

(2019) 09 CAL CK 0076

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 487 Of 2012

Surabuddin @ Surab Ali @ Chhrub Ali@ Sarab Ali

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 23-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(2)(f)
Code Of Criminal Procedure, 1973 — Section 164, 313
Evidence Act, 1872 — Section 6
Juvenile Justice (Care And Protection Of Children) Act, 2000 — Section 2(1), 2(k), 7A, 20, 64
Uttar Pradesh Children Act, 1951 — Section 29
Juvenile Justice Rules, 2007 — Rule 12, 12(3)(a), 12(3)(a)(i), 12(3)(a) (ii), 12(3)(a) (iii)

Citation : (2019) 09 CAL CK 0076

Hon'ble Judges : Sahidullah Munshi, J; Subhasis Dasgupta, J

Bench : Division Bench

Advocate : Dipanjan Chatterjee, Sekhar Barman, Binoy Kumar Panda, Subham Kanti Bhakat

Final Decision : Disposed Of

Judgement

Subhasis Dasgupta, J

This criminal appeal is directed against the judgment and order of conviction dated 27.07.2012 and 30.07.2012 passed by learned Additional District & Sessions Judge, F.T.C. 5, Barasat in connection with Sessions Case No. 35(9)/2008 giving rise Sessions Trial No. 07(05)/2009, convicting the appellant under Section 376 (2) (f) of the Indian Penal Code, and thereby sentencing the convict appellant to suffer rigorous imprisonment for life with fine of rupees five thousand in default further rigorous imprisonment for six months.

Before we resort to address the core issues, raised in this appeal, some salient facts, may be adumbrated hereunder.

An eleven years old girl, while carrying food with her, supplied from house, as lunch of her father, was subjected to rape by accused person on 26.10.1995 at about 2.30 p.m. by appellant, on her way to field, where her father was watering the agricultural land with use of pump and was expecting arrival of his daughter taking meal for him.

While committing rape, the victim girl was taken to a nearby field with papaya grove and appellant then ravished her over there. The father/complainant (PW-1) was anxious about his daughter for not arrival within expected reasonable hours, as ordinarily the victim girl would reach to her father during such time taking food for father as lunch, while doing work in the field. The father/complainant could not keep him waiting further for his daughter to come by controlling his patience. He proceeded immediately thereafter, to his house and on the way found his daughter weeping and standing on the land belonging to Hemat Ali. The father noticed blood stain on the wearing apparels and on the thigh of the victim girl, and on query the father could learn that accused had ravished the victim girl forcibly, taking her to the nearby papaya grove on her way to the field of her father from house. The victim girl sustained injury in her private parts with an evidence of profused bleeding therefrom. She was then taken to Barasat District Hospital first for her medical care and management and from where she was referred to R.G. Kar Medical College and Hospital for her crisis. The victim had to be hospitalized for about seven days prior to being discharged. Attempt was made for recording the statement of the victim girl under Section 164 Cr.P.C., but her statement under Section 164 could not be recorded, for the victim being severely traumatized and also being in a state of shivering and shocking, when produced for such purpose.

The Trial Court after framing charge against the accused under Section 376(2)(f) of Indian Penal Code, in this case examined as many as ten (10) witnesses including the parents of the victim girl (PW-1 and 3) and the Doctor, medically examining the victim girl at Barasat Hospital at the first instance (PW-7). The discharge certificate and medical examination report of the victim girl being collected in this case during the investigation were marked as Exhibits 4, 7 and 8 respectively, while the FSL report submitted pursuant to the wearing apparels of the victim stained with blood being sent for forensic examination and report, was marked as Exhibit-9.

The court conducting the trial after collection of evidence, proceeded to hold the appellant guilty of offence, already charged with, relying upon the evidence of PW-1 (father of the victim/maker of the FIR), PW-3 (mother of the victim), PW-6 (grandfather of the victim) together with medical evidence of Doctor examining the victim girl (PW-7) and the Investigating Officers PW-8 and PW-10.

The learned advocate for the appellant assailed the order of conviction on two fold grounds. Firstly, taking the grounds on the merits of the case, and secondly, attracting technical points raising a plea of juvenility during the course of this appeal and seeking relief thereunder, as per Amendment Act 33 of 2006,

introduced in Juvenile Justice Act, 2000, providing the benefit of juvenility, as on the date of commission of offence, the appellant had not completed eighteen years of age.

The points surfaced pertaining to the merits of the case were chosen by the learned advocate for the appellant to attack the sustainability of order of conviction by the learned Trial Judge submitting that learned Trial Judge illegally placed much reliance upon the testimony of the PW-1, PW-3 and PW-6 in order to base conviction in the instant case, where admittedly victim girl could not be examined, as she had suffered death two years after she fell victim of rape; that the witnesses being relied upon by the learned Trial Judge, like PW-1, PW-3 and PW-6 were all interested witnesses, and as such their testimony were tainted with biasness, accordingly should not be relied upon; that despite the possibility of good number of village people, varying from 50 to 100 (vide cross-examination of PW-3 and PW-6), to know about the incident, no village people came forward lending support to the prosecution story in unfolding the prosecution version; that the prosecution story so built up, not being a truthful account of any incident, the two co-villagers already examined as PW-4 and PW-9 were declared hostile to the prosecution for not having supported the prosecution case, and as such no credence could be attached upon the testimony of the witnesses being relied upon by learned Trial Judge in holding the appellant guilty; that though the victim was allegedly described to have been suffered from shock, and in consequence thereof, at the first instance, when she was put up for recording her statement under Section 164 Cr.P.C., she was then looked to be trembling, traumatized and shocked also, but the Investigating Agency did not venture to record the statement of the victim girl under Section 164 Cr.P.C. at any subsequent date, after her alleged symptoms of trembling disappeared considerably rendering the prosecution case to be not believable; that the discharge of vaginal blood from the private parts of the victim girl might be possible during menstruation or falling from hard surface, which stood sufficiently demonstrated in the cross-examination of the Doctor examining the victim girl at the first instance in the Emergency of Barasat District Hospital, the Trial Judge ought to have disbelieved the slight hymenal abrasion so as to make out a case of alleged forceful penetration, in the absence of any external injury being found on the private parts of the victim girl; that the prosecution version was highly improbable in view of the political rivalry between the parties, which sufficiently elicited in the cross-examination of witnesses by the defense; that the learned Trial Judge made reference to several citations in order to fortify the order of conviction and such decisions as referred were distinguishable from the present facts and circumstances of the case on the premises that in all such references victim prosecutrix was examined, unlike the present one; that the learned Trial Judge failed to appreciate the evidence of the witnesses in its real perspective, as successfully transpired in the cross-examination of witnesses rendering the prosecution testimony highly improbable.

As regards the technical points pertaining to the plea of juvenility raising for the

first time on 27.06.2013 by filing CRAN No. 608 of 2013, learned advocate of the appellant submitted that in view of the Amendment Act 33 of 2006, introduced in Juvenile Justice Act, 2000, the benefit of juvenility shall be extended to the appellant.

Learned advocate representing the State refuting the submissions raised by the appellant in this case supported the order of conviction and submitted that the learned Trial Judge was justified in placing reliance upon the testimony of father, mother and grandfather of the victim girl, whose testimony could not be procured by reason of her death occurred about two years after the incident, which was however, objectively testified by the medical evidence, adduced by PW-7 examining the victim girl first at the Emergency of the District Hospital at Barasat. Thus according to State respondent the medical examination report of the victim girl, proved by PW-7, marked as Exhibit-4 together with the Discharge Certificate issued by R.G. Kar Medical College and Hospital (Exhibit-7) and the medical examination report of the R.G. Kar Medical College and Hospital dated 26.10.1995 (Exhibit-8) would sufficiently and objectively prove the case of successful penetration upon the victim girl, entangling the accused to be the perpetrator of crime.

Learned advocate for the respondent/State further submitted that the prosecution as made out should not be disbelieved merely on account of non-examination of the victim together with non-recording of statement of the victim girl under Section 164 Cr. P.C., when there had been sufficient explanation offered, as revealed from the order sheet dated 18th November, 1995, of the Magistrate while attempting to record the statement of the victim girl under Section 164 Cr.P.C. It was thus, proposed that when the learned Magistrate supposed to be recording the statement of the victim girl had duly noted his observation in the order sheet describing the victim girl to be tender aged, suffering from shock yielding her trembling and weeping also rendering her to be incapable of giving any statement, such observation of the Magistrate should be treated to be sufficient explanation for not recording the statement of the victim and the same should not be doubted on this premise anymore. It was not the case that victim girl was deliberately suppressed from facing the witness box, as admittedly the victim girl left this world about two years after the traumatized incident.

Regarding plea of juvenility, it was proposed by the learned advocated for the respondent/State that though in course of examination under Section 313 Cr.P.C., the appellant described himself to be of 25 years old young man on 13.07.2012, thereby forfeiting his right to claim of juvenility any more, but the enquiry when having been held pursuant to the direction given earlier by the Division Bench of this Court, the plea of juvenility could be set at rest on the basis of enquiry report, if otherwise found to be acceptable.

We had the occasion to hear rival submissions raised by parties to this case with respect to their arguments and counter-arguments pertaining to the subject

under reference.

The points thus raised could be addressed by the discussion made hereinbelow.

The father of the victim girl PW-1 lodged FIR on 26.10.1995 at about 18.20 hrs. The date of occurrence was on 26.10.1995, at about 2.00-2.30 p.m. The father/complainant had studied up to Higher Secondary Examination, (revealed from cross-examination of the PW-1). At the relevant point of time PW-1 was watering the agricultural land with use of pump set. The house of PW-1 is situated not in close proximity with the place of occurrence. It is, however, intervened by a considerable distance. PW-1 on the fateful day of the incident was expecting arrival of his daughter taking lunch for him, supplied from his house, as ordinarily the meal of PW-1 used to be reached by his daughter during lunch time. PW-1/father became worried for his daughter not coming to field within the reasonable expected hours of arrival. The tension of the father then mounted up, consequently the father stopped the pump set and proceeded towards his house. The father on his way to his house, found his daughter weeping under papaya tree on a land belonging to Hemat Ali. The father found blood stain on her thigh and wearing apparels also. On interrogation, the PW-1/father could learn that appellant had committed rape on her. PW-3/mother on query similarly could learn after the occurrence, that appellant had ravished her daughter on her way to the field, where her father was watering the land for agricultural purpose, at a place, as disclosed by PW-1/father himself, already mentioned in the FIR. The bewildered parents then took their daughter to Panchayat member (PW-2/the scribe) and thereafter went to Barasat Hospital, wherefrom the victim girl was referred to R.G. Kar Medical College and Hospital.

PW-6 the grandfather of the victim girl, similarly could learn about the incident on being interrogated from the victim girl.

According to the appellant, the testimony of PW-1, PW-3 and PW-6 ought not to have been relied upon by the Trial Judge, being parents and close relative of the deceased, having their specific interest over the case and as such their testimony should be ignored being tainted with biasness.

Admittedly, the testimony of the victim girl could not be procured in this case, as she left this world about two years after the incident. Whether the victim suffered her death being traumatized or in consequence of the injury sustained, both physically and mentally, as a rape victim, which in our view, might be an extraneous consideration for the purpose of decision of this appeal, but the significant fact is that the parents of the victim like PW-1, PW-3 had their occasion first to know about the incident, and before whom the victim immediately after the occurrence made disclosure, naming the perpetrator of the crime including the place of occurrence and the manner in which she had been ravished. The parents thus gathered direct knowledge over the impact of forceful penetration caused by the appellant, to their daughter, found not only on the person of the deceased like thigh, but also on the wearing apparels of the

daughter, which were ultimately produced before the Investigating Officer for FSL examination and report.

The cross-examination of the PW-1 and PW-2 failed to shake the spontaneity and immediacy of the statement made by the victim girl to her parents disclosing the name of the perpetrator of the crime, which however, left no chance of fabrication. Such statement of the victim girl in the form of disclosure entangling the appellant to be a perpetrator of the crime being incidental and almost contemporaneous with the acts alleged requiring decision in this appeal, in the given circumstances of the case, would naturally pose a question begging answer from us as to whether the statement of the victim girl, whose evidence could not be procured by reason of her death, could become admissible under Section 6 of the Evidence Act or not.

Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. The purpose of incorporating Section 6 in the Evidence Act is to complete the missing link, in order to admit hearsay evidence.

Privy Council considered the extent up to which the rule of *res gestae* can be allowed as an exception to the inhibition against hearsay evidence in the case of *Teper v. R* [(1952) 2 All ER 447]. The observation made therein may be mentioned as hereunder:

"The rule that in a criminal trial hearsay evidence is admissible if it forms of the *res gestae* is based on the propositions that the human utterance is both a fact and means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

It would be profitable here for our present purpose to refer Section 6 of the Evidence Act which runs as follows:

"Relevancy of facts forming part of same transaction.-Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

The Apex Court in the case of *Gentela Vijayvardhan Rao vs. State of Andhra Pradesh* reported in (1996) 6 SCC 241 had the occasion to consider the principle behind the rule of *res gestae* evidence.

It was observed in such decision that the principle of law embodied in Section 6 of Evidence Act is usually known as *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected

with the fact in issue 'as to form part of the same transaction' that it becomes relevant by itself. This rule is an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be the part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication, then the statement is not part of *res gestae*.

In the case of *Sukhar vs. State of Uttar Pradesh* reported in (1999) 9 SCC 507, the Apex Court propounded the exposition of law laying down that the Section 6 of the Evidence Act is exception to the general rule, whereunder hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of the *res gestae* must have been made contemporaneously with the acts or immediately thereafter.

The Apex Court had further occasion to address such issue pertaining to *res gestae* in the case of *Bhairon Singh vs. State of Madhaya Pradesh* reported in (2009) 13 SCC 80, wherein it was propounded that to form a particular statement as a part of the same transaction, utterances must be simultaneous with the incident and/or substantially contemporaneous that is made either during or immediately before or after its occurrence.

Applying the ratio of the aforesaid cases to the evidence of PW-1 and PW-3, we are of considered view that we are not left with any hesitation in coming to the conclusion that the statement of victim girl made to her parents immediately after the occurrence, which was not only intimately connected with the fact in issue (the fact in issue being the victim girl was ravished by appellant), but was also instinctive reaction to the event of commission of sexual violence of an eleven (11) years old victim girl, inspired by the excitement of occasion, or spontaneous reaction thereof, and further such statement having made almost contemporaneously immediately after the occurrence noticing father/PW-1 coming towards her and thereby providing knowledge to him as to the commission of rape upon her including the name of perpetrator of such crime would necessarily become admissible under Section 6 of Evidence Act. Such statement of victim girl given to parents could not be taken to be mere narratives of past event being made almost contemporaneously immediately after the occurrence excluding the possibility of any deliberative fabrication and thereby forming a part of *res gestae* under Section 6 of Evidence Act.

The natural effusion of a statement of excitement, revealed from the disclosure of the victim girl to her parents spontaneously and immediately entangling the

appellant, as disclosed by PW-1 and PW-3 would inevitably inspire confidence. The Trial Judge though relied upon the testimony of the PW-1, PW-3, PW-6 describing it to be consistent, coherent, corroborative, truthful and convincing, but failed to take notice of the provisions of Section 6 of the Evidence Act, rendering the testimony of PW-1 and PW-3 at least to be inherently probable upon applying the tests of *res gestae* evidence.

The Doctor in the Emergency of District Hospital at Barasat first examined the victim girl on 26.10.1995 at about 7.30 p.m. for her profuse bleeding from vagina with history of rape by the appellant. The name of the appellant, however, stood recorded in the injury report provisionally prepared at first time in the Emergency of Barasat District Hospital, marked as Exhibit-4, what was earlier disclosed by the victim girl to her father immediately after the occurrence. Since, the vaginal bleeding of the victim girl could not be brought under control after getting her admitted in the hospital, she was referred to R.G. Kar Medical College and Hospital for better medical attention and management. She was discharged on 01.11.1995 from the hospital for her sufferings caused from vaginal injury consequent upon sexual assault. The sufferings of the victim girl was in consequence of sexual assault giving rise to her vaginal bleeding, and the same was successfully noted in the discharge certificate (Exhibit-7). In the medical examination report of the victim (marked as Exhibit-8) slight hymeneal abrasion was detected without any evidence of causing external injury in the private parts of the victim girl. In the cross-examination to Doctor (PW-7), a suggestion was put to Doctor whether vaginal bleeding was possible during menstruation or falling from hard surface, which was replied in affirmative. In the absence of any case being developed during cross-examination, even by putting suggestion to witnesses in the form of denial examined by prosecution, that the victim girl had the occasion to fall down from hard surface during her menstrual period, there could not be any reasonable nexus between the suggestion given to the doctor with that of the Hymeneal abrasion found in the private parts of the victim, said to be the prime case of uncontrolled profused bleeding from the vagina. The testimony of PW-1 and PW-3 being reliable on application of the tests as laid down in Section 6 of the Evidence Act, received substantial objective ratification and corroboration from the medical evidence, testified by PW-7 and medical documents, marked as Exhibit 4, 7 and 8 respectively. Non-appearance of semen found on the wearing apparels of victim girl would be without any significance, because proof of forceful penetration is *sine qua non* to the proof of charge under Section 376 I.P.C. though sent for FSL and report. Prosecution case would not be rendered improbable vide Exhibit-9, because forceful penetration being the prime criteria for determination of offence of rape, absence of semen would not cause much help to appellant.

The settled proposition of law is that merely because a victim is dead and consequently could not be examined can never be a ground of acquittal, if there is otherwise evidence available, proving the criminal act of accused concerned. Such proposition of law came to be decided by the Apex Court in the case of

State of Karnataka vs. Mahabaleshwar Gourya Naik reported in AIR (1992) SC 2043 as referred by the State respondent. In our considered view, the omission of a rape victim to narrate the incident of rape, if goes clearly explainable, could not be taken to be fatal for the prosecution, simply because the victim was not examined to testify the allegation of having committed rape on her will not render the prosecution case to be thrown overboard, when there is sufficient evidence, as discussed hereinabove to connect the injury sustained in the private parts of the victim girl with that of the act complained of. On such premise, learned advocate state/respondent referring decision delivered in the case of Rafiq vs. State of Uttar Pradesh, reported in AIR 1981 SC 559, submitted that for want of corroboration of prosecutrix, the prosecution case could not be falsified on the ground that corroboration as a condition for judicial reliance on the testimony of prosecutrix is not a rule of law, but a guidance of prudence under given circumstances.

True it is that Trial Judge considered some of the judgments like (2012) 1 SCC (Cri.) 240 delivered in the case of Mohd. Imran Khan vs. State Government (NCT of Delhi), (2004) Cal. CrLR (Cal) 1993, (1996) 2 SCC 384 delivered in the case of State of Punjab vs. Gurmit Singh & Ors., AIR 2005 SC 2327 delivered in the case of State of Rajasthan vs. Biram Lal, 2003 Cri.LJ 962 delivered in the case of Prem @ Ballu vs. State of Haryana, 2008 Cri.LJ 3543, delivered in the case of Moti Lal vs. State of M.P. in order to fortify the conviction, wherein victim prosecutrix adduced her evidence, unlike the present case, but the same could not be allowed to operate as prime ground to dislodge the conviction, because what the Trial Judge did, he simply endeavoured to ascertain the principle and proposition of law, without caring about the applicability of such proposition of law over such facts. On applying our anxious consideration on the issues under reference, we are of our considered view that the conviction, as recorded by the learned court below cannot be shaken to doubt for making irrelevant adherence to such citations, not strictly applicable to the facts and circumstances of this case, when evidence is otherwise available to affirm the conviction relying upon some convincing evidence, placed on the record.

Argument was raised by the learned advocate for the appellant that the Trial Judge illegally proceeded to derive capital from a decision rendered in the case of State of Karnataka vs. Mahabaleshwar Gourya Naik (supra), in order to establish that merely because of non-examination of the victim or victim being died consequently could not be the ground of acquittal in the given set of circumstances. Referring paragraph 3 of such decision, learned advocate for the appellant endeavoured to distinguish such judgment from present text involved in this case submitting that in the referred case there was an eye witness like, PW-4, who found the convict standing there under a tree raising his underwear and seeing his appearance, the convict ran away from that place. Having relied upon such undemolished evidence of eye witness, like PW-4, the court proceeded to base conviction, even in absence of victim prosecutrix being examined in this case. The case in hand is bereft of any eye witness, like the factual matrix

covered in the case of State of Karnataka (supra). But the ratio decided in such case could be easily applied over the facts and circumstances of the case, as already relied upon by the State respondent in the instant case.

An attempt was made by the learned advocate for the appellant to discredit the testimony of PW-1, PW-3 and PW-6 by describing the same to be tainted with some biasness, but the significant fact is that there could not be any invariable rule that interested evidence can never form the basis of conviction, unless corroborated to a material extent in material particulars by independent evidence. PW-1, PW-3 and PW-6 by reason of their relationship with the victim girl are ordinarily natural witness, who may be close relative of the victim, but cannot be regarded as interested witness, in the absence of their any interest in having the appellant convicted for some animus or some other reason. In the cross-examination to witness, it was endeavoured to show the political rivalry between the parties which both PW-1 and PW-2 boldly refuted the suggestion, put to that effect during cross-examination.

Admittedly, the complainant party had their belief towards the political ideology of C.P.M party, while the accused had his liking and fascination towards opponent political party, namely Trinamool Congress. The cross-examination of the witnesses transpired nothing revealing nature and extent of political enmity and the gravity of political hostility between the parties, without which the plea taken by defense to have been falsely implicated is far from belief. In such background the testimony of PW-1 and PW-3 was rightly relied upon by the Trial Judge in convicting the appellant in the absence of any apparent infirmity or inconsistency found in their testimony adduced before the court.

While conducting rape trial, the court is expected to examine the broader probabilities of a case, not being swayed away by minor contradictions or insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape.

Such observation was made by the Apex Court in the Case of State of Punjab vs. Gurmit Singh reported in (1996) 2 SCC 384. In the absence of apparent infirmities or discrepancy, the prosecution story of having committed rape upon the victim girl, who is no more at this world, is believable being inherently probable, as established from the testimony of PW-1, PW-3 and PW-7(doctor examining the victim and furnishing medical report of the victim girl).

While making appreciation of the case in the perspective of broader probabilities after application of the test of close scrutiny of the testimony of PW-1, PW-3, if not PW-6, we are of considered opinion that the same is intrinsically reliable or inherently probable in the absence of any successful case being made out in the cross-examination.

The conviction thus, cannot be disturbed in any manner whatsoever for the discussion made hereinabove and as such the same must be sustained.

The juvenility was admittedly claimed for the first time in an appeal before this court on 27.06.2013, furnishing school leaving certificate of the appellant, issued on 07.08.2012, while the order of conviction was recorded on 30th July, 2012. The court for determination of the plea of juvenility called for a report from the Trial Judge, which held enquiry in terms of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the rules framed thereunder. In course of conducting enquiry by the Trial Court, the appellant was subjected to ossification test and as per ossification report, the appellant was less than seventeen (17) years but more than eighteen (18) years old on 26.10.1995 i.e., on the date of occurrence. The Division Bench of this court by its order dated 14.03.14 upon considering the decision of Hari Ram vs. State of Rajasthan reported in (2009) 13 SCC 211, proceeded to accept report so as to extend the benefit of the new Act, giving due treatment to him to be juvenile. Ultimately, on 31.03.2014 the appellant was directed to be released on bail after the submission of such enquiry report pertaining to the juvenility of the appellant.

Learned advocate for the appellant taking the plea of juvenility submitted that since the appellant was juvenile on the date of commission of offence, because he had not completed eighteen (18) years of age on the date of occurrence of offence, the appellant would be entitled to get the benefit of provisions under Section 2(l), 7-A, 20 and 64 of the Juvenile Justice Act, 2000. It was further argued by the appellant that according to Amendment Act 33 of 2006 in the Act, the benefit of of juvenility shall be extended to the appellant.

The Amendment Act 33 of 2006 came into effect from 1st April, 2001, which provides that a (Juvenile) means a person who has not completed eighteen (18) years of age as substituted for sixteen (16) years, which was earlier position under the old Act of 1986.

Reference was made by appellant to three decisions, out of which two were rendered by the Apex Court in the case of Amit Singh vs. State of Maharashtra & anr. reported in (2011) 13 SCC 744, in the case of Abuzar Hossain @ Gulam Hossain vs. State of West Bengal reported in (2012) 10 SCC 489 and a judgment delivered by Division Bench of this Court in the case of Aurangajeb Alam @ Guddu vs. State of West Bengal reported in (2007) 2 C Cr LR (Cal) 513 in support of plea of juvenility so as to get the protection of juvenility by reason of introduction of Amendment Act 33 of 2006, with effect from 1st April, 2001.

The court holding the enquiry doubted the school leaving certificate of the appellant, issued on 07.08.2012 , Ration Card of the appellant, issued on 30.08.1996 and the Voter's Identity Card, produced in course of the enquiry, for want of original birth certificate being produced together with the manipulation caused in the entry of the school while issuing school leaving certificate, evident from the conspicuous overwriting, found against the entry of name of the appellant. The appellant was subjected to ossification test, held on 29.11.2013. As per the ossification report, the age of the appellant was described to be less than seventeen (17) years, but more than seven (7) years on 26.10.1995, i.e,

the date of commission of offence. The enquiry for the determination of the age of the appellant in support of the plea of juvenility is supposed to be held under the provisions of Section 2(l), Section 7A read with Rule 12 of the Juvenile Justice Rules, 2007. The documents to be relied upon, while determining the age of a juvenile in conflict with law, have been specifically mentioned in Rule 12(3) (a) (i) (ii) (iii). None of the documents mentioned in Rule 12(3(a) being furnished, indicative of recording the age of the juvenile, the court conducting enquiry proceeded to make reliance upon the ossification test report of the appellant. Though the court conducting the enquiry failed to record a finding conspicuously in so many words in determination of the age of the appellant, as laid down under Section 7A of the Juvenile Justice Act, 2000, but in the absence of any other convincing documents being produced, the finding as to the age of the appellant on the date of commission of offence could be easily ascertainable and inferred also in context with the provisions, shown in Rule 12 of Juvenile Justice Rules, 2007.

A medical report in determination of age of a person is not conclusive in nature. After a certain age, it becomes difficult to determine age of a person on the basis of ossification test or other tests. The opinion of the Medical Officer is to assist the court and the report submitted by the Medical Officer assumes of an advisory character. Upon consideration of the limitation of the medical report pertaining to the age determination of a person, it is settled proposition of law that it should be given flexibility of two years on either side.

The enquiry report determining the age of a juvenile as per Rule 12 of Juvenile Justice Rules, 2007, shall be construed to be conclusive proof of age of a juvenile in conflict with law, now under reference. As has already discussed that the court conducting enquiry in the absence of convincing documents, doubted the documents produced for ascertaining the age of the appellant, providing sufficient reasons, so in the given set of facts, the court conducting enquiry had to place reliance on the ossification test report of the appellant, describing the appellant to be less than seventeen (17) years but more than seven (7) years on the date of commission of offence.

Now the point requiring decision is if such report could be safely considered or not.

A reference to Exhibit-8 (medical examination report of the victim girl held on 26.10.1995) would clear the doubt, surfaced on this field. The description of appellant including his age was recorded by the doctor according to the information furnished by the patient party, and in particular by the mother of the victim girl, while subjecting victim girl to medical examination. The doctor thus, while recording a sexual assault by appellant described the age of the appellant to be seventeen (17) years old. Such information indeed was furnished not at the instance of the convict appellant, but supplied at the instance of the mother (PW-3) of the victim girl. By doing necessary correlation of Exhibit-8 with that of the enquiry report, determining the age of the appellant on the basis of

ossification test report, the appellant could be safely taken to be a juvenile within the meaning of Section 2(l) of Juvenile Justice Act, 2000, and also in application of Amendment Act 33 of 2006, entitled to be protected as per ratio laid down in the case of Amit Singh (supra) as rightly referred by the appellant, extending the benefit of juvenility to a juvenile who had not completed age of eighteen years on 01.04.2001, and also further providing retrospectivity in its application to the Act. In view of the ratio laid down in the case of Abuzar Hossain @ Gulam Hossain (supra), the claim of juvenility could be raised at any stage even after the final disposal of the case. It thus could be raised for the first time before a court of appeal even after final disposal of the case. The right forfeiting the claim of juvenility as initially submitted by State respondent, is not an acceptable proposition of law. In view of the decision of Division Bench of this court rendered in the case of Aurangajeb Alam @ Guddu (supra), the benefit of margin of error goes in favour of the accused.

In the case of Amit Singh, the ratio decided by the Apex Court, in the case of Hari Ram vs. State of Rajasthan reported in (2009) 13 SCC 211 and a decision of Constitution Bench in Pratap Singh vs. State of Jharkhand reported in (2005) 3 SCC 551 were duly considered. The Constitution Bench in Pratap Singh's case held the benefit of juvenility cannot be extended to the person who has completed eighteen (18) years of age as on 01.04.2001, i.e, the date of enforcement of the Act. The legislature brought about Amendment Act 33 of 2006 in such background. After the decision of the Constitution Bench in Pratap Singh case, the Apex Court further in the case of Hari Ram (supra) considered the question of law in the light of Amendment Act 33 of 2006.

In the case of Hari Ram (Supra) the Apex Court decided the ratio observing that as per Sections 2(k), 2(l), 7-A of the 2000 Act and Rule 12 of the 2007 Rules read with Section 20 of the Juvenile Justice Act, 2000 as amended in 2006, a juvenile who had not completed eighteen years on the date of commission of the offence, is also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act. The said position has been re-emphasized by virtue of the amendments introduced in Section 20 of the 2000 Act whereby the proviso and Explanation were added to Section 20, which make it even more explicit that in all pending cases, including trial, revision, appeal and any other criminal proceedings in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile would be in terms of Section 2(l) of the 2000 Act, and the provisions of the Act would apply as if the said provisions had been in force when the alleged offence was committed.

Thus, upon applying the ratio of Amit Singh's case originating from the case of Hari Ram vs. State of Rajasthan (supra) the appellant would be entitled to get the benefit of protections under Sections 2(l), 7-A, 20 and 64 of the Juvenile Justice Act, 2000, because on the date of commission of offence, appellant was below eighteen (18) years of age as per definition of juvenile, found in Section

2(I) read with Section 7-A of the Juvenile Justice Act, 2000.

The only question, next fell for determination was if appellant could be referred to Juvenile Justice Board for appropriate sentence permissible under the Act even after maintaining the order of conviction or not.

By reason of the introduction of Section 7-A in the Juvenile Justice Act, 2000, with the aid of Amendment Act 33 of 2006 it is thus crystal clear that the prohibition upon the court for conducting trial of a juvenile for commission of an offence is absolute. There is no option but to deal with the juvenile in accordance with the provisions of the Juvenile Justice Act. Failure to do so would be contrary to the specific statutory provision and result in violation of statutory provisions and denial of legal protection to the juvenile.

Section 20 of Juvenile Justice Act, 2000 refers to case where a person had ceased to be a juvenile under the 1986 Act, but had not yet crossed the age of eighteen (18) years, then the pending case shall continue in the ordinary court as if the Juvenile Justice Act, 2000 has not been passed, and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Juvenile Board, who shall pass order in respect of the juvenile. Section 20 enables the court to consider and determine the juvenility of a person even after conviction by a regular court and also empowers the court while maintaining conviction to set aside the sentence imposed and forward the case to the Board concerned for passing sentence in accordance with the provisions of the Act.

In the case of Jayendra & anr. vs. State of Uttar Pradesh reported in (1981) 4-SCC 149, the Apex Court had the occasion to address the issue whether a convict appellant being twenty three (23) years of age on the date of the report of his juvenility plea could be sent to special home for serving out the sentence permissible to be awarded under Uttar Pradesh Children Act, 1951. Section 29 of Uttar Pradesh Children Act, 1951, has strong resemblance with Section 7-A of Juvenile Justice Act.

Section 29 provided that if the child was found to have committed an offence, punishable with imprisonment, the court may order him to send to an approved school, similar to a special home mentioned in Juvenile Justice Act, 2000, for a period of stay as will not exceed his attaining age of eighteen years. The Apex Court thus considered in such case, that he could not be sent to the approved school, when Jayendra was of twenty three (23) years age on the date of report of juvenility plea, in view of the provision of 29 of Uttar Pradesh Children Act, 1951.

Under such circumstances, the Supreme Court upheld the conviction of Jayendra and quashed the sentence imposed upon him and directed that he should be released forth with.

In the case of Bhoop Ram vs. State of Uttar Pradesh Reported in (1989) 3 SCC 1, a report was called for from the Trial Court to determine as to whether the accused was juvenile or not, which reported that the accused was not juvenile on the date of occurrence, but the court differing with the report came to the conclusion that the accused was juvenile on the date of offence and he was no longer a juvenile on the date of judgment of the court, and the sentence awarded against him was set aside, though conviction was upheld.

The principle and reasoning offered in the case of Jayendra & anr. (supra) were followed in the case of Bhoop Ram vs. State of Uttar Pradesh (supra), when it was found by the Apex Court that on the date of the consideration of the appeal by the Supreme Court, the appellant Bhoop Ram was aged more than twenty eight years (28) of age, and as such there was no question of his being sent to an approved school in accordance with the provisions of the Uttar Pradesh Children Act, 1951, for the purpose of his detention to serve out the sentence. The appellant thus, had crossed the maximum age of detention at the time of consideration of issue pertaining to juvenility. It was considered by the Apex Court that no fruitful purpose will be served by making reference of the order of conviction to Board even after sustaining the conviction.

In the case of Bharat Bhushan vs. State of Himachal Pradesh reported in (2013) 11 SCC 274, it was held that the accused claiming juvenility in murder trial convicts was required to be dealt with under Section 20 of Juvenile Justice Act, 2000, which required the High Court to record a finding about the guilt of the accused and to forward the juvenile to the Juvenile Board. It was also observed that reference to the Juvenile Board at the belated stage was not necessary for the appellant being thirty six (36) years old then and father of three children. In such circumstances, reference to the Juvenile Justice Board at that distant point of time was considered to serve no practical purpose.

In the instant case at hand, the enquiry report submitted by the court determining the age of the appellant went unchallenged by the State respondent. The Apex Court in the case of Vijendra Singh vs. State of Uttar Pradesh reported in (2017) 11 SCC 129, upon consciously taking note of the ratio decided in the case of Hari Ram (supra), maintained the order of conviction upon setting aside the sentence as regards one of the appellants, out of two appellants observing therein that remitting the matter to the Juvenile Justice Board would be without any significance, as the appellant, whose plea of juvenility was accepted, remained in custody for more than the maximum period for which he could have been detained to special home, and accordingly directed to be released from custody.

The appellant being below seventeen (17) years of age on the date of commission of offence was no longer a juvenile, when the order of conviction was recorded against him on 27.07.2012, though he was juvenile at the time of commission of crime, and the appellant could be presumably taken to be thirty four (34) years old approximately when the order of conviction was recorded

against him. Upon applying the ratio decided by the Apex Court as discussed in the aforementioned paragraphs, we are of considered view, that it will serve no practical purpose for such order of conviction being referred to Juvenile Justice Board in application of Section 20 of the Juvenile Justice Act, 2000, because the permissible limit of age upto which a juvenile in conflict with law could be detained in special home under Juvenile Justice Board has already been elapsed, so far the appellant is concerned.

We thus dispose of the appeal treating the appellant as juvenile on the date of commission of offence after sustaining the conviction but upon setting aside the sentence passed against him.

Urgent certified copy of this order, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary formalities.

Office is directed to send down lower court's record along with copy of the judgment for communication to the learned concerned court below through the concerned District Judge.

I agree.