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

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Date of Judgment: 22nd August, 2017

+ **CRL.A. 1526/2013**

TARA CHAND

..... Appellant

Through: Mr. Biswajit Kumar Patra, Adv.

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP for the State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') against the judgment dated 10.01.2013 by which the appellant has been held guilty for the offence under Sections 376 and 506 of the Indian Penal Code (hereinafter referred to as 'IPC'). Challenge is also made to the order on sentence dated 24.01.2013 by which the appellant has been sentenced to rigorous imprisonment for life and a fine to the tune of Rs.10,000/- for the offence under Section 376 of IPC, in default of payment of fine, simple imprisonment for a period of one month and for the offence under Section 506 of IPC, the appellant has been sentenced to rigorous imprisonment for a period of two years. Both the sentences were ordered to run concurrently.
2. The brief facts of the case as noticed by the Trial Court reads as under:

“2. The case of the prosecution is that on 3.5.2012 an information was received at Police Station Samaypur Badli from Baba Sahib Ambedkar Hospital, Rohini that a girl 'P' aged about 13 years, unmarried in a pregnant condition was got admitted in the hospital by her father. The said information was reduced into writing vide DD No.21A which was handed over to ASI Raj Devi who reached the hospital and collected the MLC of the victim and recorded her statement. In her statement to the police, the victim 'P' informed that her father was working as a Cook in a hotel and her mother was working as maid servant in kothies. According to the victim, about four-five months ago her Mause (uncle) Tara Chand started residing in their house and started working with her father as Cook. She further informed the police that they were residing in a tenanted room and she used to sleep along with her parents in the said room only and after her parents went off to sleep, her Mause Tara Chand used to wake her up and took her outside the room near the door where he used to commit rape upon her. She further alleged that Tara Chand used to threaten her not to disclose about the incidents to anybody or else he would kill her father. According to the prosecutrix 'P' out of fear she did not raise any alarm nor she informed her parents about the same but on 2.5.2012 she experienced pain in his stomach on which her father took her to Dr. Baba Sahib Ambedkar Hospital where she was treated.

(3) On the basis of the said statement of the prosecutrix 'P' the present case was got registered and investigations were commenced. There was a natural abortion suffered by the prosecutrix and hence the foetus could not be preserved but on account of the complications she was brought to the hospital where dilation and evacuation was completed samples of which product were taken, preserved and handed over to the Investigating Officer which were thereafter sent to FSL for examination. On 4.5.2012 the accused Tara Chand was arrested at the instance of the father of the prosecutrix who on interrogation admitted his involvement in the present case. During investigations the statement of the prosecutrix 'P' was recorded under Section 164 Cr.P.C. before the Ld. MM wherein she stood by her ground. After completion of

investigations charge sheet was filed against the accused Tara Chand in the Court”

3. To bring home the guilt of the appellant, the prosecution examined 13 witnesses in all. The statement of the appellant was recorded under Section 313 of Cr.P.C. whereby he stated that he had been arrested on the basis of wrong allegations and denied all the incriminating material against him. The appellant pleaded innocence and claimed to be falsely implicated in the present case. No evidence was led by the appellant in his defence.
4. Mr. Biswajit Kumar, learned counsel appearing on behalf of the appellant submits that the judgment of the Trial Court is based on surmises and conjectures and not based on cogent, clear or impeachable evidence. Counsel contends that the Trial Court had erred in not taking into consideration that the prosecution has not been able to prove its case beyond reasonable doubt. The order is contrary to the law and has resulted in gross miscarriage of justice. It is contended that the testimony of the victim is full of discrepancies and contradictions and cannot form the basis of conviction of the appellant. Counsel further contends that the testimonies of PW6 and PW7, being the father and mother of the prosecutrix respectively are hearsay evidence and thus cannot form the basis of conviction.
5. Learned counsel has strenuously urged that both PW6 and PW7 have testified that the victim along with her parents, brother and the appellant were all residing in one room and thus it is highly improbable that the appellant was able to lure the prosecutrix in the middle of the night to leave the room without her consent. It is contended that the victim has testified that her mother was suffering

from depression and used to take sleeping pills, while her father used to consume alcohol with the appellant and would then fall into deep sleep. In these circumstances, learned counsel for the appellant contends that the testimony of the brother of the victim would have been of utmost importance. However, the prosecution has chosen not to produce the brother of the prosecutrix in the witness-box.

6. Counsel further contends that, according to the prosecutrix, she was raped daily for a period of 2-4 months. It is highly unusual that after the repeated act committed by the appellant, the victim continued to reside in the same room and did not make any complaint. It is also highly unusual that there was no change in her behaviour which is evident upon reading the testimonies of PW6 and PW7 during cross-examination. All the factors clearly show that either the appellant has been falsely implicated or assuming, without admitting, the act was consensual in nature. Learned counsel has also relied upon the ossification test which was conducted, as per which it was opined that the girl was not less than 14 years of age and not more than 16 years of age. While relying upon the judgment of a Single Judge of Madhya Pradesh High Court in the case of *Akeel vs. State of Madhya Pradesh*, reported at *1997 SCC On Line MP 225*, learned counsel contends that the appellant should be given the benefit and the age of the prosecutrix based on the ossification test would be three years plus or minus which would show that she was a major and in a position to give consent.
7. *Per contra*, Mr. Rajat Katyal, learned counsel for the State submits that there is no infirmity in the judgment passed by the Trial Court. The Trial Court has carefully analyzed the testimonies of various

witnesses and reached the conclusion of the guilt. Mr. Katyal submits that the testimony of the parents of the victim is consistent in the manner how the victim had suffered stomach-ache and was taken to the hospital where she informed the nurses about her condition. Counsel also contends that the testimony of the victim is of sterling quality. Her statement made in Court, statements made under Sections 164 of Cr.P.C and 161 Cr.P.C. are consistent and thus it cannot be said that the conviction cannot be made on the basis of the sole testimony of the victim. Mr. Katyal further submits that the case of the prosecution stands fully established not only on the basis of the evidence of the prosecutrix and her parents but also stands established on the basis of the scientific evidence. The MLC of the prosecutrix stands proved by PW4 Dr. Hem Lata and the opinion rendered by the Medical Board was proved by PW11 Dr. Vineet Popli as Ex.PW11/A and also the DNA examination leaves no room for doubt that the prosecutrix was raped by the appellant herein.

8. Counsel has also highlighted the fact that the prosecutrix could not raise any alarm as she was threatened by the appellant that in case she would raise an alarm, he would stab her father. Mr. Katyal further submits that the appellant cannot derive any benefit out of minor discrepancies/contradictions which did not go to the root of the matter. Counsel further submits that the defence sought to be raised by the appellant today in Court cannot be pressed as the appellant has not cross-examined the prosecutrix on the ground that the act was consensual in nature neither such a defence has been raised in the statement recorded under Section 313 of Cr. P.C.

9. We have heard learned counsel for the parties and considered their rival submissions and also given our thoughtful consideration to the matter.
10. At the outset, it would be necessary to analyse the testimony of the prosecutrix who was examined as PW8.
11. The prosecutrix (PW8) testified in her examination-in-chief that her father was working as a cook in a hotel and her mother was working as a maid in *kothies*. PW8 testified that about four to five months prior to the incident, the appellant had come to Delhi and started living at their house at the instance of her *Mausi*. The appellant was unemployed and her *Mausi* pleaded with her father to get him employed somewhere. The father of PW8 got the appellant employed in the same hotel where he was working as a cook and the appellant started staying at their house. It was further deposed by PW8 that they were residing on rent in a room where they all used to sleep together. PW8 explained that there were two rooms in the house, out of which they were residing in one of the rooms, however, nobody was residing in the other room and was kept vacant. The remaining testimony of PW8 was in the form of question and answers which were put to the prosecutrix by the Trial Court. It was deposed by PW8 that the appellant used to commit *gandi harkat* with her. PW8 explained that when her parents went off to sleep, the appellant used to wake her up and ask her to come outside and there he used to commit rape upon her. It was put to PW8 as to whether she had informed this fact to anybody. The prosecutrix responded that she did not tell anybody as the appellant used to threaten her not to disclose the incident to anybody or else he would stab her father who used to come late at

night with the appellant. PW8 further deposed that one day she felt severe pain in her abdomen to which her father took her to the hospital where she was examined by the doctor and the incident of rape came to light. It was further deposed by PW8 that initially she did not tell anything to the doctor in the hospital but when the Doctor questioned her, she told everything to the Doctor about what the appellant used to do with her. The police was called by the Doctor. The statement of PW8 was recorded by the Police which was proved by her as Ex.PW8/A. After some days, she was produced before the Metropolitan Magistrate and her statement under Section 164 of Cr.P.C. was recorded which was proved as Ex.PW8/B. On a specific Court Question regarding how many occasions did the appellant made physical relations with her, to which she responded that the appellant made physical relations with her daily for a period of two to four months. The appellant was correctly identified by the prosecutrix in the Trial Court as her *Mausa*.

12. In her cross-examination PW8 admitted that she alongwith her parents, brother and the appellant used to sleep in one room. PW8 stated that the appellant used to do *galat kaam* with her in the room which is on the front side. It was voluntarily explained by PW8 that the said room remained vacant and nobody used to reside in the same. It was observed by the Trial Court that PW8 had explained that she and her family were residing as tenants in one room whereas the other room was vacant and nobody was residing there. PW8 further stated that when the appellant used to wake her up in the night, nobody from her family had ever come to know about the same. It was voluntarily explained by PW8 that her mother used to take sleeping pills during

the night for the treatment of her depression and therefore her mother did not ever come to know about what was happening. PW8 also stated that her father did not ever realise what was going on during those nights and had voluntarily explained that her father and the appellant used to take alcohol together before sleeping and therefore her father never came to know about what had happened during those nights. PW8 further stated that she did not raise any alarm when the appellant used to take her out and had voluntarily explained that PW8 was extremely scared because whenever she tried to object, the appellant used to show her a knife. PW8 did not tell any of her friends in the school or her class teacher or any other teacher, as to what the appellant was doing with her. It was voluntarily explained by PW8 that at that time she was new in the school and did not know anybody there. It was also stated by PW8 that on one occasion she had tried to tell her mother about the incident but her mother refused to believe and stated that the appellant used to love her and take good care of her because the appellant used to give her chocolates and *chowmin* to eat. The appellant used to drop her to the school in the morning. In the evening, PW8 used to go for tuition classes. It was voluntarily explained by PW8 that she used to go for her tuitions alone. PW8 had denied that she had made physical relations with some other person and when her parents came to know about the same, in order to save their honour, they had falsely implicated the appellant. She further denied that she has deposed falsely to implicate the appellant at the instance of her parents.

13. PW6 Joginder (father of the prosecutrix) testified in his examination-in-chief that he was a Cook by profession and his wife namely Anju

Arya @ Hansi Devi (PW7) used to work as a Maid in the *Kothies*. On 01.05.2012 at about 1:00 AM in the night, his daughter 'P' complained pain in her stomach and took his daughter to Baba Sahib Ambedkar Hospital, Delhi. His daughter was bleeding from her private parts and was examined by the doctors. The doctor informed PW6 that his daughter was pregnant and it was a case of rape. His daughter was admitted in the hospital for about nine to ten days and was medically treated. After one day of admission of his daughter in the hospital, police came in the hospital and recorded his statement whereby it was alleged by her that the appellant had committed rape upon her. The site plan was prepared at the instance of his daughter. The statement of his daughter was recorded before the Metropolitan Magistrate, Rohini Court. The appellant was arrested on 04.05.2012 and was interrogated by the Police officials. PW6 testified that in the year 2007, his daughter was admitted in MCD Primary School, Rohini, in first standard and her date of birth was recorded as 02.04.2002. Before 01.05.2012, the appellant was residing with them for the last seven-eight months. The appellant was duly identified by PW6 in the Trial Court.

14. In his cross-examination, PW6 stated that he was residing as a tenant and there were only two rooms on the second floor. PW6 stated that he along with his family members i.e. his wife, daughter 'P' and son Kuldev and the appellant used to sleep in the same room. It was further stated by PW6 that he came to know about the pregnancy and the rape of his daughter from the doctors and later his daughter had disclosed the same to him. PW6 admitted that prior to the incident his daughter never informed him about any kind of misbehaviour by the

appellant nor he noticed any abnormality in her conduct. It was also admitted by PW6 that he had no suspicion on his daughter or on the appellant or anybody before the incident came to light. PW6 denied that he had enmity with the appellant and due to which he falsely implicated him in the instant case.

15. PW7 Anju Arya @ Hansi Devi (mother of the prosecutrix) testified in her examination-in-chief that she used to work in the *Kothies* as a Maid and her husband used to work in the Hotel as a Cook. She further testified that the appellant used to reside with them for about four to five months prior to the date when her daughter made complaint to them regarding the pain in her stomach. On the first day of May of the year 2012, her daughter complained pain in her stomach. At about 10-11 PM, her husband (PW6) alongwith the appellant returned to home when she informed her husband about the condition of the prosecutrix. Thereafter, her daughter complained severe pain in her stomach and was taken to a Government Hospital i.e. Baba Sahib Ambedkar Hospital in Rohini where her daughter was admitted and was medically examined by the doctors. Her daughter remained in the hospital for about nine days. The doctor informed them that her daughter was pregnant and had been raped. The hospital authorities further informed the police officials after her daughter informed nurses that the appellant committed rape upon her. PW7 further deposed that her daughter did not tell her anything and she only came to know from the nurses that her daughter was being raped by the appellant. On 03.05.2012, Police came to the hospital and made inquiries from her daughter. The statement of her daughter was recorded by the Police whereby she alleged that the appellant

committed rape upon her. PW7 further deposed that her daughter was discharged from the hospital after a period of nine days. The appellant was duly identified by PW7 in the Court as the husband of her younger sister.

16. In her cross examination, PW7 stated that her age at the time of her deposition in Court was around 35 years and she was married around 16 years before her deposition. The prosecutrix was her eldest child and was born at home after three years of her marriage in Delhi. No information was given to *Anganwari* or to the Municipal Corporation and thus there was no authentic date of birth certificate of her daughter. PW7 further stated that her daughter was seven to eight years of age when she got admitted in the school. The husband of PW7 had given the information with regard to the date of birth of her daughter. PW7 failed to state the date of birth of her daughter which was recorded in the school records nor did she recollect in which year the prosecutrix was born. PW7 further stated that her daughter was around 13 years of age. PW7 denied that she was deposing wrong age of her daughter by five to six years or that her daughter is more than 18 years of age. PW7 further stated that she was doing the work in Kothies as a maid and her daughter did not accompany her. She had two children i.e. one daughter and one son. PW7 used to leave her house at about 7.00-8.00 AM and returned by 5.00-6.00 PM. It was further stated by PW7 that the prosecutrix used to leave the house by 8:00 AM and used to return at about 2:00 PM and thereafter left for tuitions at 3:00 PM. PW7 admitted that she was not at home when 'P' used to return from the school and also when she used to return from tuitions and has voluntarily explained that she used to return at about

4:30 PM. The daughter of PW7 used to go for tuitions along with one Madam and used to return with her husband. However, she could not tell the name of the Madam. PW7 denied that the prosecutrix used to go for tuitions alone along with her other friends. PW7 admitted that she could not tell with whom the prosecutrix used to go in her absence and had voluntarily explained that she only knew that she went for tuitions. PW7 stated that prior to the time when they took her daughter to the hospital, the prosecutrix neither told her anything nor did she notice any abnormality in her behaviour and conduct. It was voluntarily explained by PW7 that she was totally normal. PW7 admitted that she never had any suspicion on the appellant nor on her daughter till she was taken to the hospital for treatment where they came to know that her daughter was pregnant. PW7 denied that the appellant had been falsely implicated by her and her husband or that the prosecutrix had named the appellant on their tutoring because they were inimical to the appellant.

Medical Evidence:

17. PW4 Hemlata had proved the MLC of the prosecutrix as Ex.PW4/A, which was prepared by Dr. Roshini Aggarwal. As per the MLC, the prosecutrix was brought to the hospital by her father Joginder (PW6) on 02.05.2012, at about 1:30 AM as she was complaining pain in her abdomen and bleeding per-vagina from five days and history of passage of some fleshy mass per vagina at home. During her medical examination, the UPT of the prosecutrix was found positive but her parents did not give any history pertaining to the sexual or physical assault. On local examination, there was slight bleeding per vagina,

her hymen was torn, cervical OS was closed and uterus was found ante-verted. The prosecutrix was admitted in the hospital for further dilation and evacuation and the evacuated material was preserved and handed over to the Investigating Officer. As per the MLC the prosecutrix was found fit for the statement on 02.05.2012 at about 1:34 AM.

Forensic Evidence:

18. PW13 A.K. Shrivastava, Deputy Director (Biology), DNA Fingerprinting Unit, FSL, Delhi testified that on 18.12.2012 two parcels were received by him for the examination. The parcel No.1 was containing blood sample and blood in gauze of the appellant which was marked as Ex.1a and Ex.1b respectively. The parcel No.2 was containing the POC kit and three pads in normal saline of the prosecutrix which was marked as Ex.2a and Ex.2b respectively. On DNA profiling, one set of alleles of the source of Ex.1a and Ex.1b are accounted in the alleles of the source of Ex.2a and Ex.2b. As per the report, one set of alleles from the source of Ex.2a and EX.2b are similar with one set of alleles of the source of Ex.1a and Ex.1b. The detailed report of PW13 was proved by him as Ex.PW13/A and the Genotype Data Table was proved as Ex.PW13/B.
19. As to the age of the prosecutrix, the prosecution has relied upon the opinion rendered by the Medical Board (Ex.PW11/A) and the testimony of PW5 Renu Bhatnagar, Principal of MC Primary School, Sector-18 Rohini who had brought the relevant documents pertaining to the prosecutrix.

20. PW11 Dr. Vineet Popli testified that on 29.06.2012, the prosecutrix was produced before the Medical Board for her age determination/ossification test. The Medical Board comprised of Dr. Rajeev Ranjan (Radiologist), Dr. Jitender Singh (Ortho Surgeon), Dr. Vijay Dhankar (HOD, Deptt. of Forensic Medicine) and Dr. Kunwar Sanjay Kumar (Dental Surgeon). The detailed report of the Medical Board was proved as Ex.PW11/A as per which the approximate bone age of the prosecutrix was more than 14 years but less than 16 years.
21. PW5 Renu Bhatnagar deposed that as per the admission record, the prosecutrix was admitted to their school on 06.07.2007 in first standard and her name was found mentioned at serial No. 5936. As per the records, the date of birth of the prosecutrix was 02.04.2002. The copy of the admission register, the copy of the admission form which was filed by Joginder (PW6) in respect of the admission of the prosecutrix and the copy of the affidavit filed by Joginder with regard to the date of birth of the prosecutrix was proved by PW5 as Ex.PW5/A, Ex.PW5/B and Ex.PW5/C respectively. PW5 also proved a certificate with regard to the date of birth of the prosecutrix as Ex.PW5/D. In her cross-examination, it was admitted by PW5 that PW6 Joginder did not submit any date of birth certificate of the prosecutrix from any local authority at the time of her admission and also admitted that the date of birth of the prosecutrix was recorded on the basis of the affidavit filed by her father.
22. At this stage, it would be relevant to mention Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which reads as under:

“12. Procedure to be followed in determination of Age:

...
(3) *In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:*

- (a) (i) *the matriculation or equivalent certificates, if available; and in the absence whereof;*
(ii) ***the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;***
(iii) *the birth certificate given by a corporation or a municipal authority or a panchayat;*

*(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering **his/her age on lower side within the margin of one year.***

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”—

23. It would be useful to refer the observations made by the Supreme Court of India in the case of **Ashwani Kumar Saxena vs. State of Madhya Pradesh**, reported at (2012) 9 SCC 750, the relevant para 43 reads as under:

“43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of

evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.”

(Emphasis Supplied)

24. In the case of ***Mahadeo vs. State of Maharashtra*** reported at (2013) **14 SCC 637**, the Apex Court made reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The relevant para 13 reads as under:

“13. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.”

(Emphasis Supplied)

25. We may profit with the view taken in the case of ***Uday Kumar Yadav vs. State (NCT) of Delhi*** reported at **2015 SCC Online Delhi 7255**, of which one of us (G.S. Sistani, J.) was a member wherein the Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 was considered and it was categorically held that clause (b) of sub-Rule 3 of Rule 12 makes it abundantly clear that only in the absence

of (i), (ii) and (iii) of clause (a) the medical opinion is to be sought from a duly constituted Medical Board.

26. Reliance has been placed by the learned counsel for the appellant on *Akeel's* case (*supra*). We find the facts of the case relied upon are different wherein the prosecutrix had admitted in her Court testimony that she had gone with the accused voluntarily and the accused had intercourse with her and there was no compulsion. The para 6 and 7 relied by the counsel read as under:

“6. To appreciate the rival submission raised at the Bar, I have perused the impugned judgment and closely scrutinised the evidence on record with the assistance of the learned counsel for the parties. The prosecutrix who has been examined as PW 4, has categorically asserted that she had gone with the accused voluntarily and the accused had intercourse with her and there was no compulsion. As there was consent on the part of the prosecutrix it is not necessary to consider whether there has been sexual intercourse or not. However, on a perusal of the materials on record, there is no iota of doubt that the accused had sexual intercourse with the prosecutrix.

For determination of the age of the prosecutrix, the learned trial Judge has placed reliance on the school leaving certificate. He has also taken into consideration the evidence of the Doctor, PW-7 and the radiologist, PW-9 to arrive at the conclusion that she was below 16 years. Mr. Pandey, learned counsel for the appellant has strenuously urged that PW-9, the radiologist in his report (Ex. P-6) has opined that the girl was above 16 but below 17 years of age. He has also contended that from the school admission register it appears that the victim girl was more than 13 years and 9 months. The submission of the learned counsel for the appellant is that once a report has been given by the doctor, emphasis should not have been given on the oral evidence by the Court to arrive at the conclusion that the age of the prosecutrix is below 16 years of age. On a perusal of the evidence of PW-9 it

is apparent that he has opined in his report that the victim girl is between 16 to 17 years of age. Ossification test is one of the tests to find out the age. It is well known that the determination of age by ossification test is neither absolute nor exact. The High Court of Orissa in the cases of Srilatcha Kumari v. State of Orissa, (1993) 6 O.L.R. 661 and Bishnudas v. State of Orissa, (1996) 11 O.L.R. 602 have held that variation of age in the ossification test can be upto 3 years in either way. The High Court of Bombay in the case of Balasaheb v. The State of Maharashtra, 1994 CrL. L.J. 3044, after referring to Modi's Medical Jurisprudence and Toxicology (First Edition) expressed thus:

“It is observed that the error in the case of age based on ossification test may be three years.”

It is also noticed that the learned trial Judge has placed reliance on school leaving certificate. The said document cannot form the basis to determine the age, as the guardians have a tendency to understate the age of their children at the time of admission in the school. This view of mine gains support from the decisions rendered in the cases of Brijmohan Singh v. Priyabrata Sinha, AIR 1965 SC 282, and Bishnudas Behra v. State of Orissa, 1997 CrL. L.J. 2207.

As indicated above, the doctor has already opined that the victim girl was between 16 to 17 years of age. No doubt there can be an error in the periphery of three years. But the benefit of the error has to go in favour of the accused in view of other obtaining circumstances.

7. The learned trial Judge has scrutinised the oral evidence to arrive at the conclusion that the victim girl is below 16 years. Taking into consideration the opinion under Ex. P-6 and the permissible margin, I am of the considered view that the determination with regard to the age of the prosecutrix does not appear to be correct. It can be safely concluded that at the time of occurrence the girl was more than 16 years of age. Once it is determined that the victim is more than 16 years and

there was free consent, the question of commission of offence under section 376 does not arise”

(Emphasis Supplied)

27. We are of the view that the case of *Akeel's (supra)* as relied upon by the counsel for the appellant does not apply in the given facts and circumstances of the case and the observations made by the Hon'ble Supreme Court in the case of *Mahadeo* and *Ashwini Kumar Saxena's* case (*supra*) would apply in the facts of this case.
28. Furthermore, in view of the *Mahadeo's* case (*supra*), we are of the view that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 extracted hereinabove, is applicable in determining the age of the victim of rape. In this regard, the testimony of PW5 Renu Bhatnagar (Principal, MC Primary School) assumes importance. As per her evidence, the date of birth of the prosecutrix has been mentioned as 02.04.2002 in the school records. The copy of the admission register, the copy of the admission form and the copy of the affidavit filed by her father with regard to the date of birth of the prosecutrix was proved by PW5 as Ex.PW5/A, Ex.PW5/B and Ex.PW5/C respectively. PW5 had also proved a certificate with regard to the date of birth of the prosecutrix as Ex.PW5/D. No suggestion had been put to PW5 with regard to the entries mentioned in the school records. The said date of birth also finds support from the testimony of PW6 Joginder (father of the prosecutrix), whereby the date of birth of the prosecutrix was stated as 02.04.2002 and had gone unchallenged in his cross-examination.

29. Therefore, the argument of the appellant that the certificate tendered by the father of the prosecutrix at the time of her admission in school and also the certificate issued by the school authorities showing the date of birth of the prosecutrix cannot be relied is erroneous and not convincing. Thus, we believe the date of birth of the prosecutrix as 02.04.2002. Even otherwise, as per the Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, '*In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering **his/her age on lower side within the margin of one year***'. Thus, the margin of only one year has to be considered while calculating the age of the minor.
30. We may also notice the view taken in the case of ***Dildar Singh vs. State of Punjab***, reported at (2006) 10 SCC 531, wherein the mother of the prosecutrix came to know about the rape of her daughter after 3 months had elapsed and the symptoms of pregnancy were shown by her daughter. The Apex Court upheld the concurrent finding of the Trial Court and the High Court and maintained the conviction of the accused under Sections 376 and 506 of IPC. The relevant para 7 reads as under:

"7. In the instant case, the girl was a minor below the age of 16 years. She was studying in Class VIII and the appellant was the drawing teacher of that class. It is no doubt true that the prosecutrix did not report the incident to anyone either on the first occasion or on the second. Ultimately a stage was reached when she could not keep it a secret since her mother discovered that she was pregnant. In these circumstances, she was compelled to disclose the true facts. Having regard to the facts and circumstances of the case, we do not find any

infirmity in the reasoning of the High Court and the conclusion reached by it.”

(Emphasis Supplied)

31. It has been strongly urged before us by the counsel for the appellant that the testimony of the prosecutrix is full of discrepancies and contradictions and cannot form the basis of conviction of the appellant.
32. Prior to dealing with the said argument, we deem it appropriate to revisit the law relating to conviction of the accused on the basis of the sole testimony of the prosecutrix in a rape case.
33. It is a settled proposition of law that an order of conviction for an offence of rape can be sustained on the sole testimony of the prosecutrix, provided the same is of sterling quality leaving no shadow of doubt over her veracity. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in **Rohit Bansal v. State**, reported at **2015 SCC Online Delhi 9937**, had observed as under:

“18. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence. The statement of the prosecutrix is more reliable than any other witness. Where the testimony of victim of sexual assault instills [sic: instils] the confidence in court, the same can be relied for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance to prudence under the given circumstances.”

(Emphasis Supplied)

34. It would also be useful to refer the case of *State of M.P. v. Dayal Sahu* reported at (2005) 8 SCC 122, wherein the Apex Court observed that where the statement of the prosecutrix inspires confidence, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. It was further observed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. The relevant para 14 reads as under:

“14. A plethora of decisions by this Court as referred to above would show that once the statement of the prosecutrix inspires confidence and is accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities.”

(Emphasis Supplied)

35. In a recent case of *State of Himachal Pradesh v. Sanjay Kumar*, reported at (2017) 2 SCC 51, the Apex Court convicted the accused for the offences under Sections 376(2)(f) and 506 of IPC and restore the conviction recorded by the Trial Court. The relevant para read as under:

“17. Another argument of the defence before the trial court was that it was impossible that such an incident would have occurred in the house where so many family members lived. In such circumstances, it could not be believed that the respondent would have taken the prosecutrix to the room on the first floor and committed sexual intercourse. This argument was also brushed aside by the trial court pointing out that, in her cross-examination, the prosecutrix has stated that the incident had taken place in the morning hours, around 8.00 a.m. to 9.00 a.m. Female members of the family returned back to the house after one hour of the incident. The prosecutrix had stated that she had not disclosed about the incident to anyone since the respondent had threatened to kill her and also did not disclose to her mother on phone, out of fear. She was not conversant as to how to make a call on phone. The Sessions Court found that the testimony of the prosecutrix appeared to be true. It could not have been expected of a child of tender age to narrate the incident or share the happening with her to anyone when she had been put under fear by the accused. Even she could not disclose this incident to her mother. Her testimony that she did not disclose to her mother out of fear on phone appeared probable to the Sessions Court, keeping in view her tender age.

18. Concluding that the deposition of the prosecutrix was found to be credible and trustworthy, which was sufficient to convict the accused person even in the absence of any corroboration, insofar as the present case is concerned, the medical evidence supported her version. On this basis, conviction of the respondent was recorded under Sections 376(2)(f) and 506 IPC.

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22. We have already narrated the case of the prosecution as well as the testimonies of the prosecutrix, her mother PW 1 and the medical evidence. After going through the evidence of the prosecutrix and her mother, we find that apart from some minor and trivial discrepancies with regard to the period of stomach ache or about the medicine taken from the local doctor/chemist, insofar as material particulars of the incident are concerned, version of both these witnesses is in sync with each other. Here is a case where charge of sexual assault on a girl aged nine years is levelled. More pertinently, this is to be seen in the context that the respondent, who is accused of the crime, is the uncle in relation. Entire matter has to be examined in this perspective taking into consideration the realities of life that prevail in Indian social milieu.

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30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about

significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims.

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P. [Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551]. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.

32. From the evaluation of the prosecution material discussed above, it is abundantly clear that the evidence brought on record contains positive proof, credible sequence of events and factual truth linking the respondent with rape of the prosecutrix and had criminally intimidated her. Hence, the respondent is found to be guilty for offence under Sections 376(2)(f) and 506 IPC since he committed rape with a minor girl aged nine years.... ”

(Emphasis Supplied)

36. Applying the law laid down in the aforesaid judgments to the facts and circumstances of the present case, we are of the view that non-examination of brother of the witness had not dented the case of the prosecution. We believe the statement of the prosecutrix as true since it was supported by the medical and scientific evidence on record. It was found to be trustworthy and not shrouded with any doubt. The next argument raised by the counsel for the appellant that it was highly improbable that the appellant was able to lure the prosecutrix in the middle of the night to leave the room without her consent. In this regard, it is evident from the results of the ossification test that the victim was not less than 14 years and not more than 16 years of age. The reading of the ossification test would show that the prosecutrix was less than 16 years. In this background, the plea of consent raised by the counsel for the appellant cannot be entertained at all. We also find force in the argument raised by the counsel for the State that the appellant is not allowed to raise the defence of consent at this stage as the appellant has failed to cross-examine the prosecutrix on this ground and neither such a defence has been raised in the statement

recorded under Section 313 of Cr.P.C. Thus, the said argument was also not found to be convincing.

37. Having considered all the aspects of the matter, we find no infirmity in the judgment and order on sentence passed by the learned Trial Court which would require interference by this Court. We uphold the conviction and sentence awarded by the Trial Court. There is no merit in the present appeal. Accordingly, the appeal stands dismissed.
38. Trial Court record be sent back.

G. S. SISTANI, J.

CHANDER SHEKHAR

AUGUST 22, 2017
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