also mindful of the judgment of the Supreme Court in State of West Bengal & Ors. v. Committee for , , , ,

Protection of Democratic Rights, West Bengal & Ors., (2010) 3 SCC 571, which lays down the circumstances in which the High Court may direct the" , , , ,

CBI to carry out investigation in a case.Â The present case involves the working of the FSL Delhi, whose reports are called for by the prosecution",,,,,

and courts in a large number of cases, and the said reports are led in evidence and relied upon by the Court in the formation of their decisions.Â Thus,",,,,

there can be no gainsaying that the matter involves public interest at large.Â The circumstances, prima facie, could disclose the commission of",,,,,

offences under the Prevention of Corruption Act, Indian Penal Code etc. if thoroughly investigated.",,,,

117. Accordingly, we direct the CBI to register a preliminary inquiry and to look into the working of the FSL in the matter of formation of reports in",,,,,

respect of samples received by them, particularly the DNA reports.Â The reports prepared by Ms. L. Babito Devi from time to time shall particularly",,,,,

be examined by the CBI and her activities etc. should be thoroughly investigated.Â If the preliminary inquiry discloses commission of cognizable,,,,

offence by any of the persons involved in the matter of collection of samples and preparation of reports, the CBI shall, accordingly, proceed in the",,,,,

matter.Â,,,,

A copy of this judgment be communicated to the Director, CBI for taking action forthwith. A copy of this judgment be also served on the Standing",,,,,

Counsel for the CBI attached to the High Court.,,,,,