

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRA-S-3454-SB-2017 (O&M)
Date of Decision: 06.10.2018**

Manoj Gautam

....Appellant

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Dr. Deipa Singh, Advocate and
Mr. Armaan Midha, Advocate
for the appellant.

Mr. Arun Kumar, A.A.G., Haryana.

ANITA CHAUDHRY, J

The appellant has been convicted and sentenced to 10 years imprisonment along with a fine of Rs.80,000/- under Section 6 of POCSO Act. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 2 years.

The narration of facts first.

A complaint Ex.P11 was given by the mother of the victim on 02.11.2013. Her 4 year old daughter was studying in Sarv Vidhya Public School, Indri. She had lodged a complaint against the Principal alleging penetrative sexual assault on her minor daughter. Her daughter was admitted in this School few months earlier. She had sent her daughter to

school in the school Van on 31.10.2013. The allegations were that after the school was over, the Principal, namely, Manoj Gautam called the child victim to his room and asked her to remove her clothes and she refused, the accused forcibly removed her clothes on the pretext that she was to be given an injection. Thereafter, he inserted his finger in the vagina and touched the vagina with his penis and tried to penetrate. The complainant asked the police to inquire into the occurrence.

The victim was counselled by a lady Advocate. No report through has filed. The child was thereafter, sent for medical examination. The accused was also called for his medical examination. Five days after the incident, the mother of another child appeared before the police and levelled similar charges. It subsequently appeared that the second victim's family is related to the family of the complainant. The accused was arrested on 06.11.2013. His disclosure statement was recorded and he is said to have demarcated the crime scene. The counselling of the second victim was videographed. The accused was subjected to polygraphic test. Medical opinion was taken and subsequently challan was presented.

Charge was framed under Sections 376(2)(f), 376 (2)(i), 376 (2)(j), 376 (2)(m) of IPC and Section 6 of POCSO Act, 2012.

The Investigating agency filed an application seeking further investigation in the matter. The Special Court gave liberty to the Investigating Agency to file further report. Subsequently, a supplementary report was submitted seeking discharge of the accused. The report was contested by the complainant. The trial Court did not accept the discharge report.

The prosecution examined the second victim first, who disclosed that she used to go to school in the Van and there were Diwali celebrations in the school and they were playing when the celebrations were on and she was resting in the school compound and her teacher committed illegal act with her. The victim pointed out towards the accused and said that he had given her an injection in her vagina and later removed her clothes and thereafter nothing happened. She stated that at that point of time, she was present along with the other victim. She stated that she can write the name of the teacher but she could not give his name but she stated that the same incident occurred with the other victim. In the cross-examination, she had stated that she had come to the Court with her parents. She stated that she had taken admission in the school two days earlier and the photographs of the Principal was given by her mother. She immediately stated that it was her father, who had shown the photographs and it was about four months earlier. She stated that all the incident was told to her by her mother two days back and her mother had repeated the statement to her. She stated that she could not recognize her class teacher. She stated that she could not recognize the driver or cleaner of her school Van, who took her to school. She stated that Diwali celebrations went on for four days and she went to school after Diwali. She stated that presently some other teacher was teaching and she could not give his name. She could not even give the date on which Diwali was celebrated. She stated that she was not shown the photograph of her teacher and she had seen the photograph herself. She stated that the photographs were also seen by her parents. She stated that she did not know the name of her music teacher but she was aware of the name of Manoj Gautam and this name was given to her by her mother.

The first victim 'T' (Tamasjot) was examined as PW-10. It is her mother who had lodged the FIR. She stated that her father was in the Army and she used to go to School by bus and after the school, her father used to bring her back on his bike. She stated that she used to study in Sarv Vidhya Public School, Indri and her clothes were taken out by 'Sir' and she had forgotten his name and he had given an injection in her vagina and he inserted his penis in the vagina and all this was done on the upper floor and the door had been closed and her friend (second victim) was also with her and they were in a lying position. She stated that the name of the teacher was Manoj Gautam. She stated that their teacher Sangeeta Madam and Bharti Madam had taken them on the upper floor in their lap and she disclosed this fact to the mother and to the police and to the Uncle. She pointed towards the counsel representing the complainant. She stated that she was not taken to the doctor. She stated that there were two lady teachers and three male teachers in her school and thereafter the child showed her fingers of both the hands but she could not count. She could not give the name of the male teachers. She could not give the name of the Van driver. She could not give the number of rooms in the school. She stated that she had not seen the rooms. She stated that she had not participated in the dance on the occasion of Diwali. She stated that the accused did not take their class. A query was posed as to who had told the name of the accused. She had stated that she knew the name herself. The child was asked whether any photograph was shown to her after the incident. She stated in the negative.

Dr. Vikas Moudgil, PW-2 had medically examined the accused.

He proved his report.

Dr. Mala, PW-6 had medically examined the first victim and on local examination she found no external mark of injury on any part of the body but she noted redness with mild swelling on Labia majora and labia minora. The hymen margin were red and tender. The second victim was also examined but on 05.11.2013 she stated that no external mark of injury was seen however, the hymen margins was red and tender. The medical officer stated that the possibility of sexual assault was noted by her in the MLR on the basis of the history given by the mothers. She stated that in the original record, she had not give the duration of sexual assault of the second victim and the Investigating Officer had approached her and had asked her to mention the duration and she had given the duration to be 24 hrs to 72 hrs in both the MLRs. She stated that the hymen in the children is deeply located and there is no development of vagina and it starts developing only after the age of 8. She stated that the possibility of redness on labia minore can be there even if the child scratches. She stated that she admitted that she had mentioned about redness on the labia minora. She admitted that as per Modi's jurisprudence the color of the labia minora has been mentioned as pinkish and she had mentioned about the color as it was slightly abnormal.

The following question was put by the Court below:-

“Court Ques: You conduct medical-examination of Tamasjot on 02.11.2013, and that of Jasmeet Kaur on 05.11.2013, however, you have mentioned in your opinion Ex.D6 that the duration of assault in both cases was 24 to 72 hours, give reasons?”

Ans: I have mentioned the duration according to the occurrence of incident i.e. 31.10.2013. The duration given by me is only a probability and there is a possibility of exceeding the same. This varies from person to person and according to the circumstances of the patient whether the patient has taken

medication or not.”

FSL report Ex.PX and PX/1 was tendered in evidence according to which no semen could be detected. The polygraphic test was inconclusive.

The prosecution examined the mother of the first victim as PW-9. She disclosed that her daughter had gone to school in the Van at 7 am and there were pre-Diwali celebrations in the school and she came home late at about 1.30 pm/1.45 pm and she did not appear to be normal and when she started changing her clothes her daughter started crying and asked her not to touch her as she was feeling pain and on asking she said that her principal Manoj Gautam had given her an injection and he had removed her clothes and had fingered her and thereafter inserted her penis in her vagina. She stated that they gave an application Ex.P-11 and the police took them for counselling where the statement of her daughter was recorded and her medical was done and the child identified the room and the police had taken her to the school. She admitted that she had not disclosed that her daughter had come late that afternoon. A number of questions were put to her with respect to find out the relationship with Avtar Singh. She stated that Avtar Singh was the son of Harbhajan Singh, brother of her father-in-law. She stated that her husband was in the Army and he was not at home on the day of occurrence. She stated that she was not working and she had not gone to the school for a job. She stated that on the day of occurrence, she did not consult the doctor but she had given her a paracetamol tablet. She stated that when her daughter did not reach home, she inquired from the teacher and made a call and the teacher had told her that the child would be coming late.

She stated that on coming to know about the fact, she tried to call her husband but she could not contact him and she spoke to him at night. She stated that she did not speak to anyone in the village. She stated that she did not lodge the complaint against the owner of the school as there were holidays in the school and she visited the school with her sister-in-law who was working in Kurukshetra University on 02.11.2013. She denied that her sister-in-law was an active member of Indian National Lok Dal. She stated that she did not make any inquiries from Avtar Singh's daughter. She stated that her husband came home after 20-25 days of the incident. She stated that she had never met the principal prior to the incident and she had met her daughter's teachers namely Sangeeta and Bharti. She stated that she did not make any inquiries from both the teachers. She could not say whether the crime team had given a report that no such incident had taken place. On further cross-examination effected on 07.02.2017, she stated that her daughter had identified the music room in the presence of the police official she admitted that all the persons had told her that incharge of the music room was Manoj Verma. She stated that some unknown person had sent a photo on the mobile phone of her sister-in-law which was the photograph of the Principal and on that basis they had made allegations against him. She admitted that she had shown the photographs to her daughter and to the other victim. She admitted that on the day of the incident, Diwali celebrations were going on. She stated that initially, the identity of the accused was doubtful as to whether it was Manoj Gautam or Manoj Verma. She volunteered that Manoj Gautam was named on the basis of photograph.

Lakhbir-PW/11, mother of the second victim, stated that when her daughter returned from School at about 1.30 pm/2.00 pm and was taking

off her dress, her daughter asked her not to touch as an injection had been given in the vagina and when she made further inquiry, she stated that it was the Principal, Manoj Gautam. She stated that her daughter explained that he removed her clothes and lay her down on the bed and he put his penis in her mouth and rubbed it on her stomach and threatened her not to disclose to anyone at home. She stated that she went to the police station on 05.11.2013 and thereafter got the medical done. She stated that videography of the counselling was done. She stated that she was not present at the time when the statement of her daughter was recorded by the DSP. But this statement was found to be false and an observation in this regard was made by the trial Judge as on seeing the CD, she was found to be present in the same room.

She admitted that she was related to other family who had lodged the FIR. She stated that the police had not got the accused identified either in the police station or in Jail. She stated that she never visited the school even after the incident. She admitted that her daughter and the second victim had performed in the school on that day. She stated that she did not know that a case had been got registered regarding the same incident by the other victim. She denied that she had met the mother of the first victim. She stated that statement of her daughter was recorded in the Court and some questions were put by the Presiding Officer to the first victim but the daughter felt hungry and went out of the Court and therefore her statement could not be recorded. She could not say whether the first victim had made any statement subsequently. She stated that her daughter went to School at 7.45 a.m. and used to return by 3.00 pm. She could not give the name of the present class teacher and she did not even know the name of the Principal of the School where the child was later studying. She could not

even remember the name of the teacher of the previous school. She stated that she came to know the name of the Principal of the previous school on the day of the admission in that school.

PW-8 Avtar Singh, father of the second victim gave the same facts as his daughter had given. He stated that they went to the police station on 05.11.2013 and her medical was done and videography of the counselling was also done. On further cross-examination, he stated that he had not seen the occurrence and the identity of the wrongdoer remained doubtful as to whether it was Manoj Gautam or Manoj Verma and Manoj Gautam was named on the basis of the photograph received on the mobile phone of his sister. Similar was the statement made by Harpreet Kaur/PW-9.

Sangeeta/PW-14, a teacher in the School brought the attendance record. In the cross-examination, she stated that the school had celebrated Diwali function on 31.10.2013 and the Nursery students came to the school in casual uniform and she along with Bharti Sharma supervised the dance performance by the children of Nursery class and the performance continued till 11.20 a.m./11.25 a.m. and both the victims had performed the dance and after the function these two girls along with other Nursery class students were taken to the classroom and their attendance was taken and at 11.30 am the school had closed. She disclosed that she along with Bharti Sharma had gone to Bus No.5 and both the girls boarded the bus at about 11.35 a.m and the driver's name was Suresh and helper's name was Ravi Kumar and the children were dropped at about 11.45 a.m. She stated that the Principal was not present in the School and came to the school after the children had gone, for distribution of diwali gifts to the teachers. She stated that Rom Bahadur, Peon was at the gate when the bus left for Buddanpur

village. She admitted that Rajeev Mehta, HCS came along with Manoj Gautam for distributing the gifts to the teachers and no occurrence had taken place and she had made a statement to the Crime Branch and similar statement was suffered by her to ASI Daljeet Singh and to DSP, Indri and to Inspector Aman CIA, Karnal on 03.11.2013/4.11.2013 and 5.11.2013.

Bharti Dabas/PW-17 deposed that SIT was constituted by Superintendent of Police, Karnal and the statement of second victim was recorded and she had called the Legal Aid Counsel and a lady constable and at the time of recording of the statement, the legal aid counsel and the lady constable and mother were inside her office and the door was closed and nobody else was allowed. She stated that recording was videographed and it was converted into a CD Ex.D2. She stated that her role in the SIT was only for counselling. She admitted that the statement of the child had to be recorded by the senior police officer not below the SI but she did not record the statement and gave dictation to constable Kavita and thereafter whatever was stated by the child was reduced into writing. The CD Ex.D2 was shown to the witness and she admitted that the conversation which took place in between the legal aid counsel and the victim was not prepared correctly and it was not the exact version.

Neelam Kashyap Deputy Advocate General, Office of Advocate General Haryana, Chandigarh-PW-18 stated that she was called by the DSP and statement of second victim was recorded in the presence of DSP Bharti Dabas, lady constable Kavita and Lakhbir Kaur, mother of the victim and its videography was recorded. She stated that she had also counselled the first victim. She admitted that the answer to some questions in Ex-P16 was not the exact version which was given by the child. She

admitted that the two lines of Ex-P12 had been added lateron.

The accused denied the prosecution version and gave his account of the day. He stated that he had falsely implicated in this case. He stated that he had left his house at about 11.15 a.m. and went to Dr. G.D. Sharma's clinic, opposite to the civil hospital, Karnal and then he went to Pash Pustakalya where Press were also present and it was called to protest the demolition and he was there till 12.00 noon and then he proceeded for the school and reached there at about 12.30 p.m. and he along with SDM Rajiv Mehta had distributed the diwali gifts. He stated that all the students by then had left School and the charge of the Nursery class was with Sangeeta and Bharti and they took the attendance twice. Both the teachers got the nursery students board the respective buses & both the victims had left school at about 11.30/11.45 a.m. He could not give name of the driver and the helper. He stated that when he reached the School, Manoj Verma was not present and he had come in the morning and had left before he reached the school. He stated that after the school, he had gone to the Bar Room of District Karnal and got prepared some documents. He stated that Kavi Sammelan was arranged on the next day and no such incident had occurred in the School.

The accused examined Dr.G.D. Sharma, who brought record and stated that the DSP, Madan Lal moved an application and on that application he gave certificate Ex.D8.

Rajiv Mehta/DW-2 Additional Deputy Commissioner, Panipat deposed that he had reached the school at about 12.15 P.M on 31.10.2013. and after 5 minutes, Manoj Gautam had reached the school. He stated that earlier, in the morning, he had got a call that he (accused) was not feeling

well and asked him to attend the function in place of him. He stated that he along with Manoj Gautam had distributed gifts to the teachers and his statement was recorded by the DSP and in his statement he had stated that the case was lodged on account of conspiracy against him. He declared that the principal was working in the school for the last 4-5 years and there was no complaint against him.

Kamal Midha, News Reporter, Total TV-DW/3 stated that he was working as a reporter in Pash Paustaklya in Total TV and on 31.10.2013 he had reached the Pash Paustaklya where reporters had gathered to cover the protest and Manoj Gautam had reached the Pash Paustaklya and he was present there and he had taken his interview on that day and proved CD Ex.D-9.

Gurmeet, Private Assistant to Shri Chander Parkash Kathuria, Chairman, Haryana Sugar Federation deposed that he had accompanied the accused to Pash Pustkalya and had taken some photographs which they had produced before the DSP.

Rom Bahadur, Peon in the School deposed that the school got over at about 11.30/11.45 am and all the children left school before 12.00 noon. He stated that Rajeev Mehta reached the school at about 12.15/12.30 p.m. and five minutes later the Principal had reached the school and both of them had distributed gifts to the teachers.

Bharti Sharma, DW-6, Teacher of the Nursery class testified that the students of the nursery class used to attend school from 7.40 a.m. to 11.30 a.m. and there were diwali celebrations and children of the nursery class had participated in the function and thereafter they returned to the class room and their attendance was taken and both the teachers dropped the

children of the nursery class including the victims were led to the respective buses and the principal was not in school and he had arrived at 12.20/12.25 p.m. She also stated that the principal did not teach any class of the school. She also stated that since the students of the nursery class were very small and they had never visited the music room either independently or along with the teachers.

Archana, DW-7 made a statement similar in line with DW-6. Ravi Kumar, Helper on the bus, DW-8 stated that the custody of the children of the lower classes was handed over to them by the respective class teachers and Sangeeta and Bharti had dropped the students at 11.40 am on their respective buses and the children were dropped at village Buddanpur around 12.00 noon and till then the principal had not reached the school.

Madan Lal, Retired DSP, DW-9 submitted that he had filed a report in this case against the accused. He stated that in February, 2014 he received a letter from ADGP, Haryana asking for further investigation and SIT was constituted and it was headed by him and thereafter, permission of the trial Court was taken and investigation was carried out by him. He deposed that the principal had not reached the school till 12.00 noon and they had taken the CDR (Ex.D17) along with the location of the Principal. He also proved the statement given by the first victim Ex.D19 and the orders passed by the Magistrate thereupon. He stated that as per the conclusion on further investigation, the accused was found innocent and discharge report was submitted. He stated that he had not recorded the statements of the victims although he had joined them in investigation. He stated that the victims were little girls and as per his observations, they

could not make the statements, therefore, their statements were not taken.

Dr. Chandbir Mandhan, Advocate testified that the accused had joined the function on 01.11.2013.

ASI Deepak Kumar, DW-11 proved the CDR and the location of the accused from 10.53 am till 7.20 pm on 31.10.2013. Karan Singh Mandhan, Advocate made the same statement as made by DW-10.

The trial Court convicted the accused and rejected the statement of the defence witness and sentenced him to the imprisonment mentioned hereinbefore.

The counsel representing the appellant urged that the incident had occurred on 31.10.2013 and the FIR had been lodged on 02.11.2013 and according to the complainant, she came to know of the incident the same afternoon. Counsel submits that the husband of the complainant was in the Army and he did not come back even on coming to know of the incident. The counsel submits that the child was produced before the Magistrate and her statement is Ex.D20, and the Magistrate had observed that the child was not a competent witness as she was unable to relate anything. The counsel submits that the second victim was produced by the mother on 5th of November, 2013 as the complainant, learnt that her daughter was unable to give account of the incident and the second victim's mother account was that she came to know of it on the same day. It was urged that they introduced the second victim who was her relative's child. It was urged that there was no evidence of penetrative sex and in the initial inquiry, the accused was found to be innocent and no semen was detected. Counsel further submits that the date of the incident was same though the victims had been examined three days apart. Counsel further submits that

the redness can appear on scratching and the medical officer had deposed that she had mentioned the history as was given by the mother. Counsel further submits that diwali celebrations were in the school and the children had performed and the little ones are never left alone and they were taken to their class, where the second attendance was taken and thereafter they were left in the school bus. The counsel urges that all the children reached their homes before 12.00 noon and as per the version given by the complainant, her daughter reached after 1.30 pm and it is not her case that her child was separately sent in the school bus. Counsel further submits that school was closed after 31.10.2013 and the mother had not visited the school even on the opening and the place of incident is said to be music room which is not on the ground floor and is on the upper floor and the children could not have gone there alone unnoticed. Counsel further submits that the investigation is tainted as the investigating officer called the children but did not record their statements and he deposed that he found that the girls were too small and they were not be in a position to make a statement and he did not even summon the class teacher or the driver or the helper who were most relevant. The counsel further submits that the DDR No.11 was entered on 03.11.2013 as they found the case to be doubtful. Counsel further submits that first victim had joined the school only three months earlier and it is the categorical case of the prosecution that the principal was not teaching any class, therefore, identification parade was necessary. The counsel further submits that PW-14 who is a teacher in the school had stated that both the girls were with her the whole morning till they were left in the bus and she had also stated that she had made a similar statement to the investigating officer and those statements have been kept away. Counsel

further submits that the complainant admits that they were doubtful about the identity and named the principal because a photograph was circulated by her sister-in-law and that photograph was shown to the child and she had admitted that they had not shown the photograph of the music teacher Manoj Verma and in the light of this evidence, the conviction recorded by the trial Court was wrong and the evidence is fabricated. The counsel further submits that the time of incident given by the prosecutrix is after 12.00 noon but there is ample evidence on the record that the children had reached home by 12.00 noon and police had collected the CDRs which show the presence of the petitioner in the School only after 12.15 pm. It was urged that the child had been tutored and it is dangerous to accept such statements. The counsel further submits that a responsible officer of the government of the rank of HCS had vouched in favour of the appellant that the principal had arrived in the school after him.

The State counsel on the other hand supported the judgment and it was urged that the statement of the victims get supports from the medical evidence and there was no reason to discard their statement and the appellant had been rightly convicted.

A witness is the prime source of evidence in the judicial proceedings. The law recognizes that a child is a competent witness and there is nothing in law that prevents him from appearing in the Court and give evidence. The key concerns about child witness are their competence and credibility as witnesses when the child is too small the evidence is required to be evaluated carefully and it is the duty of the Court to find out whether the child is an easy prey or has been tutored. It has to be kept in mind that a child of tender age may not show absolute consistency in the

depositions and if it appears that there is a possibility of the child being tutored the Court should exercise extreme caution in relying upon his evidence.

In '**Rameshwar Vs. State of Rajasthan AIR 1952 Supreme Court 54'**, the Court had pointed out that Judge should record their observation whether the child understands the need of speaking truth and said why they think so. Otherwise, the credibility of the witness cannot be well established and it may become necessary to reject the evidence.

However, the Supreme Court in '**Nivrutti Pandurang Kokate & Ors. Vs. State of Maharashtra (AIR 2008 SC 1460)**' cautions that the child witness is a dangerous witness as he/she is pliable and liable to be easily influence, shaped and moulded. On the other hand, on scrutinizing the evidence if the Court comes to the conclusion that there is truth in the deposition, nothing prevents the Court from accepting the evidence. The child is, however, a privileged witness. The competency or credibility of a child witness, which may differ from case to case, is to be decided by the Court based on the facts and circumstances of each case.

In short, child witness is not someone to be frowned upon if he is able to discern between right and wrong. Conviction on the basis of deposition of a lone child witness is permissible if he is found to be competent witness and his evidence is convincing in terms of quality, reliability and trustworthiness. However, such a witness should be accepted with great caution and circumspection.

"Voir dire test": A concept derived from the Anglo-Norman phrase, refers to '*Oath to tell the truth*'. The word *voir (or voire)*, in this combination, comes from The French which states, "That which is true".

The test is conducted for the purpose of deciding the competency of the child witness. It has to be seen whether the victims could describe the incident. The complaint in the present case was made three days after the incident. The child was produced before the Magistrate three days after the incident, the first victim was not able to make a statement. The prosecution conveniently kept that statement away from the Court. The Magistrate had observed that the child was of tender age and she could not understand the incident fully and in his opinion she could not depose and therefore the request made by the police was declined. The investigating officer did not record their statements as according to him, the victims were too small to depose.

The incident is based on the testimonies of child witnesses, both aged 3½/4 years, and students of the nursery class. The first victim's mother had lodged the FIR and had disclosed that the child was admitted in the school only three months earlier. It is not disputed that the Principal of the School was not taking any classes, therefore, the identity of the perpetrator was crucial. When the statement of the complainant is examined fully, it is found that she was hesitant about the person involved and she was certain only after a photograph was received by her from one of her relative. The photograph of the Principal was then shown to the child. It has come in evidence that there was a music teacher also known by the name of 'Manoj' and the music room is on the second floor of the School.

The sole witnesses to the incident are the two girls of the nursery class. They were very small and of a tender age, it is first necessary whether they were able to form proper opinion about the nature of incident because of immaturity and understanding. Besides that it has to be

considered whether their sole testimonies could be relied upon considering the evidence led by the defence, the shaky testimony of the complainant and delay in lodging the FIR. It has to be seen whether the victim could recount the details of the incident specially when the minor witnesses were not expected to be familiar with sexual activity.

The law recognizes the child to be a competent witness but were the two witnesses able to give a lurid details. Whether their statements are credible? As noted above, the first victim was unable to give the account of the incident before the Magistrate. That was three days after the incident. The Magistrate had declared her to be incompetent. A year later the child gave a detailed account of the incident, how could that be possible unless she was tutored. No child of this age could have described the incident in the manner it has been done. Some of the answers which have been given are in contradiction to what the mother has stated. The child had stated that both the lady teachers had taken them to the upper floor in their lap meaning thereby that the children were led into the room by the teachers which was not the case of the prosecution. The child only knew the name of the lady teacher and not of the male teachers. The child could not give the time line when she joined this school and it is normal, as a child so tender, would not know. According to the first victim, she went to school by bus but she asserted that her father used to bring her back on the bike which was not true. It has come in evidence that the child's father was in the Army and he was not in town on the day of the incident and had returned after twenty days. It is also strange that the father did not return home even on learning about the incident.

According to the prosecution, both the children were counselled but the prosecution failed to produce the video/CD of the counselling and held it back. The defence produced the video recording of the counselling of the second victim. On going through it, it becomes clear that the child had been unable to narrate the incident. The victim gave reply in the negative to every question posed to her. When it came to the specific incident, the child wanted assurance that the mother was in the room and when they put the specific question to her, the child looked back at her mother.

The counsellor had put questions to the children as to whether anything had happened after the dance performance. The (second) victim shook her head denoting that nothing had happened. She was again asked as to what she did after that, the child replied that she had done nothing. She was asked as to whether she returned home after that, the child replied in agreement stating that they had gone home. Probing question was put as to whether something bad had happened with them. The child shook her head denoting that nothing had happened. The counsellor then again asked as to whether their clothes were removed. The victim replied in the negative. Same question was again put to the child as to who had removed her clothes in the school on the day of the function. The child again shook the head and said nothing. The DSP offered to give her a pen then called the child towards her and asked the child as to who had removed her clothes the child stated that 'Sir' had removed her clothes. She asked the name of the person the child looked towards her mother and the mother prompted her to give the name, the child again replied that it was 'Sir'. The DSP again asked the child to give the name of the persons and then she said Mr. Manoj Gautam

Sir. The DSP again asked the child as to who all were there she stated that no one was with her. The DSP asked her as to whether her friend was with her and what was her name then she gave her own name and the name of the first victim. The DSP asked if the first victim (naming her) who was with her in the room upstairs. The child pointed to the room in which they were already sitting saying that it was the room as big as that room. The DSP then prompted and stated that it was the music room or whether it was the room on the upper floor. The child stated that it was on the ground floor. This illustrates the manner in which the counsellor and the DSP had questioned the victim.

There is another important aspect which the investigator failed to investigate. The accused had taken a defence that he was not present in the school and had arrived in the school after the function was over. The police had collected the call details recorded but did not choose to produce it. The CDRs were produced in defence and it can be seen that the arrival in the area is after 12.00 p.m. The teachers, the bus driver, the peon, all were categorical that the bus/van had left the school by 11.45 am which is the normal time the van leaves for dropping the children. The mother had disclosed that her daughter reached home at about 1.00 p.m. She had also stated that as the child had not reached home and she had called the teacher. There is no evidence to show that any call was made to the teacher that afternoon. The prosecution had failed to lead evidence to prove this. It is a known fact that the children of tender age are not left alone and the teachers leave them upto the bus and this routine is followed everyday and it was done on that day too, therefore, it is difficult to accept that the bus left school without these two victims and only the two girls were left later in the

day.

The defence of the accused gets support from the Additional Deputy Commissioner, Panipat who was at the relevant time posted as SDM at Guhla, District Kaithal. The lady teachers also have supported the defence version and had stated that both the children had participated in the function and thereafter they returned to the class and their attendance was taken and then the teachers dropped the children including the two victims to their respective buses. They have vouched for him.

The medical evidence does not suggest that the girls had been raped. The FSL report was in the negative. The girls had spoken of penetration. Considering the girls were of tender age, the damage to their private parts would have been greater. The medical officer had stated that she had mentioned about the history of violence as it was narrated to her by the mother. She had also stated the possibility of redness can appear even on scratching.

There is admission by the complainant that her daughter had performed in the school whereas the victim had stated that she had not performed. This goes to show that the victim were of tender age, unable to even remember that they had participated in the school function. The trial Court could not have relied upon such evidence. The conviction could not have been based on the corner stone of such deposition. A child of such age was not in a position to form a discreet opinion about the nature of the incident due to immaturity of understating. The Court could not have considered them as competent or reliable and their testimonies could not be relied upon. The trial Court failed to evaluate the evidence carefully and failed to notice that the child had fallen prey to tutoring. There was no

consistency in their depositions that was made before the counsellor and then made in the Court. It is clear that it was a case of tutoring and it is unfortunate. The trial Court failed in its duty and relied upon their testimony without examining the evidence led by the defence which included the CD-Ex.D2 the video recording of the counselling. It was clearly a case where the child witness was pliable, was easily influenced, shaped and moulded. The trial Court was not right in accepting their evidence. The children did not have the maturity to understand the consequences. They were not in a position to understand the nuances of the incident and had given an account of the incident as was narrated to them. The identity of the accused was in doubt there is no explanation why no identification parade was held. The counsellor/DSP were leading the child to depose in a particular manner, offering gift to the child. The child did not know the name of her class teacher, how could she remember the name of the principal who did not teach them (the victims).

It is found that the child witnesses were not competent witnesses and were not in a position to depose and had been tutored and it would be unsafe to rely upon their testimony. As a consequence, the conviction recorded by the trial Court has to be *set aside*. The appeal is accepted. The accused is acquitted.

October 06, 2018

ps-I

**(ANITA CHAUDHRY)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No