

(2018) 03 DEL CK 0345

In the Delhi High Court

Case No : Criminal Appeal No. 1137 Of 2017

State GOVT Of NCT Of Delhi

APPELLANT

Vs

Sonu Kumar

RESPONDENT

Date of Decision : 07-03-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 311, 313, 378
Indian Penal Code, 1860 — Section 354, 363, 376, 377, 506
Evidence Act, 1872 — Section 114, 118, 165
Code Of Criminal Procedure, 1898 — Section 540

Citation : (2018) 03 DEL CK 0345

Hon'ble Judges : Vipin Sanghi, J;P.S.Teji, J

Bench : Division Bench

Advocate : Rajat Katyal, Manoj Singh, Abhay Singh

Judgement

Vipin Sanghi, J

1. The present appeal under Section 378 Cr.P.C. has been preferred by the State upon grant of leave, to assail the judgment dated 31.01.2017 passed by the learned Additional Sessions Judge - 01, South-East District in Case No.2113/2016, SC No.12/2013 arising out of FIR No.398/2010 registered at PS - Okhla, acquitting the respondent/ accused of the charge framed against him.
2. The aforesaid FIR was initially registered under Section 363/354 IPC. The charge-sheet was filed under Section 363/ 354/ 376/ 377/ 367/ 506 IPC. However, the Trial Court framed the charge under Section 363/ 376/ 377/ 506 IPC vide order on charge dated 11.04.2012.
3. The case of the prosecution was that on receiving information at about 8:55 p.m. on 16.12.2010 of kidnapping of a girl aged about 8-9 years, police entered the information in the register vide DD No.25A (Ex. PW-16/A) and ASI Jagbir Singh (PW-16) along with Const. Sonu (PW-10) reached at the place mentioned in the information i.e. I-71A, Harkesh Nagar, New Delhi, where a crowd had gathered. In the crowd, he met the complainant Virender (father of victim) PW-9

and his daughter - the prosecutrix. One boy, whose name was revealed as Sonu - the accused was produced before PW-16. PW-9 made his statement (Ex. PW-9/A) that when he was at his house at about 8:00 PM his two daughters went outside to play and at 8:45 PM. his younger daughter (PW-1) came home and intimated to him that one boy had taken the prosecutrix from the hillock (pahari). Complainant immediately disclosed this fact to his landlord Rakesh (PW-4), who made a call on 100 no. and the complainant, his landlord (Rakesh) and others rushed in search of the prosecutrix. Complainant stated that while searching for the victim they reached at Harksh Nagar Chowk, and they saw that one boy named Sonu Kumar, S/o Vipin Singh, R/o. D-38, Harkesh Nagar, Delhi - (whose name came to be known later on upon inquiry) was crossing the railway line holding hand of the victim and walking fast. He stated that they rushed and the accused was overpowered. He stated that the prosecutrix told him (complainant) that the boy had misbehaved with her. The boy (accused) was handed over to police, who had been beaten by public while over powering him. On the statement of the complainant, rukka was prepared and case was registered under Section 363/354 IPC and investigation was started. The police station was asked to send a lady constable. Accordingly, Lady Constable Renu (PW-8) came to the spot. The prosecutrix and the accused were taken to AIIMS Hospital and were got medically examined; thereafter the accused was arrested in the case. The samples of the victim and accused were collected by the doctor during medical examination and handed over to I.O. and the same were sent to FSL for opinion.

4. The I.O. got recorded the statement of victim before Ld. M.M. Mr. Anuj Aggarwal (PW-7) under Section 164 Cr.P.C. on 18.12.2010. In the said statement (Ex. PW-7/B), the learned MM recorded that administration of oath to the prosecutrix was dispensed with as she was 9 years of age. In response to the query, "What do you do?", the prosecutrix responded "I study in IIIrd Class". The prosecutrix in her said statement disclosed that two days earlier she went with her sister to defecate in the open. One person came to her and he stated that he is the brother of her neighbour. He took the prosecutrix along with him inside the jungle. He showed a blade to the prosecutrix and threatened her that he would kill her if she did not listen to him. He asked the prosecutrix to remove her pant. The prosecutrix stated that she tried to bite him and run away, but the accused caught held of her. She further stated that the accused pulled down her pant and he also pulled down his own pant, and thereafter he did "gandaa kaam" with her. She stated that he first tried to put his "gandi cheez" - meaning penis, inside her and then he did put his "gandi cheez" insider her. Thereafter, he put his "gandi cheez" inside her mouth. Thereafter, he removed his penis (gandi cheez) from her mouth. Thereafter, the accused started bringing her back to her house. At that time, many people saw them and caught held of the accused and beat him up.

5. Consequent to the aforesaid statement of the victim, sections 367/376/377/506 were added in the case. The investigation was taken over by

S.I. Rajinder Kaur (PW-5). The statement of the younger sister of the prosecutrix (PW-1) was got recorded on 22.12.2010 under Section 164 Cr.P.C. (Ex. PW-7/F) without oath, since she was just 6 years of age. She stated that her elder sister took her to pahaari for bathroom. The accused came there and claimed that he is the mama. The witness asked him whether he was mama of Sumit. To this, the accused replied in the affirmative. She also stated that Sumit lives in the neighbourhood. She further stated that the accused told her sister that he would give her biscuits and he took her sister with him. She did not accompany her sister, and the sister (i.e. the prosecutrix) told her to go back to her home. She further stated that after reaching her home, on the asking of her mother, she told her that the prosecutrix had gone with the mama of Sumit. Thereafter, the father of Chandu called the police on the phone.

6. PW-5 arranged the counseling of the victim/ prosecutrix from PW-14 Ms. K.K. Pandey and Ms. Aastha, officials of an NGO. She also recorded the statement of the prosecutrix under Section 161 Cr PC, as well as of her younger sister PW-1. Upon completion of the investigation, chargesheet was filed before Magistrate and the case was committed to the Sessions.

7. The respondent pleaded not guilty. Accordingly, the trial proceeded. The prosecution examined 17 witnesses in all, including the younger sister of the prosecutrix as PW-1; the prosecutrix as PW-2; Rakesh Kumar, the Landlord as PW-4; and Virender, father of the prosecutrix as PW-9.

8. During the trial, the prosecutrix was examined as PW-2. In her testimony - which too was initially recorded on 07.07.2012 without oath, considering that she was found to be 11 years of age and studying in 5th class, she stated that in the winter previous to the one which had passed, she had taken her younger sister to the nearby pahaari for toilet purpose in the evening. When the younger sister (PW-1) was attending to nature"s call, one person came to her and asked not to use the said place for the said purpose as he passed his vehicle there and he went away. After some time, he again came and stated that the prosecutrix and her sister should use the place for toilet purpose which his sister uses, and he took both of them with him. He said to the prosecutrix that he is the maternal uncle of her neighbour, and that he will give the prosecutrix some biscuits which he asked to give to his nephew. The younger sister of the prosecutrix (PW-1) went home and the accused took the prosecutrix with him towards the jungle. The accused asked the prosecutrix to act on his dictates, otherwise he would leave her there. He also intimidated the prosecutrix by showing her a blade. Thereafter, the accused removed the pant of the prosecutrix and also removed his pant and put his penis into her mouth, and thereafter inserted his penis into her vagina. Thereafter he was taking the prosecutrix to some other place. On the way, the brother of the prosecutrix met them. On seeing the brother of the prosecutrix, the accused started to ran away but was caught by her brother. He was beaten by the public persons who had gathered there and the prosecutrix was brought home. Thereafter, she was taken to the police. The police inquired

about the incident from her and she narrated the same to the police. Thereafter, the police took her to the doctor for check-up. The police had also taken her to the Court, where her statement was recorded. The prosecutrix was shown the accused through the screen and she correctly identified the accused. She exhibited her statement recorded under Section 164 Cr.P.C. as Ex.PW-7/B bearing her signatures at point "B". She stated that at the time of the incident, she was wearing a pink colour panty which was taken by the doctor during her medical examination. She identified her panty which was produced by the MHC(M) as Ex.P-1.

9. She was cross-examined at length by the defence counsel. Her age was never disputed or questioned by the accused during her cross-examination. She denied acquaintance of the accused with her family, or that her father had any financial transaction with him. She also stated that when the accused was taking her to some other place after the incident, her brother was ahead and her father and landlord Rakesh were lagging behind. They had also come to the place where the prosecutrix and the accused were present. She stated that her brother had saved her from the hands of the accused. She denied the suggestion that she had been tutored. She also stated that she had disclosed to her father, brother and the police that some wrong act had been committed with her, but the entire incident in detail could not be narrated by her as lot of public persons were present there. She also stated that in the police station, the police had made inquiries from her but as she was terrified and under a trauma, and as many public persons were present, she had only stated that the accused had committed wrong act on her. She also stated that she had not taken a bath or changed her clothes before her medical examination. Even to the doctor, she had stated that wrong act had been committed on her. She did not notice any injury as she was very much terrified after the incident. After her medical examination, when she was taken home she narrated the entire incident to her mother who might have disclosed the same to the father on the next day. She denied that she had leveled the allegation of rape against the accused at the instance of her parents. She denied the suggestion that the accused had not committed rape, or that he was just helping her to cross the railway line when her father and brother came. During her detailed cross-examination, the defence could not dent the version of the prosecutrix. She withstood her cross-examination and was not shaken in the material part of her deposition. PW-2 also identified the accused.

10. The younger sister of the prosecutrix was examined as PW-1. PW-1 corroborated the statement of the prosecutrix and stood by her version as recorded under Section 164 Cr.P.C. In her cross-examination, she denied that the accused live in her neighbourhood. The defence could not dent the statement given by PW-1.

11. The version of the prosecutrix (PW-2) was further supported by the father of the prosecutrix (PW-9). He stated that the prosecutrix was 11 years of age when his statement was recorded on 06.09.2013. He stated that he was told by his

younger daughter PW-1 outside the home, that the prosecutrix was taken by the neighbour Sonu while the prosecutrix was playing at the pahaari. He stated that he informed his neighbour Rakesh (PW-4) and then the call was made on number "100" by Rakesh.

12. Similarly, Mr. Rakesh Kumar (PW-4) supported the version of the prosecutrix. He stated that he made the call on number 100. He stated that he himself went to locate the girl. He learnt that the girl had been recovered at the railway line and that the accused had been apprehended. Pertinently, during his cross-examination by the learned APP, he stated "On my inquiry from X (name redacted) she was saying that "pant utari" and thereafter she started weeping". He was cross-examined by the accused, but no challenge was raised to his aforesaid statement. The version of the prosecutrix was supported by the I.O., S.I. Jagbir Singh (PW-16), Mr. Anuj Aggarwal (PW-7), (the Magistrate who recorded the statement under Section 164 Cr PC), Ms. K.K. Pandey (Counselor)/ PW-14. The other prosecution witness, including Ms. Anit Chhari, Sr. Scientific Officer, CFSL, Rohini, New Delhi (PW-17) established the technical and connecting evidence.

13. In the statement of the accused recorded under Section 313 Cr.P.C. he took the plea that he was falsely implicated. He stated that the father of the prosecutrix had been taken Rs.5,000/- from him, and when he asked him to return the same, he threatened the accused with false implication. He did not led any defence evidence.

14. The submission of Mr. Katyal, the learned APP is that the impugned judgment is completely laconic, borders on perversity, and has been rendered by overlooking the evidence led by the prosecution. He submits that the approach of the learned ASJ is completely and fundamentally flawed, and the same has led to grave travesty of justice. He submits that the learned ASJ has gravely erred in failing to appreciate the evidence in the light of the settled legal principles. The learned ASJ has assumed that the prosecutrix was a major, even though, it had consistently come on record that she was only 9 years of age at the time when the incident took place on 16.12.2010. The same was evident, inter alia, from the initial report made vide DD No.25A; her medical examination report; her statement recorded by the learned MM under Section 164 Cr.P.C., and; from the testimony of the prosecutrix before the Court and the testimony of her father (PW-9). He submits that at no stage, the accused challenged the case of the prosecution with regard to the age of the prosecutrix. No cross-examination on this aspect was ever undertaken of any of the prosecution witnesses. Mr. Katyal submits that the learned ASJ could not have turned a blind eye to the age of the prosecutrix, considering that she was studying only in 3rd class at the time of the incident. He submits that it was not a borderline case where a doubt could have been raised whether the prosecutrix was 18 years of age, or not. In any event, even if the learned ASJ had any doubt, he could have directed the medical examination of the prosecutrix under Section 311 Cr.P.C. read with Section 165

of the Evidence Act. Merely because the birth certificate or the primary school record of the prosecutrix had not been produced, was no reason to assume that she was a major on the date of the incident. The predecessor of the learned ASJ, while recording the statement of the prosecutrix had found her to be an 11 year old minor girl, and on that basis no oath was administered to her. Thus, it was not even open to the learned ASJ to doubt the said recording made by the predecessor learned ASJ, who recorded the statement of the prosecutrix on 07.07.2012.

15. Mr. Katyal further submits that minor embellishments and contradictions, which do not go to the root of the case of the prosecution, and which arose on account of loss of memory of the prosecution witnesses have been made the basis of the respondent's acquittal. The learned ASJ has completely ignored the fact that the prosecutrix and the other prosecution witnesses, including the minor sister of the prosecutrix (PW-1), father of the prosecutrix (PW-9) and neighbour (PW-9), were consistent in material part of their testimony.

16. Mr. Katyal has submitted that the report of the DNA fingerprinting was also called for from the FSL, and the DNA drawn from the blood sample of the accused matched with the DNA found on the underwear of the prosecutrix. Thus, Mr. Katyal submits that this was a clinching piece of evidence. He submits that, apparently, on account of a typographical mistake in the DNA Fingerprint Report dated 06.06.2013 (Ex. PW-17/C), it was incorrectly mentioned in respect of parcel (1), which contained the underwear of the prosecutrix, that the said sample was received, sealed with the seal of "BS" containing Exhibit "1".

17. Mr. Katyal submits that there was no occasion for the seal "BS" being affixed on the envelope containing the Ex. 1 i.e. the underwear of the prosecutrix. He submits that after the conduct of the initial examination of the samples, the remnants of the exhibits were sealed with the seal of AC FSL Delhi and returned by the FSL. The samples were again sent for DNA fingerprinting on 21.02.2012 with the seals intact. However, since in the DNA Fingerprint Report dated 06.06.2013 (Ex. PW-17/C), it was stated that the parcel-1 was received with the seal of "BS", the State had moved an application on 27.10.2016 before the learned ASJ for direction to the I.O./ SHO concerned in respect of the aforesaid apparent typographical error. The said application was adjourned to 16.11.2016 for arguments. It was further adjourned for arguments to 03.12.2016, 19.12.2016, 07.01.2017. On 07.01.2017, while the learned APP was on leave, the learned ASJ ignored the aforesaid application and proceeded to record the statement of the accused under Section 313 Cr.P.C. Final arguments were thereafter heard on the following date i.e. 21.01.2017, and the matter was posted on 31.01.2017, when the impugned judgment was passed.

18. Mr. Katyal submits that the procedure adopted by the learned ASJ has led to failure of justice. He submits that the prosecution has ample evidence to show that the samples, when sent for DNA Fingerprint examination, were sent with the seal of FSL intact and not with the seal of "BS". Mr. Katyal has submitted that, in

any event, even if the said DNA Fingerprint Report were not be taken into account, there is ample evidence available on record to convict the respondent/accused.

19. Mr. Katyal submits that the prosecutrix was credible in her testimony and was consistent in her statement recorded under Section 164 Cr PC and when she deposed in Court. The medical evidence and the forensic evidence establish kidnapping, rape and unnatural sex with the victim. Thus, he submits that the impugned judgment deserved to be set aside, and the accused convicted.

20. On the other hand, the submission of learned counsel for the respondent accused is that the impugned judgment does not call for interference by this Court. The learned ASJ has correctly doubted the case of the prosecutrix since there are material contradictions and improvements in the case of the prosecution, as discussed in the impugned judgment. He further submits that the samples were evidently tampered with and, therefore, the DNA fingerprinting report was correctly not relied upon by the learned ASJ. He further submits that even the FSL Reports (Ex. PW-17/A and Ex.PW-17/B) do not support the case of the prosecution inasmuch, as, EX.PW-17/B shows that the species of the semen stains on the underwear could not be ascertained, and the same appeared to be of blood group "B", whereas the blood group of the accused is "O". Reliance is also placed on the testimony of Dr. Dheeraj Jawada PW-15, to submit that he had medically examined the accused on 17.12.2010, and he did not find any injuries on the male organ of the accused. The said witness had opined that if a fairly grown man commits sexual intercourse with a 9 year old girl, the injuries on private parts of both - the victim and the assailant are bound to occur.

21. Learned counsel submits that the accused has been falsely implicated in the case on account of him demanding return of the loan of Rs.5,000/-advanced by him to the father of the prosecutrix.

22. We have heard learned APP as well as learned counsel for the respondent accused. We have also perused the Trial Court judgment. We have also perused the Trial Court Record, which has been referred to by the learned counsel. We are conscious of the parameters which we should follow before a judgment of acquittal is reversed in appeal. The accused is presumed to be innocent, unless proved guilty. With his acquittal, the said presumption stands further strengthened. 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.

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."

23. The reasoning adopted by the learned ASJ to conclude that the minority of the prosecutrix on the date of the incident was not established, to say the least, borders on perversity. The learned ASJ, observes in para 6 of the impugned judgment that the prosecution had not examined any witness to prove the date

of birth of the victim, nor her birth certificate issued by any authority empowered to issue the same had been produced. He observes that while deposing in Court, the prosecutrix had given her age as 11 years and considering her age, the Court examined her without administering oath. The father of the victim PW-9 had also not given her date of birth. Consequently, the learned ASJ came to the conclusion that "It cannot be said that the age of the victim below 18 years has been proved by the prosecution as per law".

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

25. The first report of the prosecutrix going missing was recorded vide DD No.25/A (Ex.PW-16/A) which was to the effect that one boy had taken a girl aged 8-9 years with him "behla fuslaa kar". Thus, the initial complaint itself was in respect of a minor girl aged 8-9 years going missing with a boy. The same led to registration of the FIR (Ex.PW-6/A) under Sections 363/354 IPC at 22:35 hours on 16.12.2010. The FIR also recorded the age of the prosecutrix as 9 years. On the night following the incident itself, the medical examination of the prosecutrix was got conducted at AIIMS vide Ex.PW-11/A, which too recorded the age of the prosecutrix as 9 years. Pertinently, even the examining doctor did not have any doubt about the minority of the prosecutrix and about her being about 9 years of age. The statement of the prosecutrix was thereafter recorded by PW-7 under Section 164 Cr.P.C. vide Ex.PW-7/B, wherein the learned MM also records the age of the prosecutrix as 9 years. Even he did not have any doubt about the minority of the prosecutrix, or about her age. He dispensed with the administration of oath precisely for the reason that the prosecutrix was 9 years of age and she disclosed that she studies in 3rd class. Thereafter the prosecutrix was examined before the Court as PW-2, and on this occasion, she gave her age as 11 years. Pertinently, the statement of the prosecutrix was recorded on 07.07.2012 and by then, she was studying in class 5. Once again, the learned ASJ satisfied herself with regard to the minority and intelligence of the prosecutrix before recording her statement. She dispensed with administration of oath, since the prosecutrix was found to be a child 11 years of age. Once again, no doubt arose in the mind of the learned ASJ, and none was raised either by the prosecution or by the defence with regard to her age. The prosecutrix was cross-examined at length by the defence. However, no suggestion was given to her, that she was not a minor either on the date of the incident, or on the date of her cross-examination. On the contrary, suggestions were made that she had been tutored by her parents to falsely implicate the accused - the implication being that she was a minor open to tutoring to falsely implicate the accused.

26. Virender (PW-9), the father of the prosecutrix in his examination in chief (which was conducted on 06.09.2013) disclosed the age of the prosecutrix as 11 years as on the date of the making of his statement. PW-14 Ms. K.K. Pandey, the Counsellor describes the prosecutrix as a "Child".

In the cross examination of none of the prosecution witnesses, including the

prosecutrix, or her father, it was suggested by counsel for the accused that the prosecutrix was not a minor aged 9 years at the time of the incident. That is not even a defence taken by him in his statement recorded under Section 313 Cr PC.

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

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

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

"10. Section 540 is intended to be wide as the repeated use of the word "any" throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways: (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona

fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart, The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly.". (emphasis supplied)

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

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

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

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

33. The learned ASJ has doubted the credibility of the prosecutrix by observing that the initial statement made by the complainant (the father PW-9), on the basis of which the case was registered, made allegations of molestation alone and that the victim made allegations of rape and oral sex by the accused only two days after the registration of the case. Pertinently, the prosecutrix in her deposition has stated that she had narrated the incident to the police, whereafter the police took her to the doctor for check up. In her cross-examination, she stated that she had disclosed to her father, brother and the police that some wrong act had been committed with her, but the entire incident in detail could not be narrated by her as a lot of public persons were present there. She stated that she was taken to her house by her father, brother and police, and she was also taken to the police station from where she was taken to the hospital on the same day. She stated that in the police station, the police had made inquiries from her, but she was terrified and under a trauma as many public persons were present, and she had only stated that the accused had committed wrong act with her. Even to the doctor, she had stated that the wrong act had been committed with her. She had not noticed the injury on her body as she was very much terrified after the incident. She stated that after her medical examination, she was taken to her home and she narrated the entire incident to her mother, who

might have disclosed the same to her father on the next day. The police also took her to the Judge, where her statement was recorded. She stated that she had narrated the details of the incident which happened with her before the Magistrate in her signed statement Ex. PW-7/B.

34. The aforesaid explanation furnished by the prosecutrix is completely natural and believable. The prosecutrix was a small child aged 9 years at the time of the incident. She had been subjected to physical abuse - an experience that she could not have comprehended at her age. Not only she would have been traumatized, but she also would have experienced a sense of shame on account of her being subjected to rape and oral sex. It would not have been easy for her to narrate her exploitation in her own words. Her statement that she did not come out with the details of the act perpetrated by the accused in the presence of her father, brother and police, due to presence of a lot of public persons is completely natural and believable. It is equally believable and natural that a girl of young age would narrate her experience and trauma that she had been subject to, to her mother. Children, particularly daughters, naturally confide in their mothers. They -particularly girls, may find it very embarrassing and traumatizing to speak about such experiences before males in the family and more so in the presence of police and other public persons. Pertinently, her medical examination corroborates her allegation of being subjected to rape. Upon her gynecological examination, though her hymen was found present, it was congested and oedematous, i.e. it had swelling. The swelling indicates forceful penetration or attempted penetration. Mild bleeding was also found and the undergarments were also stained. There was also a discharge found coming out of her private parts.

35. The observations made by the Supreme Court in *State of Punjab v. Gurmeet Singh & Ors.*, AIR 1996 SC 1393 - wherein the Supreme Court examined the manner in which the statement of a prosecutrix should be appreciated, are extremely pertinent and instructing in a case like the present. The Supreme Court in *Gurmeet Singh* (supra) held:

"9. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility.

The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the

prosecutrix microscopically, so as to disbelieve her version.

The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good

witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashtra v. Chandraprakash Kewalchand Jain* [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence." (emphasis supplied)

36. We may also refer to *Vijay @ Chinev v. State of Madhya Pradesh*, (2010) 8

SCC 191, Krishan Kumar Malik Vs. State of Haryana, (2011) 7 SCC 130 and State of Rajasthan Vs. Babu Meena, (2013) 2 SCALE 479, wherein the Supreme Court held that the statement of the prosecutrix if found to be worthy of credence and reliable, requires no corroboration. The solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy and unblemished and is of sterling quality; the conviction of the accused could be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and no further corroboration is required.

37. Pertinently, the prosecutrix was medically examined on the night following the incident at 1:00 a.m. on 17.12.2010. She stated in her testimony that she had not taken a bath or changed her clothes before the medical examination. Even though the clear allegation of rape and oral sex was made by the prosecutrix only in her statement under Section 164 Cr PC on 18.12.2010, the fact of the matter is that she had been medically examined in the early hours of 17.12.2010 when the examining gynecologist found the hymen congested and automated with mild bleeding; discharge present and undergarments stained. Pertinently, the vaginal smear was prepared and the undergarment of the prosecutrix was also sealed and handed over to the police.

38. Unfortunately, the learned ASJ has completely ignored the medical examination report of the prosecutrix as well as the FSL report. The learned ASJ has disbelieved the testimony of the prosecutrix and PW-9 the father, only on account of an insignificant embellishment in their testimonies, which naturally creep in due to lapse of memory with passage of time. The prosecutrix claimed that her brother saved her first, as his father lagged behind. On the other hand, the father claimed that the brother of prosecutrix was away to school. Pertinently, the incident is of 16.12.2010 and the testimony of prosecutrix was initially recorded on 07.07.2012 i.e. nearly two years after the date of the incident. The testimony of the father PW-9 was recorded even later, i.e. on 06.09.2013 and he was cross-examined on 19.12.2013. The cross-examination of PW-9, wherein he stated that his son had not accompanied him as he had gone to school was recorded little over 3 years after the date of the incident. Thus, the aforesaid apparent contradiction is completely understandable due to lapse of time in the recording of cross-examination of PW-9. The said statement of PW-9, even otherwise, does not stand to reason, since the incident occurred in the evening and the first information to the police was given at about 8:55 p.m. on 16.12.2010. Pertinently, in his cross-examination, PW-9 stated that the school timing of his son is 12:00 noon to 6:00 p.m. Therefore, there was no question of the son being at school at the time when the younger daughter i.e. PW-1 informed of the prosecutrix being taken away by the accused. Notably, PW-9 stated that on the date of the incident i.e. 16.10.2010, the son reached home around 8:10 p.m. The effort to locate the prosecutrix started only thereafter. Pertinently, even PW-4 stated in his cross-examination that he found the brother of the prosecutrix present at the railway crossing where the accused was apprehended and the crowd had gathered. Thus, the apparent contradiction in

the statement of PW-2 and PW-9 on the aspect as to whether, or not, the brother of the prosecutrix/ son of PW-9 had accompanied PW-9 is of no relevance. It is an obvious case of failing memory of PW-9.

39. Similarly, the learned ASJ has made much of the fact that there is no statement of the prosecutrix found on record, as recorded on 16.12.2010 even though the prosecutrix had stated that on the date of the incident she was brought home and thereafter taken to the police station, where upon inquiry, she made the statement to the police. Pertinently, SI Jagbir Singh (PW-16) was initially the I.O. in the case. In his testimony, he did not state that after being taken to the police station from her home, the statement of the prosecutrix was recorded on 16.12.2010 under Section 161 Cr PC. In fact, in his cross-examination, he stated that "It is correct that I have not recorded any statement of the prosecutrix at the police station". Pertinently, in her examination-in-chief, the prosecutrix, inter alia, stated "I was brought home and thereafter, I was taken to the police. The police inquired from me. I narrated the incident to the police". She did not state that any statement of her's was recorded by the police. All that she stated was that the police inquired from her, and she narrated the incident to the police. In contradistinction, in the following sentence, she stated "Thereafter, the police brought me to the doctor for check up. The police had also taken me to the Judge on other day where my statement was recorded" (emphasis supplied). Even in her cross-examination, the prosecutrix had stated "In the police station, the police had made inquiries from me but as I was terrified and under trauma and as many public persons were present I had only stated that the accused had committed wrong with me". She stated "The police had recorded something after making inquiries from me but I cannot tell what statement was recorded by the police". Thus, the prosecutrix did not state that her statement was recorded upon her dictation or narration. All that she stated was that the police recorded something after making inquiries. Pertinently, the accused did not suggest to the prosecutrix that her statement under Section 161 Cr PC was recorded by the police at the police station on the date of the incident. Unfortunately, the learned ASJ has construed the above testimony of the prosecutrix to mean that prosecutrix had "made the statement to the police" i.e. a statement under Section 161 Cr PC.

40. The aforesaid demonstrates a complete lack of capacity in the learned ASJ to understand, marshal and appreciate the evidence as he has failed to appreciate the context in which the prosecutrix had made her statement during her cross-examination.

41. On the one hand, the line of cross-examination adopted by the accused shows that he suggested to the I.O. that the statement of the prosecutrix was not recorded at the police station. Yet, it appears that it was argued on his behalf before the learned ASJ that the statement of the prosecutrix had been recorded on 16.12.2010, which is not to be found on record - thereby raising a doubt in the case of the prosecution.

42. The observation made by the learned ASJ that the landlord of the complainant, Rakesh Kumar/ PW-4 did not support the case of the prosecution is also erroneous. It was not the case of the prosecution that PW-4 was an eye witness to the occurrence. It is his own statement that he learnt of the prosecutrix going missing from Virender (PW-9)/ the father of the prosecutrix, whereafter he made a call on No.100 and also proceeded to search for the prosecutrix. He clearly states that he himself went to locate the girl, but came to know that the girl had been recovered at the railway line and that the accused had been apprehended. He went towards the railway line where a number of persons were present and the accused was surrounded by the crowd. He never claimed that he was a witness, either to the incident or to the apprehension of the accused by the brother or father of the prosecutrix. He never claimed that he had seen the accused taking the prosecutrix across the railway line, or that he had apprehended the accused. Thus, to say that PW-4 did not support the case of the prosecution is absolutely incorrect. Each and every prosecution witness may not be a witness to the entire sequence of events, and he may be a witness only to a part of the transaction. Merely because he may not be aware of the entire transaction or sequence of events, does not render him an unreliable or discredited witness. It cannot be claimed that such a witness does not support the case of the prosecution.

43. Turning to the forensic evidence led in the case, it has come in evidence that the samples of the victim and the accused were drawn, sealed with the seal of CMO, AIIMS Hospital, New Delhi and delivered to the I.O. for forensic examination. It has also come in evidence that the three sealed parcels containing the Underwear (Ex. 1), Microslides having faint smear (Ex. 2a & 2b) and gauze cloth piece having dark brown stains described as "Blood in gauze of accused" (Ex. 3) were received in sealed condition by the FSL as is evident from the report of the FSL (Ex. PW 17/A, 17/B & 17/C). Pertinently, upon examination, human semen was detected on Ex. 1, 2a and 2b i.e. the underwear of the prosecutrix and the swabs taken from the private parts of the prosecutrix. Equally pertinent it is to note that blood was detected in Ex. 1 i.e. the underwear of the prosecutrix. The serological examination of the underwear disclosed human blood of "B" group - which is the blood group of the prosecutrix. This corroborates the medical report of the prosecutrix which found mild bleeding on her private parts.

44. Pertinently, though human semen was detected, inter alia, on Ex. 1 i.e. the underwear of the prosecutrix, the report made by the Biology Division, in the column - "Semen Stains:" in respect of "1" Underwear" shows a blank "----" under the heading "Species of Origin". However, under the "ABO Grouping/ Remarks", the group has been mentioned as "B" Group. It also shows "Reaction observed in Anti B & Anti H Sera".

45. The submission of learned counsel for the respondent/ accused is that the blood group of the semen stains found in the underwear "Ex. 1" was of "B"

Group, whereas the blood group of the accused is "O" Group, has no merit. Pertinently, the said report Ex. PW-17/B also contains a note that "The above reactions may be due to Blood or Semen or the mixture of both". Thus, even though the blood group of the accused is "O" Group, the semen found on the underwear was detected as belonging to "B" Group, since it got mixed with the blood of the prosecutrix.

46. Learned counsel for the respondent/ accused has also argued that PW-15, Dr. Dheeraj Jawada, who had medically examined the accused, do not find any injury on the penis of the accused. In his cross-examination, he, inter alia stated "I also did not find any injury on the male organ. In my opinion, if a fully grown man commit a sexual intercourse with a 9 year old, the injuries on the private part of both i.e., victim and assailant bound to occur".

47. Thus, the submission of counsel for the respondent/ accused is that the medical evidence does not support the case of the prosecution.

48. We do not find any merit in this submission for the reason that, firstly, the testimony of the prosecutrix appears to be completely reliable and trustworthy. Pertinently, even PW-4 stated that the prosecutrix started weeping when he enquired from her about what had happened to her. In his cross-examination he stated "On my inquiry from X (name redacted) she was saying that "pant utari" and thereafter she started weeping". This statement was not challenged. It shows that the prosecutrix contemporaneously and spontaneously though ashamedly, made the aforesaid partial disclosure of her experience to PW-4, and was overwhelmed and taken over by emotions. This behavior leads credence to the statement of the prosecutrix. That itself would be sufficient to convict the respondent/ accused. The said testimony is further corroborated by her medical examination report Ex. PW-11/A, as well as the FSL reports above referred to. Where was the question of human semen being found on the underwear as well as the micro slides prepared from the samples drawn from the 9 year old prosecutrix, if she had not been subjected to rape? The said medical report also shows that though her hymen was present, the same was congested and vagina was swollen (oedematous). Mild bleeding was also present and there was discharge coming out of the same. The fact that the prosecutrix and PW-1, her younger sister named and identified the accused as the person who had taken away the prosecutrix and assaulted her, as also the fact that the accused was caught with the prosecutrix while crossing the railway line and also beaten up by the public - establishes beyond all reasonable doubt the fact that it was the accused who had taken away the prosecutrix with him. The possibility of the accused not having fully penetrated the prosecutrix cannot be ruled out, and that would explain the lack of injury on the male organ and the presence of the hymen.

49. On the basis of the material available on record, we are of the considered opinion that the prosecution has successfully proved the guilt of the accused beyond reasonable doubt.

50. We also find the approach of the learned ASJ in dealing with the matter extremely casual. The application moved by the prosecution for seeking the direction to the I.O. /SHO concerned in respect of the apparent typographical error found in the DNA fingerprinting report (Ex.PW-17/C) dated 06.06.2013 remain undecided by the learned ASJ. The learned ASJ adjourned the said application on four occasions. On 07.01.2017, he dealt with the said application in the absence of the learned APP, who was on leave on that date and proceeded with the matter to record the statement of the accused under Section 313 Cr.P.C. Soon thereafter he heard the final arguments in the case on 21.01.2017 and pronounced on 31.01.2017. In the impugned judgment, he has sought to cast a doubt on the case of the prosecution by relying upon Ex.PW-17/C which mentions the seal as that of "BS" and not of "FSL". However, he conveniently forgets the aforesaid application moved by the prosecution. The aforesaid demonstrates the casual and cavalier approach on the part of the learned ASJ in dealing with the matter. It is unfortunate that he has not bestowed upon the matter the application of mind that it deserved. Since we are of the view that even in the absence of the DNA fingerprinting report there is sufficient evidence available on record to find the respondent accused guilty, we do not consider it necessary to, at this stage, deal with the application moved by the prosecution before the Trial Court.

51. The impugned judgment is not sustainable and is hereby set aside. Accordingly, the appeal stands allowed. The respondent Sonu Kumar stands convicted under Sections 363/ 376 IPC.

52. Accordingly, the respondent Sonu Kumar is taken into custody forthwith. He shall be produced before the Court on the next date.

53. List for hearing arguments on sentence on 15.03.2018.

54. Latest nominal roll be called from the Jail Superintendant.