

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.573 OF 2017

YOGESH GOPAL CHAVAN)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.530 OF 2017

DEEPAK NARAYAN SOLANKI)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Harshavardhan Salgaonkar a/w. Mr.Harshad Bhadbhade,
Advocates for the Appellant in Criminal Appeal No.537 of 2017.

Mr.Vijay Desai, Advocate for the Appellant in Criminal Appeal
No.530 of 2017.

Mrs.M.R.Tidke, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 14th DECEMBER 2018

ORAL JUDGMENT :

1 Criminal Appeal No.573 of 2017 is filed by appellant/accused no.1 Yogesh Chavan whereas Criminal Appeal No.530 of 2017 is filed by appellant/accused no.2 Deepak Solanki. By these appeals, they are challenging the judgment and order dated 27th April 2017 passed by the learned designated Judge under the Protection of Children from Sexual Offences Act, 2012, for Greater Mumbai in POCSO Special Case No.385 of 2015. By this judgment and order, appellant/accused no.1 Yogesh Chavan is convicted of offences punishable under Sections 376 and 506 of the Indian Penal Code apart from the offence punishable under Section 6 of the POCSO Act. For the offence punishable under Section 376 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.10,000/- and in default, to undergo further rigorous imprisonment for 2 months. Similar sentence is imposed on him for the offence punishable under Section 6 of the POCSO Act. For the offence punishable under Section 506 of the Indian Penal Code, the appellant/accused no.1 is sentenced to suffer rigorous

imprisonment for 2 years apart from direction to pay fine of Rs.2,000/- and in default, to undergo further rigorous imprisonment for 1 week.

2 By the impugned judgment and order, appellant/accused no.2 Deepak Solanki is convicted of offences punishable under Section 354 of the Indian Penal Code and under Section 8 of the POCSO Act. He is sentenced to suffer rigorous imprisonment for 3 years apart from direction to pay fine of Rs.5,000/- and in default to undergo further rigorous imprisonment for 1 month, for the offence punishable under Section 354 of the Indian Penal Code. Similar sentence is imposed on him for the offence punishable under Section 8 of the POCSO Act. The learned trial court had directed that substantive sentences shall run concurrently.

3 Briefly stated, facts leading to the prosecution of the appellants/accused persons and the resultant sentence can be summarized thus :

- (a) Case of the prosecution, as reflected from the First Information Report (FIR) dated 20th May 2015, Exhibit 13, lodged by the victim female child/PW2 is to the effect that after death of her father in the year 2012, she herself, her brother Harsh (juvenile in conflict with law) and her mother were residing at Room No.45, Near Nagina Masjid, Tardeo, Mumbai. Her brother was addicted to liquor and narcotic drugs. He used to beat her as well as her mother and was demanding money. The victim female child/PW2 in her FIR further averred that in the year 2013 when she was sleeping on the mezzanine floor of her house i.e. Room No.45, her brother Harsh (juvenile in conflict with law) came there, tied her mouth by handkerchief and her hands by means of a rope. He, then, kissed her, assaulted her and left. She further averred in her FIR Exhibit 13 that from January 2015 she started working with Cipla Company on salary of Rs.5,000/-. It is further averred that in March 2015, her brother Harsh gave some Chinese food to her and forced her to eat it. She, then, slept and in the morning noticed that

there were no clothes on her person. Her vagina was aching. She came to know that her brother committed rape on her. She informed this fact to her mother, who ignored it. The FIR Exhibit 13 lodged by the victim female child/PW2 contains further averments which are related to appellant/accused no.2 Deepak Solanki. She stated that on 17th March 2015, at about 2.00 a.m., appellant/accused no.2 Deepak Solanki came to her house for drinking liquor. Thereafter, her brother left the house for bringing eatables. Then appellant/accused no.2 Deepak Solanki started pulling her towards him and he was touching her breasts. Her mother then gave understanding to appellant/accused no.2 Deepak Solanki.

- (b) So far as appellant/accused no.1 Yogesh Chavan is concerned, averments in the FIR Exhibit 13 against him are to the effect that on 7th April 2015, the victim female child/PW2 went to the Girgaum Chowpatty along with her friend. As they were late at the chowpatty, she told her

friend to reach her to the house of her maternal aunt at Lower Parel. When she went to the house of her maternal aunt at Lower Parel, she came to know that her maternal aunt has gone out of station. However, husband of her maternal aunt i.e. appellant/accused no.1 Yogesh Chavan was present in the house. He asked her to come inside and sleep. Then her friend went away. She slept in the house of appellant/accused no.1 Yogesh Chavan. When she was sleeping, he pressed her mouth and committed rape on her. He threatened her that if the incident is disclosed to anybody, he will commit suicide.

- (c) The victim female child/PW2 in her FIR Exhibit 13 further averred that on 10th April 2015, she disclosed the incidents to her friend Priyanka Patil and as per her advise, she got herself admitted to Children's Home at Dongri on 10th April 2015. As she was frightened, she disclosed to the Probationer Officer named Ravi that she went to stay in the Children's Home as her brother beats her. On 1st May 2015

she disclosed all events to Vasanti More, Deputy Superintendent of the Children's Home. She was then sent to J.J.Hospital, Mumbai, for medical examination. This FIR was lodged by the victim female child/PW2 in presence of PW6 Chaya Mutha, Probationer Officer of the Children's Home, Dongri, on 20th May 2015, which ultimately resulted in registration of Crime No.152 of 2015 for offences punishable under Sections 376, 354A, 328, 323 of the Indian Penal Code and under Sections 4, 6, 8 and 10 of the POCSO Act with the Police Station Tardeo, Mumbai.

- (d) During the course of investigation, statement Exhibit 11 of the victim female child/PW2 recorded on 10th July 2015 by PW1 Mrs.S.P.Agarwal, Metropolitan Magistrate, came to be collected. Statement of witnesses came to be recorded. The appellants/accused persons were arrested. They were got examined by PW3 Dr.Shailesh Mohite and PW4 Dr.Chaitanya Kulkarni. Reports of medical examination of the victim female child/PW2 were collected. Spots of the

incidents came to be inspected in presence of panch witness PW7 Raju Shaikh and Panchnama Exhibit 27 came to be recorded. Similarly, clothes of appellant/accused no.1 Yogesh Chavan so also that of juvenile in conflict with law came to be seized vide Seizure Panchnama Exhibit 28. On completion of necessary investigation, the appellants/accused persons were charge-sheeted.

- (e) The learned trial court framed Charge for the offence punishable under Sections 376, 506 and 354 of the Indian Penal Code as well as under Sections 6 and 8 of the POCSO Act against the appellants/accused persons. They pleaded not guilty and claimed trial.
- (f) In order to bring home the guilt to the appellants/accused persons, the prosecution has examined in all nine witnesses. Mrs.S.P.Agarwal, the learned Metropolitan Magistrate is examined as PW1. Exhibit 11 is the statement of the victim female child/PW2 recorded under Section 164 of the Code

of Criminal Procedure by this witness. The victim female child is examined as PW2 and the FIR lodged by her on 20th May 2015 is at Exhibit 13. Dr. Shailesh Mohite of the Nair Hospital is examined as PW3. This witness had examined appellant/accused no.2 Deepak Solanki and the report of medical examination of this accused is at Exhibit 17. Dr. Chaitanya Kulkarni of the Nair Hospital is examined as PW4. He had examined appellant/accused no.1 Yogesh Chavan and the report of that medical examination is at Exhibit 19. Dr. Nisha Thakre, Assistant Professor of the J.J. Hospital is examined as PW5. She medically examined the victim female child/PW2 on 2nd May 2015 and the report of that medical examination is at Exhibit 21. Probation Officer working in the Children's Home, Dongri, namely Chaya Mutha is examined as PW6. Panch witness Raju Shaikh is examined as PW7. Exhibit 27 is the Spot Panchnama and Exhibit 28 is the panchnama of Seizure of clothes of the appellants/accused persons and those of the juvenile in conflict with law. Investigating Officer Surekha

Dighe, Assistant Police Inspector, of Police Station Tardeo is examined as PW8. She had recorded the FIR Exhibit 13 and had arrested both the appellants/accused persons on 21st May 2015. The Arrest Forms are at Exhibits 30 and 31. Another Investigating Officer Dilip Mali is examined as PW9. Exhibit 37 is the Birth Certificate of the victim female child/PW2 issued under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, by the Registrar.

- (g) Defence of the appellants/accused persons is that of total denial. As per the defence version, the victim female child/PW2 had stolen gold chain of daughter of appellant/accused no.1 Yogesh Chavan in the birthday ceremony. She as well as her friend then sold that chain and spent the money. There was big quarrel over this issue and appellant/accused no.1 Yogesh Chavan had threatened the victim female child/PW2 with penal action. Therefore, she has falsely implicated him in the crime in question.

(h) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellants/accused persons and they are accordingly sentenced, as indicated in the opening paragraph of this judgment.

4 I have heard the learned counsel appearing for the appellants/accused persons at sufficient length of time. By taking me through the entire evidence – oral as well as documentary, it is argued on their behalf that evidence of the victim female child/PW2 is totally improbable and she has modulated her version from time to time to suit her own convenience. The first version of the victim female child/PW2 is not implicating any of the appellants/accused persons but after sufficient lapse of time, she has decided to rope in the appellants/accused persons in a false case. The learned counsel appearing for the appellants/accused persons further argued that there is no corroboration to the highly improbable version of the victim female child/PW2 who was having motive to implicate the appellants/accused persons.

On behalf of appellant/accused no.1 Yogesh Chavan it is argued that the learned trial Judge has virtually stepped in the role of prosecutor and had repeatedly asked court questions to the victim female child/PW2 whenever the victim female child/PW2 was giving admission in favour of the appellant/accused no.1. Thus, in submission of the learned counsel appearing for the appellants/accused persons, fair trial was denied to the appellants/accused persons. Effective cross-examination could not be conducted because of the repeated interference by the learned trial Judge, and therefore, the appellants/accused persons are entitled for acquittal. Reliance is also placed on the judgment of the Hon'ble Calcutta High Court in the matter of **Sunil Chandra Roy and Another vs. The State**¹

5 The learned APP supported the impugned judgment and order of conviction and resultant sentence by contending that evidence of the victim of sexual offence needs no corroboration and minor omissions and contradictions in the evidence of such victim needs to be ignored by the court. The learned APP relied

1 AIR 1954 CAL 305

on the judgment of State of Punjab vs. Gurmit Singh² and contended that the finding arrived at by the learned trial court is perfectly in consistence with the evidence adduced by the prosecution.

6 I have carefully considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution. Needless to mention that Harsh – brother of the victim female child/PW2, being himself a juvenile was not put up for the trial before the learned Designated Court under the POCSO Act. The parties have reported that he was separately dealt with by the Juvenile Justice Board.

7 Case of the prosecution, as reflected from the FIR which was lodged by the victim female child/PW2 on 20th May 2015, is set out in detail in the opening paragraph of this judgment. However, at the cost of repetition, necessary averments against the appellants/accused persons found in the

2 1996 Cri.L.J. 172

FIR lodged by the victim female child/PW2 which had set the criminal law in motion are again reproduced succinctly. According to the victim female child/PW2 in the year 2013 her brother Harsh sexually molested her. Again in March 2015, her brother Harsh forced her to eat Chinese food mixed with some intoxicants. She felt sleepy. In the morning she found no clothes on her person apart from pain in her vagina, and therefore, she came to know that her brother committed rape on her. It is also averred in the FIR dated 20th May 2015 that at about 2 a.m. of 17th March 2015, appellant/accused no.2 Deepak Solanki came to her house for drinking liquor and thereafter he started pulling her towards him and touched her breasts. It is further averred in the FIR that on 7th April 2015, the victim female child/PW2 along with her friend went to Girgaon Chowpatty and as she was late, she requested her friend to reach her to the place of her maternal aunt at Lower Parel. Her maternal aunt was found to have gone out of station. Husband of her maternal aunt i.e. appellant/accused no.1 Yogesh Chavan was present in the house. He told her to come inside the house and sleep. Thereafter, her

friend left. She slept inside the house of appellant/accused no.1 Yogesh Chavan. Thereafter, appellant/accused no.1 Yogesh Chavan committed rape on her by pressing her mouth. It is reflected from the FIR that entire incidents were disclosed by the victim female child/PW2 to her friend Priyanka Patil on 10th April 2015 and on her advise she went to the Children Home at Dongri. There she got herself admitted. During her stay at that place on 1st May 2015, she narrated all incidents to the Deputy Superintendent of Children's Home namely Vasanti More. These are precise averments made by the victim female child/PW2 in her FIR reflecting commission of cognizable offence by the appellants/accused persons as well as the juvenile in conflict with law.

8 There is no dispute in respect of age of the victim female child/PW2. The prosecution has placed on record Birth Certificate of the victim female child/PW2 which was issued under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. The same is at Exhibit 37. This Certificate is disclosing the

date of birth of the victim female child/PW2 as 29th August 2000. Similar is the oral evidence of the victim female child/PW2 which is not even challenged by the defence. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, the Birth Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the municipality, panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, Certificate at Exhibit 37 came to be issued by the Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The certificate at Exhibit 48, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public

Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate Exhibit 37 is, infact, the extract of Birth Register in respect of entry of birth of the PW3/victim female child, and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence.

9 Considering the purport and totality of the scheme of the Act, namely the Registrar and Sub-Registrar are public

officers and they have statutory duty to maintain the record, the entries made by them will have to be attached value of the category “shall presume” and it would be open to the parties to prove to the contrary by proving a fact to the contrary by producing primary evidence if available.

10 It is, thus, clear that, on the dates of alleged incidents the victim female child/PW2 was less than 18 years of age. As such, even if theory of consent is sought to be advanced, then also the same becomes irrelevant as the victim of the crime in question had not attained the age of majority i.e. the consenting age.

11 Be that as it may, by this evidence the prosecution has established the fact the victim female child/PW2 was a child witness. Law regarding appreciation of evidence of the child witness is clear. It is well settled that the evidence of a child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of a law (Refer **Prakash and Another vs. State of Madhya Pradesh**³,

³ AIR 1992 (4) SCC 225

Baby Kandayanathil vs. Stae of Kerala⁴ and **Dattu Ramrao Sakhare and Others vs. State of Maharashtra**⁵). However, it is not the law that if the witness is a child, his evidence shall be rejected even if it is found reliable. The law is that evidence of a child witness must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him/her and child witness is an easy prey to tutoring by others. Such a witness lives in imagination by often mistaking dreams for reality. They live in a world of make belief. It is said that child witnesses are most dangerous witnesses and the court as a rule of prudence must consider such evidence with close scrutiny and conviction can be recorded only if such evidence passes the test of requisite quality and reliability required in a criminal trial. If evidence of the child witness is not of a quality to place explicit reliance on it, it is expected of the court to search for corroboration from some evidence which could given credence to the testimony of a child witness.

4 1993 (Supp) (3) SCC 667

5 1997(5) SCC 341

12 Similarly, it is apposite to quote the law regarding appreciation of evidence of a victim of rape. In the matter of **Gurmit Singh (supra)** the Honourable Apex Court has held thus :

“A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the

entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

It is, thus, clear that, even though the court is enjoined to examine the broader probabilities of case set up by the prosecution by ignoring minor contradictions or insignificant discrepancies, at the same time, the court while acting upon evidence of the victim of sexual offence must come to the conclusion that such victim is a witness of truth and her evidence is reliable. If it is not possible to place explicit reliance on evidence of such victim, then the court is required to search for necessary corroboration from other evidence adduced by the prosecution.

13 Keeping in mind these principles of appreciation of evidence of a child witness as well as the victim of the rape case, let us assess evidence adduced by the prosecution in the instant case for bringing home the guilt to the appellants/accused persons. First version of the victim female child/PW2 in the case in hand about the incidents and happenings in her life is material.

As stated by the victim female child/PW2 while in the witness box, after the incident of commission of rape on her by husband of her maternal aunt, she called her friend Priyanka Patil, disclosed everything to her and told her that she did not want to stay at her home, because incidents of her sexual molestation can happen again. Therefore, as deposed by the victim female child/PW2, her friend Priyanka Patil left her at the Children's Home at Dongri. What happened at the Children's Home at Dongri is coming on record from mouth of the victim female child/PW2 as well as that of PW6 Chaya Mutha, who was working there as a Probationer Officer. The victim female child/PW2 deposed that initially she was scared at the Children's Home and after fifteen days stay there, she came to be relaxed. She, therefore, disclosed the incidents to "Chaya Madam" and said "Chaya Madam" thereafter disclosed the incidents to the police. Thus, as per version of the victim female child/PW2 she had disclosed all happenings in her life which compelled her to get herself admitted to the Children's Home at Dongri to Chaya Madam. This Chaya Madam is PW6 Chaya Mutha, Probationer Officer, working with the Children's

Home at Dongri. As per version of PW6 Chaya Mutha, the victim female child/PW2 was admitted at the Children's Home on 10th April 2015. PW6 Chaya Mutha vouched that the victim female child/PW2 became mentally stable by 1st May 2015 and then on that day, she disclosed the incidents which happened in her life to Vasanti More, Deputy Superintendent of Children's Home. PW6 Chaya Mutha deposed that the victim female child/PW2 disclosed that her brother used to beat her and also used to commit sexual intercourse with her. This witness reiterated that even Vasanti More, Deputy Superintendent of Children's Home had told her about the victim female child/PW2. Thus, very first disclosure by the victim female child/PW2 coming on record is to the effect that her brother (juvenile in conflict with law) used to beat her and he had even committed sexual intercourse with her. No role, whatsoever, in commission of sexual offence of cognizable nature, is attributed to either of the appellants/accused persons by the victim female child/PW2 on this first occasion of narrations of agonies and sufferings, and that too, after a comfortable stay at the Children's Home for about 20 days. The victim female

child/PW2, so also PW6 Chaya Mutha, have categorically deposed that by that time, the victim female child/PW2 had become mentally stable and relaxed. If really appellant/accused no.1 Yogesh Chavan had committed penetrative sexual assault on her on 7th April 2015 and if really appellant/accused no.2 Deepak Solanki had outraged her modesty by indulging in sexual assault with her on 17th March 2015, what prevented the victim female child/PW2 from disclosing those incidents either to Vasanti More, Deputy Superintendent of Children's Home or to PW6 Chaya Mutha, Probationer Officer, is not explained by the prosecution in its evidence. To summarize, first version of the victim female child/PW2 made to the official witness i.e. PW6 Chaya Mutha who is responsible officer of the Children's Home is conspicuously silent about commission of any overt act by appellants/accused persons.

14 What happened subsequently has come on record through evidence of victim female child/PW2 as well as that of PW6 Chaya Mutha. The victim female child/PW2 in her evidence

has deposed that after she had disclosed everything to “Chaya Madam” (PW6) after fifteen days of stay at the Children’s Home, said Chaya Madam in turn informed the incident to police. The victim female child/PW2 deposed that then she was taken to the doctor and she told the incidents to the doctor, and that too, as stated by her 'in detail.' Thus, the victim female child/PW2 has specifically deposed that she had narrated the happenings and sufferings in her life in detail to the doctor, who had examined her. PW6 Chaya Mutha, Probationer Officer, in her evidence has stated that after hearing the disclosure of the victim female child/PW2 on 1st May 2015, she had taken the victim female child/PW2 to Police Station Tardeo on 2nd May 2015. Thereafter with the Memo, she had taken the victim female child/PW2 to the J.J.Hospital, Mumbai. Though this Probationer Officer working in the Children’s Home is categorically stating about her visit with the victim female child/PW2 to the Police Station Tardeo on 2nd May 2015, why the police did not register the FIR despite allegations regarding commission of serious offence against the victim female child/PW2 is also a fact which is not clarified by the

prosecution in its evidence. In the natural course, when the victim was taken by the Probationer Officer (PW6 Chaya Mutha) to the police station on 2nd May 2015, it is normally expected of the victim as well as the Probationer Officer (PW6 Chaya Mutha) to narrate purpose of their visit to the concerned Police Officer. If really PW6 Chaya Mutha, Probationer Officer, had heard about commission of penetrative sexual assault and the sexual assault on the victim female child/PW2 by the appellants/accused persons during the course of narrations of events by the victim female child/PW2 on 1st May 2015, then certainly she would have disclosed those incidents to the officers in the Police Station Tardeo during their visit on 2nd May 2015. This did not happen. This indicates that by 2nd May 2015, neither the victim female child/PW2 nor PW6 Chaya Mutha, Probationer Officer, were aware about commission of offences such as penetrative sexual assault and sexual assault on the victim female child/PW2 by the appellants/accused persons. Rather, at this point of time the victim female child/PW2 had no grievance against the appellants/accused persons. Not a slightest whisper about sexual

offence was made out by the victim female child/PW2 against the appellants/accused persons. It is expected of the Probationer Officer working in the Children's Home namely PW6 Chaya Mutha to have knowledge of provisions of Section 21 of the POCSO Act which provides that if any person fails to report the commission of offence under sub-section (1) of Section 19 or Section 20 or who fails to record such offence under sub-section (2) of Section 19, then such person becomes liable for the punishment prescribed in the said Section. Section 19 of the said Act casts a duty on a person having knowledge of commission of offence under the POCSO Act to report the same to the local police or the Special Juvenile Police Unit. The fact that on 2nd May 2015 despite her visit with the victim female child/PW2 to the Police Station Tardeo, PW6 Chaya Mutha, Probationer Officer, had not lodged any report regarding commission of offences punishable under the POCSO Act against the appellants/accused persons makes it clear that on that day, she must not have any knowledge regarding commission of any such offence against the victim female child/PW2. Thus, as of 2nd May 2015, the victim female

child/PW2 had no grievance against the appellants/accused persons. This makes the prosecution case in respect of penetrative as well as simple sexual assault suspect and it is not possible to place explicit reliance on version of prosecution in that regard.

15 Now let us examine what was the disclosure “in detail” by the victim female child/PW2 to the attending doctor. She was medically examined at the J.J.Hospital by PW5 Dr.Nisha Thakre, Assistant Professor, on 2nd May 2015. This Medical Officer categorically deposed about the history given by the victim female child/PW2. As per version of PW5 Dr.Nisha Thakre, the victim female child/PW2 gave the history that she came to the Remand Home “on her own” as her brother used to beat her and her mother. She was working at Cipla Pharmaceuticals and she used to pack bottles there. As testified by PW5 Dr.Nisha Thakre, the victim female child/PW2 gave history of “sexual intercourse with her brother on two to three occasions, last being two months ago.” Similar is the history recorded by PW5 Dr.Nisha Thakre in the

contemporaneous Medico Legal Certificate Exhibits 14 and 21 (marked as Exhibit twice by the learned trial court). Thus, the 'detail history' as claimed to have been disclosed by the victim female child/PW2 to the Medical Officer, allegations are only to the effect that her brother used to beat her as well as her mother and he had committed sexual intercourse with her on two to three occasions. Thus, again, no role whatsoever, is attributed by the victim female child/PW2 to the appellants/accused persons on this second occasion when she was taken to the J.J.Hospital by PW6 Chaya Mutha, Probationer Officer, and when she was examined there by PW5 Dr.Nisha Thakre, who happens to be the responsible doctor working with the reputed Government Hospital.

16 Then comes the third disclosure by the victim female child/PW2 made by her to PW8 Surekha Dighe, Assistant Police Inspector, Police Station Tardeo, on 20th May 2015 i.e. after 18 days of her visit to the J.J.Hospital. PW8 Surekha Dighe, Assistant Police Inspector, had recorded the FIR of the victim female

child/PW2 which is at Exhibit 13. In this FIR Exhibit 13, as stated in the foregoing paragraphs, victim female child/PW2 had for the very first time attributed role of sexual assault on her by the appellant/accused no.2 Deepak Solanki on 17th March 2015 and that of commission of penetrative sexual assault on her by appellant/accused no.1 Yogesh Chavan on 7th April 2015. It is, thus, clear that happenings which allegedly took place with the victim female child/PW2 on 17th March 2015 by appellant/accused no.2 Deepak Solanki and on 7th April 2015 by appellant/accused no.1 Yogesh Chavan were reported by her for the first time on 20th May 2015, despite the fact that she had tonnes of opportunities to disclose the same to the Public Officers of the Children's Home and Police Officers of Tardeo Police Station.

17 Effect of delay in lodging the FIR is considered by the Hon'ble Apex Court in the matter of **State of Himachal Pradesh vs. Shreekant Shekari**⁶. Paragraph 18 thereof reads thus :

⁶ 2004 ALL MR (Cri) 3145 (S.C.)

“18 The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle.”

Similarly, it is also well settled that it is not uncommon that there is delay in lodging the FIR in sexual offences because such offence affects honour of the family and brings shame to the victim of such offence. The victim, in such offence, is reluctant to go to the police because of society's attitude towards her. However, at the same time, the delay in lodging the FIR must get some plausible explanation from the prosecution as because of delay in lodging the FIR, there is possibility of embellishment or exaggeration in the version of the prosecution. In the case in hand, the victim female child/PW2 took shelter of the Children's Home on 10th April 2015. She became relaxed in fifteen days as claimed by her. PW6 Chaya Mutha, Probationer Officer, had confirmed before the court that the victim female child/PW2 became mentally stable by 1st May 2015. To crown this all, PW6 Chaya Mutha, Probationer Officer, herself had taken the victim female child/PW2 to the Police Station Tardeo on 2nd May 2015. Thus, there was every opportunity with the victim female child/PW2 as well as her defacto guardian PW6 Chaya Mutha, Probationer Officer, to lodge FIR against the appellants/accused persons if really they had

committed serious sexual offence against the victim female child/PW2, much prior thereto. Even if it is assumed that the victim female child/PW2 was under fright up to 10th April 2015, nothing prevented her as well as officers of Children's Home to lodge the FIR atleast after 1st May 2015. I have already noted that the victim female child/PW2 did not attribute any role to the appellants/accused persons even thereafter and till 20th May 2015, even though she was well protected and was under the guardianship of officers of the Children's Home, Dongri. Thus, the delay in lodging the FIR by the victim female child/PW2 as well as the officers of the Children's Home which went unexplained creates a shadow of doubt on version of the victim female child/PW2 in respect of penetrative sexual assault as well as sexual assault by the appellants/accused persons. Story reflected in the FIR lodged by the victim female child/PW2 as such, is coming on record by way of improvement over the original version of the victim female child/PW2 made before the Officers of the Children's Home and the Assistant Professor of the J.J.Hospital, Mumbai, on 1st May 2015 and 2nd May 2015.

Improvements on these aspects are not immaterial, inconsequential or minor in nature. The same can certainly be attributable to a desire to implicate the appellants/accused persons in a serious offence by indulging in embellishment and exaggeration over the original version.

18 Now let us examine whether irrespective of this delay in lodging the FIR, whether evidence of the victim female child/PW2 can be accepted in order to base conviction. Undisputedly, the victim female child/PW2 is resident of Tardeo locality i.e. Mumbai Central. She was residing in Room No.45, near Nagina Masjid, Tardeo, with her mother as well as brother (who was tried separately being juvenile in conflict with law). During the course of investigation, the victim female child/PW2 was taken to the Metropolitan Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure. The prosecution has got that statement (Exhibit 11) recorded on 10th July 2015 proved through PW1 Mrs.S.P.Agarwal, Metropolitan Magistrate. Let us compare versions of the victim

female child/PW2 reflected from her substantive evidence before the court with her earlier narrations in respect of the alleged offence found in her FIR Exhibit 13 lodged on 20th May 2015 as well as with her statement under Section 164 of the Code of Criminal Procedure (Exhibit 11) which was recorded on 10th July 2015. In her substantive evidence before the court without mentioning the date, the victim female child/PW2 has deposed that in March 2015 when she was sleeping in her house, her brother (juvenile in conflict with law) consumed liquor and drugs. Then he called Deepak Solanki (appellant/accused no.2) at 2.00 a.m. Thereafter, appellant/accused no.2 Deepak Solanki sent her brother out for getting some eatables. The victim female child/PW2 further deposed that subsequently appellant/accused no.2 Deepak Solanki was sleeping on the bed. She as well as her mother were sleeping on the floor. During sleep, as per version of the victim female child/PW2, she sensed that appellant/accused no.2 Deepak Solanki was touching her all over her body and specially on chest and vagina. She then got up and caused her mother to wake up. Her mother switched on the lights. They saw

appellant/accused no.2 Deepak Solanki sleeping on the bed. Then her mother slapped appellant/accused no.2 Deepak Solanki. Subsequently, her brother came and spoke that appellant/accused no.2 Deepak Solanki cannot behave in such a manner. Thus, if properly construed, these narrations mean that when the victim female child/PW2 as well as her mother were sleeping on the floor and when the appellant/accused no.2 Deepak Solanki was sleeping on the bed in their house, after 2 a.m. appellant/accused no.2 Deepak Solanki had committed sexual assault on the victim female child/PW2. This evidence indicates that the victim female child/PW2 was deep asleep and woke up on sensing inappropriate touching by appellant/accused no.2 Deepak Solanki. As against this, in her FIR dated 20th May 2015, the victim female child/PW2 has stated that at 2.00 a.m. of 17th March 2015, appellant/accused no.2 Deepak Solanki came to her house for drinking liquor. Her brother then left the home for bringing eatables. Thereafter appellant/accused no.2 Deepak Solanki started pulling her towards him and started touching her breasts. Then her mother convinced appellant/accused no.2 Deepak Solanki. The third

version in respect of this incident can be found in the statement under Section 164 of the Code of Criminal Procedure (Exhibit 11) of the victim female child/PW2. Before the learned Metropolitan Magistrate she has stated that on 17th March 2015, Deepak Solanki (appellant/accused no.2) was sleeping on the bed. She as well as her mother were sleeping on the floor. At 2.00 a.m. appellant/accused no.2 Deepak Solanki was found moving his hand on her breasts and vagina. She told this fact to her mother and her mother scolded appellant/accused no.2 Deepak Solanki.

19 Though the victim female child/PW2 has stated that at the time of commission of sexual assault on her, appellant/accused no.2 Deepak Solanki was sleeping on the bed, perusal of Spot Panchnamas at Exhibits 26 and 27 does not reflect existence of any bed in the ground floor of a small room where the victim female child/PW2 used to reside with her mother and brother. The area of that room was just 10 feet x 8 feet with a mezzanine floor made up of a tin sheet and its size was also 10 feet x 8 feet. Both the Spot Panchnamas at Exhibits 26 and 27 are

conspicuously silent about the existence of a cot at the ground floor of the house of the victim female child/PW2.

20 It is, thus, seen that, all three versions of the incidents which allegedly took place on 17th March 2015 disclosed by the victim female child/PW2 are totally divergent. The very first disclosure found in the FIR shows that when everybody was awake, as soon as brother of the victim female child/PW2 left the house at 2.00 a.m., appellant/accused no.2 Deepak Solanki started pulling the victim female child/PW2 and touching her breasts. Before the learned Metropolitan Magistrate she is not disclosing how and for what reason appellant/accused no.2 Deepak Solanki came to her house on 17th March 2015. Time of the alleged incident was also not disclosed in this statement under Section 164 of the Code of Criminal Procedure. In her substantive evidence, there are material improvements in the version of the victim female child/PW2, so far as this incident is concerned. She has spoken about waking up of her mother, switching on the lights and then slapping of appellant/accused no.2 Deepak Solanki by

her mother, when he was sleeping on the bed. These discrepancies and inconsistencies are glaring in nature because of non-disclosure of this incident on first available opportunity i.e. on 1st May 2015 to the officers of the Children's Home and then on 2nd May 2015 to the Medical Officer of the J.J.Hospital, Mumbai. Improvements made by the victim female child/PW2 over her original version in the later FIR lodged by her and her subsequent versions reflect a desire to bring home the guilt to appellant/accused no.2 Deepak Solanki.

21 Now let us examine versions in respect of the penetrative sexual assault on the victim female child/PW2 by appellant/accused no.1 Yogesh Chavan. First disclosure of the victim female child/PW2 in this regard is in her FIR dated 20th May 2015. Her cross-examination makes it clear that she had been to the Chowpatty of Girgaum, Mumbai. Considering the topography of the region and location, it is clear that house of the victim female child/PW2 at Tardeo area of Mumbai Central, is very near to Girgaum Chowpatty than the house of her maternal

uncle i.e. appellant/accused no.1 Yogesh Chavan which was at Lower Parel area of Mumbai. He was residing in Room No.16, Chinaya Building, Lower Parel area of Mumbai. This area is comparatively far away from Girgaum Chowpatty. One has to travel and cross Tardeo from Girgaum Chowpatty to reach Lower Parel area. Keeping in mind this geographical location, one will have to compare and evaluate different versions of the victim female child/PW2 in respect of the penetrative sexual assault on her allegedly made by appellant/accused no.1 Yogesh Chavan. In her FIR, the victim female child/PW2 without naming her friend has stated that as she and her friend were late at the Chowpatty, she requested her friend to reach her to the place of her maternal aunt at Lower Parel. When they went there, she came to know that her maternal aunt had gone out of station but husband of her maternal aunt i.e. appellant/accused no.1 Yogesh Chavan was present there. It is stated in the FIR that then appellant/accused no.1 Yogesh Chavan told her to come inside the house and sleep. It was thereafter that her friend had left her. The FIR reflects that the victim female child/PW2 then slept inside the house of

appellant/accused no.1 Yogesh Chavan. In that night, he committed penetrative sexual assault on her by pressing her mouth. During the course of her evidence, the victim female child/PW2 made it clear that the friend referred by her in her FIR is Priyanka Patil.

22 In her second version about this incident made on 10th July 2015, the victim female child/PW2 had disclosed to the Metropolitan Magistrate (PW1 Mrs.S.P.Agarwal) that on 7th April 2015 as she and Priyanka Patil were late while roaming at the Chowpatty, she asked Priyanka Patil to reach her to the house of her maternal aunt at Lower Parel. She further stated before the Metropolitan Magistrate that when she went to the house of her maternal aunt, she came to know that her maternal aunt had gone out of station. Then husband of her maternal aunt (appellant/accused no.1 Yogesh Chavan) told her to sleep. She refused. Then appellant/accused no.1 Yogesh Chavan pressed her mouth and raped her. Thereafter, he threatened her that if the incident is disclosed, he will end his own life. This indicates that

as soon as the victim female child/PW2 refused to accept the proposal of appellant/accused no.1 Yogesh Chavan, he gagged her mouth and raped her.

23 The third version of this incident is found in the substantive evidence of the victim female child/PW2. In her statement before the court she disclosed that she and Priyanka Patil were late at the Girgaum Chowpatty and therefore, her friend Priyanka Patil told her to go to the place of her maternal aunt. The victim female child/PW2 further deposed before the court that then her friend came with her to Lower Parel to drop her at her "Mausi's" place. She knocked the door and then came to know that only husband of her maternal aunt (i.e. appellant/accused no.1 Yogesh Chavan) was at the home and her maternal aunt was not at the home. As per her version, she then told appellant/accused no.1 Yogesh Chavan that she will not sleep there. Thereupon, he said that she should sleep in his house. As per version of the victim female child/PW2, she refused. Then appellant/accused no.1 Yogesh Chavan closed her mouth and took

her inside the house. He then closed the door of the house. He, thereafter, tied her hands and removed her clothes. The victim female child/PW2 further deposed that she then tried to shout but appellant/accused no.1 Yogesh Chavan gagged her mouth by cloth and then committed rape on her. When she got up in the morning, appellant/accused no.1 Yogesh Chavan was not present in the house but he had left some money for her. She then left the house without taking that money and did not disclose the incident to anybody else as she felt that nobody can do anything in that regard. This implies that in presence of Priyanka Patil, appellant/accused no.1 Yogesh Chavan dragged the victim female child/PW2 inside his house and then there was penetrative sexual assault on her, after tying her hands and gagging her mouth.

24 If all these three versions are considered and examined, then it becomes clear that narrations of this incident of penetrative sexual assault on her by appellant/accused no.1 Yogesh Chavan are inconsistent. Her first version found in the FIR shows that the incident of penetrative sexual assault on her took

place when she was sleeping inside the house of appellant/accused no.1 Yogesh Chavan after being dropped there by her friend. She has averred in the FIR that after committing penetrative sexual assault on her, appellant/accused no.1 Yogesh Chavan had threatened her that if the incident is disclosed to anybody else, he will commit suicide. As against this, in her statement under Section 164 of the Code of Criminal Procedure (Exhibit 11), victim female child/PW2 is stating that she reached to the house of appellant/accused no.1 Yogesh Chavan along with her friend and then on coming to know that her maternal aunt is not there, she refused to sleep in the house. Thereafter, appellant/accused no.1 Yogesh Chavan pressed her mouth and committed penetrative sexual assault on her. He, then, threatened that he will end his life if the incident is disclosed to anybody else. This version indicates that as soon as she reached his house, appellant/accused no.1 Yogesh Chavan had dragged the victim female child/PW2 inside the house by pressing her mouth and then immediately committed penetrative sexual assault on her. As against this, her substantive evidence before the court reveals that

in presence of her friend, on her refusal to sleep in his house, appellant/accused no.1 Yogesh Chavan dragged her inside the house by closing her mouth and then shut the door. He, then, committed penetrative sexual assault on her by tying her hands and gagging her mouth by cloth. She has not disclosed about threats, if any, given by appellant/accused no.1 Yogesh Chavan to her after the incident of penetrative sexual assault on her, in her substantive evidence. To crown this all, these inconsistent theories are surfacing by way of total improvement over the very first version of 1st May 2015.

25 If it is assumed that what the victim of the crime in question is stating before the court in respect of the penetrative sexual assault on her is correct, then the incident of dragging her inside the house by closing her mouth had certainly took place in presence of Priyanka Patil, who happens to be friend of the victim female child/PW2 and who had accompanied the victim female child/PW2 to the house of appellant/accused no.1 Yogesh Chavan. Even her statement under Section 164 of the Code of Criminal

Procedure also indicates that in presence of her friend Priyanka Patil, appellant/accused no.1 Yogesh Chavan took the victim female child/PW2 inside the house by pressing her mouth at the point of time when she refused to sleep in the house. The incident of dragging the victim female child/PW2 inside the house, as seen from the statement under Section 164 of the Code of Criminal Procedure, took place in presence of Priyanka Patil. As against this, as per averments in the FIR, the victim female child/PW2 without any hesitation had meekly slipped inside the house of appellant/accused no.1 Yogesh Chavan, despite knowing that her 'Mausi' is not at home. Thereafter, Priyanka Patil had left the place.

26 Normally, the victims of sexual offence are not expected to lie and to create false story of commission of penetrative sexual assault. However, in the case in hand, the entire version of the victim female child/PW2, for the reasons discussed in the foregoing paragraphs, appears to be improbable, particularly because of non-disclosure thereof for a fairly long

period of time, despite tonnes of opportunities with the victim female child/PW2 to do so. The defence has brought on record the reason which creates suspicion and reasonable doubt in the judicial mind for not acting upon the version of the victim female child/PW2 in respect of penetrative sexual assault on her. It is seen from cross-examination of the victim female child/PW2 that appellant/accused no.1 Yogesh Chavan was husband of her maternal aunt. It is brought on record from cross-examination of victim female child/PW2 that in March 2015 itself, there was celebration of birthday of daughter of appellant/accused no.1 Yogesh Chavan. The victim female child/PW2 as well as her friend Priyanka Patil were present in that celebration. The victim female child/PW2 has accepted in her cross-examination the fact that a chain was presented to the daughter of appellant/accused no.1 Yogesh Chavan by one of his relative. Though the victim female child/PW2 denied to have stolen that chain, she volunteered that later on she learnt that Priyanka Patil had stolen that chain. She accepted the suggestion that she as well as Priyanka Patil had sold out that chain and spent the money realized by sale of that chain.

As per version of this witness in the cross-examination, then, as soon as appellant/accused no.1 Yogesh Chavan and his wife came to know about this fact, there was a big fight between both of them as well as the victim female child/PW2 and Priyanka Patil. Then, as admitted by the victim female child/PW2, appellant/accused no.1 Yogesh Chavan had threatened that he would lodge police complaint if the victim female child/PW2 fails to return the chain. The victim female child/PW2 admitted the fact that then she shouted at her friend Priyanka Patil as to why she had stolen the chain. In an instinct of self preservation, the victim female child/PW2 thereafter stated that it was her friend who spent the entire money and that she had stolen Rs.3,000/- from her as well.

27 It is, thus, clear that, in the birthday celebration party at the house of appellant/accused no.1 Yogesh Chavan in the month of March 2015, there was a theft of the chain presented to his daughter and the victim female child/PW2 as well as her friend Priyanka Patil spent the money after selling that chain.

This episode has ultimately resulted in quarrel amongst appellant/accused no.1 Yogesh Chavan and his wife on one hand and the victim female child/PW2 and her friend Priyanka Patil on the other hand. Appellant/accused no.1 Yogesh Chavan had even threatened that he would lodge report of the incident to police. After this happening in March 2015, the victim female child/PW2 is implicating appellant/accused no.1 Yogesh Chavan in the episode of penetrative sexual assault, which according to her, took place on 7th April 2015, and that too at about 2.00 a.m., at the house of appellant/accused no.1 Yogesh Chavan. It does not stand to reason that after having suffered the humiliations of allegation of committing theft of a chain made by appellant/accused no.1 Yogesh Chavan and after receiving threat of lodging the report of theft to the police by appellant/accused no.1 Yogesh Chavan, the victim female child/PW2 would go to the house of appellant/accused no.1 Yogesh Chavan in the midnight and would stay with him in the night after knowing the fact that his wife is not in the house. This visit to the house of appellant/accused no.1 Yogesh Chavan happened, as according to the victim female

child/PW2, she and Priyanka Patil were late at the Chowpatty. The natural conduct of a normal human being, pitted in such a situation, would be to go to her own house which was near and on the way rather than proceeding further and reaching far away area of Lower Parel. Similarly, the victim female child/PW2 had a strong motive to falsely implicate appellant/accused no.1 Yogesh Chavan in the subject crime due to the incident of theft of the gift from his house and her resultant humiliation. This, on the backdrop of inordinate delay in lodging the report, points out possibility of false implication of appellant/accused no.1 Yogesh Chavan by the victim female child/PW2.

28 For all these reasons set out in the foregoing paragraphs, evidence of the victim female child/PW2 is found to be artificial and wholly unreliable in respect of both the incident viz. sexual assault by appellant/accused no.2 Deepak Solanki and penetrative sexual assault by appellant/accused no.1 Yogesh Chavan on her. Evidence adduced by the victim female child/PW2 was found to be discrepant and lacunic. It was duty of

the prosecution to examine either mother of the victim female child/PW2 or her friend Priyanka Patil to make out the charge leveled against appellant/accused no.1 Yogesh Chavan. Assessment of evidence adduced by the prosecution and available on record against appellant/accused no.1 Yogesh Chavan is not sufficient to base conviction for such serious offences. Evidence of the victim female child/PW2 lacks the assurance which is required in a criminal trial to bring home the guilt. It is seen that the victim female child/PW2 has modulated her version on each occasion to suit her own convenience, and therefore, the same cannot be acted upon. As against this, the prosecution was having other witnesses to prove its case and those witnesses such as Priyanka Patil and mother of the victim female child/PW2 are not examined, despite the fact that their evidence would have thrown some light on prosecution case. Thus, though available evidence is suffering from serious infirmities, and as such, cannot be accepted in absence of other evidence, which though available has been withheld from the court, adverse inference needs to be drawn against the prosecution.

29 Other evidence adduced by the prosecution is of formal nature. It is in respect of seizure of clothes of appellant/accused no.1 Yogesh Chavan so also in respect of conducting the Spot Panchnama after inspecting the houses of the victim female child/PW2 as well as that of appellant/accused no.1 Yogesh Chavan. Similarly, the appellants/accused persons were got examined through PW3 Dr.Shailesh Mohite and PW4 Dr.Chaitanya Kulkarni. Evidence of these witnesses and the Medico Legal Certificates issued by them are of no assistance for inferring the guilt of the appellants/accused persons or for corroborating the version of the victim female child/PW2. Because of delay in lodging the FIR, there was no question of finding any positive forensic evidence in the clothes and other articles seized by the Investigating Officer.

30 So far as medical evidence is concerned, PW5 Dr.Nisha Thakre on 2nd May 2015 had noted old healed tear of hymen of the victim female child/PW2 and that too with history given by none else than victim female child/PW2 to the effect that her

brother had committed sexual intercourse with her on two to three occasions. Thus, this medical evidence cannot be used for corroborating the version of the victim female child/PW2, which is found wholly unreliable by this court.

31 The learned counsel appearing for appellant/accused no.1 Yogesh Chavan strenuously contended that the accused persons are deprived of fair trial by repeated court questions by the learned trial Judge. Perusal of evidence of the victim female child/PW2 reflects that the learned trial court has asked in all fourteen court questions during the course of examination of the victim female child/PW2. Few of them are even asked during the course of chief-examination and majority of them were asked during the course of recording the cross-examination. Apart from allegations in respect of sexual offences against the appellants/accused persons, the victim female child/PW2 had made allegation of penetrative sexual assault on her by her own brother named Harsh. He was found to be a juvenile and he was not put up for trial before the learned trial court. Following are

the court questions put up to the victim female child/PW2 by the learned trial court during the course of her chief-examination :

Court Question 1: What offence had your brother committed against you?

This Court Question No.1 was asked in paragraph 12 of the chief-examination. In paragraphs 1 to 4 of her chief-examination, the victim female child/PW2 had elaborated in detail the acts which she had attributed to her brother Harsh – who being a juvenile in conflict with law was not put up for trial before the learned Designated Court under the POCSO Act.

Court Question 2: Whether you are confident that Deepak Solanki had touched you as you had not seen him touching you ?

This Court Question No.2 was also asked after above court question No.1 in paragraph 12 of the chief-examination of the victim female child/PW2. Following is the relevant portion of her evidence found in paragraph 4 of her chief-examination, so far as

accused Deepak Solanki is concerned.

“4 My house comprises of one plus one structure and three of us used to reside there. In March 2015, I was sleeping in my house and as usual my brother was consuming liquor and drugs. He called his friend named Dipu Solanki at 2 O'Clock at night. Dipu sent my brother outside to get something to eat and my brother went out. Dipu was sleeping on the bed and I alongwith my mother were sleeping on the floor. Dipu was pulling my dupatta. He was touching me all over my body specially on the chest and part of urination. Initially I thought my mother had touched me but then I got up and woke my mother and told her that somebody was touching me. My mother switched on the light and saw that Dipu was sleeping on the bed. She then gave him two slaps. Then my brother came home. My mother told him about the incident, but my brother said that Dipu could not behave in such a manner and took Dipu to the pot mala. Dipu's age is 25 years. He takes drugs with my brother.”

It is not seen from this evidence that the victim female child/PW2 has committed any error necessitating putting of the court

question to her for obtaining proper proof of relevant fact.

Following are the court questions asked throughout during the course of cross- examination, and that too, when the victim female child/PW2 had given admissions about the factual situation prevalent on the spot.

Court Question 3: With reference to para no.1 of Question no.8 of Exhibit 11, it is wrongly recorded by the Magistrate ?

Court Question 4: Whether you can hear the people residing in front of your house when they are talking in a lower tone in their house or when they are talking in the lane outside your house ?

This Court Question No.4 was asked when the victim female child/PW2 during her cross-examination had admitted the fact that inmate of her house can hear voice of people talking in lower tone residing in front of her house but not of those residing

adjacent to her house. As soon as this admission was given, the above court question was put to the witness.

Court Question 5: Whether you can hear the voices of the adjacent potmala if people are talking in low tone ?

This Court Question No.5 was asked by the learned trial court immediately when the victim female child/PW2 had admitted in her cross-examination that when she is at the mezzanine floor (potmala) she can hear the voices of the people from the adjacent potmala (mezzanine floor) and when she further admitted that the wall of the mezzanine floor (potmala) are made up of tin sheets. When this court question was put to the victim female child/PW2 subsequent to this admission, the witness answered that she cannot hear the voices of the people from the adjacent potmala and that she can only hear them when they are talking in a loud tone.

32 After paragraph number 28 of her deposition, following court questions were asked to the victim female child/PW2 by the learned trial Judge :

Court Question 6: Whether did you sleep after you ate. What your brother had got to eat at 11 p.m. ?

Court Question 7: Is it correct to say that your mother sometimes use to touch your breasts and private part ?

Court Question 8: When and how were you staying at the hostel in Vile Parle ?

Court Question 9: When did you tell the incident to Chaya Madam ?

This Court Question No.9 was asked when the witness admitted in the cross-examination that before police came to Children's Home at Dongri, Chaya Madam and Ravi Sir had not asked her anything.

Court Question 10: Did your Mause commit rape ?

This Court Question No.10 was asked when the learned defence counsel was bringing on record the incident of commission of theft of a chain presented to the daughter of appellant/accused no.1 Yogesh Chavan during the birthday celebration and the fact that the said chain was later on sold by the victim female child/PW2 and her friend Priyanka Patil. Thus, when the defence tried to bring on record the motive for false implication, this court question was asked to victim female child/PW2.

Court Question 11: Did you run away from your house only because your Mause had threatened you that he would complain against you to the police ?

This Court Question No.11 was asked immediately after the victim female child/PW2 admitted the fact of theft of chain by her as well as her friend and eloping from her own house because of this incident of theft of chain.

Court Question 12: Why did you not go to your house on that day ?

This Court Question No.12 was asked during the course of cross-examination of the victim female child/PW2 by the learned trial court particularly when the victim female child/PW2 admitted that earlier to 7th April 2015 her mother told her that her maternal aunt (mausi) had gone out of station and the victim female child/PW2 had admitted/accepted this fact.

Court Question 13: Your Mause made these phone calls after the incident of rape or when you reached his house, he immediately called up your Mause and maternal grandmother to take you to home.

This Court Question No.13 was put by the learned trial court to the victim female child/PW2 when during the course of her cross-examination she admitted the fact that her maternal uncle (appellant/accused no.1 Yogesh Chavan) had called up her maternal grandmother to tell her to take the victim female

child/PW2 who had reached his house. The victim female child/PW2 prior to this court question had also admitted that appellant/accused no.1 Yogesh Chavan had also called her maternal aunt and told her to call mother of the victim female child/PW2 for taking her to home. Earlier to this court question, it was brought on record by the defence that houses of appellant/accused no.1 Yogesh Chavan and that of maternal grandmother were near to each other.

Court Question 14: Yogesh had threatened to kill you or he had threatened to kill himself. Which of the two is correct ?

This Court Question no.14 was asked when the victim female child/PW2 was being cross-examined in respect of threats given by appellant/accused no.1 Yogesh Chavan after the incident in order to demonstrate that evidence on this aspect is inconsistent.

33 The learned counsel appearing for appellants/accused persons by pointing out that flow of cross-examination was being

repeatedly obstructed by the learned trial court, has placed reliance on the judgment in the matter of **Sunil Chandra Roy and Another (supra)**. Paragraphs 30 to 32 of the said judgment read thus :

“30 The next point urged was that there had been a mistrial in the case on account of over-interrogation of witnesses by the learned Judge. As an illustration, it was pointed out that out of 825 questions put to one of the medical witnesses, Dr. I. B. Majumdar, no less than 574 had been asked by the learned Judge himself. The complaint was not limited to the number of the questions asked, but concerned also the stage at which they were interposed and the form in which they were put. It was contended that, quite frequently, the learned Judge took a witness out of the hands of not only Counsel for the defence but also Counsel for the prosecution and pressed them with a series of questions to give the answer he wanted; and as regards the cross-examination, he destroyed its effect by intervening whenever any answer favourable to the defence was given and putting a series of suggestive questions to the witness till he retrieved himself and gave an answer favourable to

the prosecution.

It was further contended that in so interrogating witnesses on his own account, the learned Judge often introduced new matters and at times brought on record evidence which was wholly inadmissible; and he completed the error of procedure by denying to the defence an opportunity for further cross-examination. The objection taken was a serious one. If unfounded, it was an improper objection to take; but if well-founded, the effect of the irregularity must be seriously considered.”

“31 The right of a Judge to put questions to witnesses is given to him by Section 165, Evidence Act. The section says that he may "in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant". The rest of the section and the provisos thereto are not material here. The history of the section shows that it was enacted in that wide form, because in 1872 it was thought that in many of the courts of the country where lawyers of the lower ranks practised, neither were cases properly prepared, nor witnesses properly

examined, so that it was necessary to vest the Judge with an over-all power to get at the truth by asking any questions he liked. But although a great deal of time has since passed, the section has remained on the statute-book and its provisions are in substantial agreement with the English law on the subject.

The powers conferred by the section can therefore still be claimed and exercised. It is obvious that the Judge contemplated by the section is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. It has been said that it is particularly necessary that the Judge should exercise this power in a jury trial, because it is his duty to aid the jury in obtaining a proper comprehension of the facts which they, as laymen, can do only if the facts are laid bare, with the implications not left as such but fully brought out and with the false suggestions eliminated. If therefore the Judge finds that the

examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but his duty to intervene with his own questions, particularly at a jury trial.”

“32 But while theoretically the powers of the Judges are limitless and unfettered, certain principles have come to be recognised which he must follow as to the manner in which he exercises the power. It need hardly be pointed out that he must not take side; but he must not also "descend into the arena" and forsake the judicial calm for the zeal of a combatant. If he does so and questions witnesses in the spirit of beating them down or encouraging them to give an answer, his action may have an intimidating or inflatory effect upon them and their evidence may not be the evidence they would have given, if not so intimidated or encouraged. I do not think that the consideration that the Judge may, by indulging in a general examination of witnesses, disable himself to take a detached view of their demeanour, has much force in the case of a jury trial, because the ultimate judges of their credibility are the jurors who are left free to watch them. But the demeanour of the

witnesses may itself be affected by the authority of the Judge, if he exercises it excessively in questioning them.

Again although the law allows the Judge to put any question at any time, the time generally considered proper for an extended examination is when the lawyers for the parties have finished their questions or at least when the lawyer, examining the witness at the time, is passing on to a new subject. The Judge may always intervene, in the course of examination by Counsel, to put a question in a clearer form or to have an obscure answer clarified or to prevent a witness being unfairly misled, but if he does more and stops Counsel again and again to put a long series of his own questions, he makes an effective examination or cross-examination impossible and diverts the trial from its natural course.”

34 Section 165 of the Evidence Act empowers the Judge to put questions to any witnesses. In order to discover or to obtain proper proof of relevant facts, the court can ask any question about any relevant or irrelevant fact, in any form, at any time during the trial. The primary function of the Judge is to see

that justice is done between the parties. Therefore, whenever the Judge finds that the examination of witness has not been conducted in a manner, so as to unearth the truth, or that ambiguity and intricacy in the evidence needs to be clarified, provisions of Section 165 of the Evidence Act can be resorted to, by the concerned Judge. The Judge has to take active part in the proceedings before him for administering justice by putting questions to the witnesses, the answers to which, in his opinion, would help in the quest for truth. The power of the Judge conducting the trial, as seen from the provisions of Section 165 of the Evidence Act, are unbridled, and it is to be exercised in order to discover or obtain proper proof of relevant facts. If the Judge felt that a witness has committed an error or slip in the course of his examination by the parties, might be because of stress or nervousness, the concerned Judge can very well put the Court Questions to such witness in order to minimize or correct the error. No doubt, while conducting trial of case involving sexual offences, the trial Judge is not expected to be a mute spectator, but at the same time, it needs to be kept in mind that he cannot

take the role of the prosecutor. A fine balance has to be struck so as to avoid allegation of bias by the parties. Except this, nothing more is required to be commented upon on this aspect.

35 In the result, I am of the considered opinion that benefit of doubt needs to be given to appellants/accused persons considering the nature of evidence adduced by the prosecution in support of the Charge. Hence, both the appeals need to be allowed. Therefore, the order :

ORDER

- i) The appeals are allowed.

- ii) Impugned judgment and order dated 27th April 2017 passed by the learned designated Judge under the POCSO Act for Greater Mumbai in POCSO Special Case No.385 of 2015 recording conviction and resultant sentence against the appellants/accused persons is quashed and set aside.

- iii) Appellant/accused no.1 Yogesh Chavan is acquitted of offences punishable under Sections 376 and 506 of the Indian Penal Code so also under Section 6 of the POCSO Act.
- iv) Appellant/accused no.2 Deepak Solanki stands acquitted of the offence punishable under Section 354 of the Indian Penal Code as well as under Section 8 of the POCSO Act.
- v) Fine imposed, if any, paid by the appellants/accused persons be refunded to them.
- vi) Appellant/accused no.1 Yogesh Chavan be released from jail forthwith, if not required in any other case.
- vii) Bail bonds of appellant/accused no.2 Deepak Solanki stand cancelled.
- viii) Both the appeals are accordingly disposed off.

(A. M. BADAR, J.)

