

\$~

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

Reserved on: 24th February, 2018

Pronounced on: 24th May, 2018

+ CRL.A. 627/2014

RAGHAV

..... Appellant

Through: Mr. Abhishek Singh, Adv.

versus

STATE

..... Respondent

Through: Ms. Asha Tiwari, APP

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

HON'BLE MR. JUSTICE C.HARI SHANKAR

%

JUDGMENT

C. HARI SHANKAR, J.

1. This appeal, at the instance of the appellant Raghav, assails (i) judgment, dated 3rd March, 2014, passed by the learned Additional Sessions Judge (hereinafter referred to as “the learned ASJ”) whereby the appellant was convicted for having committed offences under clauses (l) and (m) of Section 5 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”) and Section 506 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), as well as (ii) the subsequent order, dated 4th March, 2014, sentencing the appellant to (a) imprisonment for life, along with a fine of Rs.10,000/-, with default simple imprisonment for six months, under Section 6 of the POCSO Act and (b) rigorous imprisonment for three years alongwith a fine of Rs.5,000/- with

default simple imprisonment of one month under Section 506 of the IPC. The benefit of Section 428 of the Code of Criminal Procedure (hereafter referred to as “the Cr.P.C.”) was also extended to the appellant. The sentences have been directed to run concurrently.

2. The facts of the case, insofar as they are relevant, may be set out as under:

(i) On 14th July, 2013, a complaint (Ex. PW-6/A) was filed by Gauri Shankar (PW-6), in the Begum Pur Police Station. The complainant alleged that the appellant, who was the brother-in-law of the complainant Gauri Shankar and was residing with him since three years, had been subjecting Gauri Shankar’s daughter (who, for reasons of anonymity as mandated by law, shall be referred to, hereinafter as ‘M’) to unwelcome sexual advances, threatening her that, in case, she reported these incidents to anyone, he would disfigure her face by throwing acid on her. It was further alleged, in the complaint, that the appellant had sexually assaulted ‘M’, by taking advantage of the fact that she was in fear as a result of the threats held out by him. The complaint further averred that the appellant had also threatened the complainant Gauri Shankar and his wife Seema (PW-3) that, if they did not surrender their daughter to him (the words used in the complaint are ‘*tum ladki ka haath mere haath mein do*’, which would convey the impression that the appellant desired to marry ‘M’), he would disfigure her face by throwing acid on her. It was further alleged that the appellant always

carried a dagger with him, showing which he used to accost the complainant's children, threatening them that, if ever Gauri Shankar came out, the appellant would stab him to death. It was further alleged, in the complaint that, owing to the threats held out by the appellant, the proposed marriage, of 'M', had also broken. In these circumstances, the complainant requested that requisite action be taken against the appellant.

(ii) On the complaint being forwarded to SI Manju Singh (PW-11), she, along with Const. Azad (PW-8), proceeded to H. No. B-26, Rajeev Nagar, Begum Pur, the residence of the complainant Gauri Shankar (PW-6), where they met 'M' and her parents. SI Manju Singh recorded the statement of 'M', and, thereafter, proceeded, with 'M', her father and Const. Azad to the Sanjay Gandhi Memorial Hospital (hereinafter referred to as 'the Hospital') where the medical examination of 'M' was conducted. The MLC (Ex.PW-4/B) of 'M', as recorded by Dr. Manisha Gupta (PW-9) reads thus:

“Pt brought to casualty with A/H/O sexual assault by her maternal uncle (*Mama*) named Raghav for ~ 2 years.

O/E - conscious, oriented

PR – 76/min BP – 116/80 mm Hg

Chest, CVS, CNS – NAD

P/A soft BS (+)

L/E – No external injury visible at the time of Examination

Adv Referred to S/R Gynae for detailed history, Examination, opinion

Brief description of the incident

Pt ('M') 17 y/F R/o Rajeev Nagar, brought by SI Manju. She complained for sexual relation by maternal uncle (*mama*) named Raghav for past 2 year. Now he is daily blackmail to her. According to Pt these sexual relations are not giving consent - one month no sexual relation with *mama*

M/H – LMP = 5/07/13

Pr MP = a day/1 month/RMPF

O/H – UNM

P/A – soft

L/E – Hymen of Pt torn

P/V – Ut (N) size, R/V, fx 3

UPT = -ve”

Dr. Manisha Gupta proved the above MLC (Ex. PW-4/B), during trial, reiterating, in her examination-in-chief on 20th January, 2014, that ‘M’ had told her that her sexual relationship, with the appellant, which had been continuing since two years, was not with her consent, and that, on examination, the hymen of ‘M’ was found torn. She confirmed, during cross examination, however, that ‘M’ was not found to be having any injury on her private parts, or on any other part of her body.

(iii) On the basis of the statement of ‘M’, *rukka* (PW-2/A) was prepared by SI Manju Singh, on the basis whereof FIR No.

224/2013 (PW-2/B) was registered in the Police Station Begum Pur by HC Kalyan (PW-2) under Sections 376/506 of the IPC and Section 6 of the POCSO Act.

(iv) Consequent to registration of the FIR, SI Manju Singh proceeded with Const. Azad (PW-8), 'M' and her father Gauri Shankar (PW-6), to H.No.C-26, Begum Pur, where the appellant was residing as a tenant. The appellant, who was found in the said premises, was apprehended and arrested *vide* Arrest Memo (Ex. PW-4/C) and his personal search was conducted *vide* Personal Search Memo (Ex. PW-4/D). The appellant's disclosure statement (Ex. PW-8/A) was recorded, whereafter the appellant led them to H. No.93, Begum Pur, where he allegedly pointed out the room where he used to commit rape upon 'M', as recorded by Pointing Out Memo Ex. PW-8/B.

(v) Thereafter, Const. Azad (PW-8) and SI Manju Singh (PW-11) proceeded with the appellant to the Hospital, where he was medically examined, *vide* MLC (Ex. PW-10/A), which reads thus:

“Brought for medical examination with A/H/O sexual assault with his niece for ~past 2 years

– O/E conscious, oriented
PR – 76/min
BP – 116/80 mm hg
Chest, CVS, CNS – NAD
P/A soft BS (+)

L/E – no external injury visible at the time of examination

- Penis, testis and scrotum well-developed
- Secondary sexual characters well-developed
- No injury to external genitalia

There is nothing to suggest that this person cannot perform the act of sexual intercourse.”

The above MLC of the appellant (Ex. PW-10/A) was proved, by Dr. Brijesh Singh (PW-10), who had prepared the said MLC, during trial. Dr. Brijesh Singh, who had also conducted the preliminary examination of ‘M’ when she was brought to the Hospital, affirmed, in cross-examination, that no struggle mark was found by him, at the time of examination, either on the appellant or on ‘M’.

(vi) On 15th July, 2013, the appellant and ‘M’ were produced before the Court of Ms. Vandana, learned MM. (PW-5), who remanded the appellant to judicial custody and proceeded to record the statement of ‘M’ under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C.”). The said statement may be translated into English as under:-

“Statement of ‘M’

Statement of Ms. ‘M’ d/o Shri Gauri Shankar , R/o- B-64 Rajiv Nagar, Begumpur, Delhi.

Aged about- 17 years

On SA

My name is 'M'. I have studied upto Class V. I reside at the above-mentioned address with my family. My maternal uncle Raghav has been living with us in our house for approximately the last three years. My maternal uncle often used to sexually harass me. One day when there was nobody at home, my uncle on some pretext took me to his room. He tied my hands and mouth and forcefully committed wrong acts (*galat kaam*) with me. I was weeping a lot. When I said I will tell my mother everything, he threatened to throw acid on me and defame me. I got scared. Since that day, whenever I was alone at home, my uncle did wrong acts (*galat kaam*) with me. Two to three months before, I mustered courage and told my mother everything. My mother turned my uncle out of the house."

(vii) Thereafter, SI Manju Singh visited the "*Nigam Prathamik Pratibha Vidyalaya*" at Begum Pur (where 'M' was studying),, where the Principal Karan Singh (PW-1) provided her a certificate (Ex. PW-1/D) which, translated into English, read as under:

“

Dated: 23/07/2013

This is to certify that 'M' daughter of Shri Gauri Shankar took admission, in Class-I on 15/07/2002. According to the School Records, her admission number is 5928, residential address is B-72, Naveen Vihar, Begumpur and her date of birth is 10.12.1996 (10th December, 1996).

Sd/-

Principal Nigam
Pratibha Balika
Vidyalaya
Begumpur, Delhi-110086
9811688056”

(viii) After recording of statements under Section 161 of the Cr.P.C, and consequent on completion of the investigation, charge sheet, under Section 173 of the Cr.P.C., was filed by SI Manju Singh (PW-11) before the learned MM. Charges were framed, against the appellant, under Sections 376/506 IPC and clauses (1) and (n) of Section 5 of the POCSO Act. The appellant pleaded not guilty, whereupon the case was sent to trial.

3. Eleven witnesses were examined by the prosecution in its support. These statements, to the extent they are relevant, may be noted as under:

(i) Karan Singh, the Principal of Nigam Prathamik Pratibha Vidyalaya, Begampur, deposing as PW-1, stated that, as per the school record, the date of birth of 'M' was 10th December, 1996. However, he also admitted that no record, of such date of birth, was produced before the school and that the said date of birth was entered, by the school, in its records, on the basis of an affidavit (Ex. PW-1/B) submitted by Gauri Shankar (PW-6). He also admitted that the said affidavit (PW-1/B) was not attested by any Magistrate. We may note, here, that the said affidavit, submitted by Gauri Shankar at the time of securing admission of 'M', merely states that the "true and correct date of birth" of 'M' was 10th December, 1996, supported by the usual verification.

(ii) PW-2 HC Kalyan who was posted in PS Begum Pur, at the relevant time, merely deposed regarding registration of FIR No 224/2013 under Sections 376/506 IPC and Section 6 of the POCSO Act, by him, on 14th July, 2013, on the basis of the *rukka* presented to him by SI Manju Singh (PW-11).

(iii) PW-3 Seema, the mother of 'M' deposed on 13th January, 2014, and, thereafter, on 20th January, 2014. Given the importance of her deposition, it is essential to reproduce the same, *in extenso*, thus:

On 13th January, 2014

“On S.A.

I am a housewife and residing at the above-mentioned address with my husband and 5 children. Prosecutrix is my 1st born child. I was suffering from piles during the period of incident and due to set reason, I used to visit hospital regularly. 6 – 7 months prior from today, my daughter came to me and started weeping. I asked about the reason of her weeping then after great persuasion she told me that her maternal uncle Raghav had committed wrong act with her when nobody was present in the house. After hearing this, I got stunned and told about this incident to my husband. My husband called my brother and asked him about the incident to which accused told that the prosecutrix voluntarily used to come in his room. My husband turned my brother out from the house. My daughter used to go out from the house to fetch water from the public And on the way accused Raghav met her and threatened her to throw acid on her face or he would stab her in case she will disclose anything more about the incident to anyone. My daughter told us about this threatening and on hearing the same, my husband went to PS and lodged a complaint against the accused. In my presence, lady police officer Manju recorded statement of my daughter. My daughter was

taken to hospital for medical examination. Since I was not feeling well, I did not accompany her to hospital. My husband had gone along with my daughter to the hospital. Thereafter, police went to the room of my brother and from there and arrested him. The accused Raghav is present in court (witness has correctly identified the accused). Police made enquiries from me and recorded my statement also.

XXXXXX By Ms Sunita Tiwari, amicus curiae for the accused.

I do not remember the date of recording of my statement by the police as I am illiterate. I do not know the date of my marriage. My elder daughter i.e. prosecutrix is presently 18 years old and she was born one year after my marriage. I cannot say how many years prior to today I got married with my husband. Vol. My husband would know about it. Again said, I was married about 19 years ago. I also cannot tell the date of birth of my daughter i.e. prosecutrix. My youngest child is aged about 8 years. I cannot tell date, month and year of birth of any of my child. My daughter was born at my parents house at Village Roshanabad, District Farukhabad, UP. The date of birth of prosecutrix was not registered with the Pradhan of village or any other authority. I came along with my husband in Delhi after 2/3 months of the birth of the prosecutrix. No birth certificate of prosecutrix was got prepared by me or my husband after coming to Delhi. No birth certificate of any child was got prepared. However, all my children had to the school. I'm residing with my family in a rented house. 4/5 tenants are residing on the ground floor and 4/5 tenants are residing on 1st floor in the same house, where I'm residing as tenant. My landlord is not residing in the same house. He is residing at some distance from our house. I'm residing in the ground floor. There are other families residing on the same floor, where I'm residing. 2 unmarried boys were also residing on the same floor in the kitchen. Vol. They leave in the morning and come back in the night. The main gate of the building remains open the entire day. I and other tenants close door of our respective tenanted premises.

It is correct that all the tenants rooms on the floor on which, I am having my tenanted premises had their separate walls. Generally, the door of the rooms of the tenants remain open during the day time, as children come and go. There is only one water And motor for all the residents of the building. The water on the 1st floor is filled by connecting a water pipe to the main water tap on the ground floor. The tenants connect their own respective pipes and electricity connection to the tap and the water motor to fill the water. I also feel water by doing so.

Accused was residing with me in my tenanted premises prior to the incident. After I came to know about the incident, I turned him out of my house and thereafter he took a separate premises on rent in some other building in the same locality. Matter was reported to the police on the day my daughter informed me about the same. I had told the police that I had been told about the incident by my daughter on that day itself.

I had not met the I/O of the case today when I came to the Court. My husband had contacted the I/O before coming to Court today and the I/O told him that we should reach the Court and that she would also reach here. I was not told by the I/O about the statement which I was to make in the Court, on reaching the Court in the morning.

It is wrong to suggest that no such incident took place as stated by me in my examination in chief. It is wrong to suggest that my husband and accused were doing the work of selling plastic chairs or that there were certain money disputes between them due to which accused has been falsely implicated in the present case. It is wrong to suggest that I'm deposing falsely."

On 20th January, 2014

On S.A.

“ I have seen EX-PX. This sketch was handed over to me by my son Bimal, who told me that he had found the same in the room of the accused. I can identify the handwriting of accused, who is my real younger brother. After seeing EX-PX, I can state that the statements written thereupon in in the end the name “Raghav” written in English are in the handwriting of accused.

xxxxxx By Ms Sunita Tiwari, learned amicus curiae for accused

“ I am illiterate. When I got married the accused was aged about four years. Accused was residing with my family and thereafter in a separate rented accommodation in the same building where I and my family are residing since 3 years prior to registration of the FIR in the present case.

Court question:-

Q You have stated that you are illiterate then how have you identified handwriting of accused on EX-PX?

Ans I have seen him writing and can identify his handwriting.

Q Can you identify handwriting of your husband, daughter, son etc., if shown to you?

Ans No.

Q Since you are unable to identify handwriting of your other family members like a son, daughter, hospitals etc. can you explain how you can identify handwriting of your brother/accused?

Ans I have seen him writing as he used to give lessons to my children.

When accused used to teach my children, they also made notes in their copies. It is correct that I cannot identify handwriting of my children. EX-PX was given

to me by my son prior to registration of the present case. I handed over EX –PX to my husband on the same day when my son gave it to me. My husband handed over EX –PX to the police, 2/3 days thereafter. Police did not record statement of my son, who had found EX –PX. I never told the police about EX –PX. The contents of EX –PX were read over to me by my son. It is wrong to suggest that EX –PX was never recovered from the room of the accused or that it is neither in the handwriting of accused nor was the sketch on it was prepared by him. It is wrong to suggest that I being illiterate am unable to identify handwriting and signature of anyone and that is why I am unable to identify handwriting of my husband, daughter etc. It is wrong to suggest that for this reason I am also unable to identify the handwriting on EX –PX.”

Ex. P-X, it may be mentioned, was a crude sketch of a face, with the lower two thirds blackened, and the following words written, on the page, in vernacular:

“Tera chehra bhayanak.” (“Your horrible face.”)

“Tezaab daalkar bhayanak chehra bana doonga dekh lena” (“I will pour acid and make your face horrible, watch out.”)

“Maarna hota kab ka maar diya hota. Dhokhebaaz ki saza hai” (“If I wanted to kill you I would have done so much earlier. The punishment of the traitor is”)

The page contains certain other words, too, in vernacular, which are incomprehensible.

(iv) ‘M’ herself deposed as PW-4. Her evidence, during trial, recorded on 13th January, 2014, reads thus:

“On SA

I am residing on the abovementioned address with my family including my parents and four

brothers. I studied upto 5th class. Accused Raghav, present in the Court today (witness has correctly identified the accused through the design in the wooden partition), is my real maternal uncle and he had been residing with us for the last three years from the date of filing of the complaint. Two years prior, he started teasing me by pressing my neck, by pulling my hair and thereafter he went to the extent of holding my hand and pressing my breast. Out of fear, I could not tell about this to anyone in the family and moreover he used to threaten me to kill me by stabbing and by throwing acid to disfigure my face in case I told about his acts to anyone.

Last year during winter days, I do not remember the exact date and month, I was alone in the house. Accused called me to his room in our house.

Court Ques. Was the accused residing with you and your family at that time?

Ans. Yes but he was staying in a separate room on the same floor in the same building.

Accused bolted the room from inside. He removed my salwar. I tried to raise alarm but accused shut my mouth by putting his hand. He also removed his pant and “usne zabardasti mere sath galat harkat kari. Usne apni susu ki jagah meri susu ki jagah me dal di.”

At that time my mother had gone to hospital to bring medicine. Accused did such wrong act with me many times whenever he found me alone in the house. Out of fear I did not disclose about his acts to anyone.

One day when my mother came back from hospital, I was weeping at that time. My mother asked me about the reason and thereafter I told her everything. My mother narrated all the incident to my father, who went to PS and lodged a complaint. Police came to my house and recorded my statement. My statement is Ex. PW-4/A and bears my signatures at point “A”. Thereafter I was taken to hospital for my medical examination by the police. My father also

accompanied me. At that time my mother was not well and she did not come with me. Initially I refused for my internal examination vide my statement recorded on the MLC by the doctor which is encircled at point “X” and bears my thumb impression at point “A” but later on my internal examination was conducted by the doctor. The MLC is now exhibited as Ex. PW-4/B.

Accused Raghav was arrested on my identification vide his arrest memo Ex. PW-4/C which bears my signatures at point “A”. His personal search was also conducted vide personal search memo Ex. PW-4/D which bears my signatures at point “A”.

Earlier also I came to the Court to give my statement before the learned Magistrate in her Chamber.

At this stage, the carbon copy of statement u/s 164 CrPC is shown to the witness from the judicial file on which she identifies her signature at point “A” and admits her statement to be correct. The carbon copy of statement u/s 164 CrPC is now exhibited as Ex. PW-4/E.

When I told about the incident to my mother and my father also came to know about the same, the accused was turned out of the house by my father. Thereafter the accused used to show knife to my brothers whenever they used to go in the gali.

xxxxxx By Ms. Sunita Tiwari, amicus curie for accused.

I do not remember the date when my statement u/s 164 CrPC was recorded by the learned Magistrate and I also do not remember after how many days of the complaint my said statement was recorded. I had told to learned Magistrate in my statement u/s 164 CrPC that out of fear I did not tell about teasing by accused to anyone else. Confronted with Ex. PW-4/E where it is not so recorded “after the incident of teasing the witness did not disclose about the incident to anyone in the family out of fear” but it is recorded in Ex. PW-4/E. I had told to learned Magistrate in my statement

u/s 164 CrPC that accused used to threaten me to kill by stabbing or by throwing acid to disfigure my face. Confronted with Ex. PW-4/E where it is not so recorded “just after the incident of teasing” but it is recorded in Ex. PW-4/E.

Since the time I am aware, I have been residing at abovementioned address. I am not aware if my parents have resided at any other place when I was a small child. Accused had teased me many times but I cannot tell the exact date and time of the same. My mother used to visit hospital regularly during those days as she was not well. I am not aware if my mother had handed over any of her medical treatment paper/prescription slip etc. to the police. The house where I was residing at the time of incident was constructed upto first floor and we were residing on the ground floor and there was a big open space in front of the said house which was called Gher (courtyard). There were other 5-6 tenants residing on the same floor where we were residing. The families of other tenants were also residing there. My mother used to leave for the hospital at about 8.00 AM and used to return in the evening at about 5.00-6.00 PM. She used to visit hospital whenever doctor called her but I cannot tell the specific dates of her said visit. My father leave house for his work at about 8.00 AM. My brothers are 16 years, 15 years, 13 years and 8-10 years of age. I cannot tell the exact time of the incident of teasing and wrong acts by the accused. Vol. Whenever he used to get opportunity, he used to do the same with me.

The room of the accused was situated in front of my room on the same floor. Since the accused had shut my mouth by his hand, I could not raise alarm at the time of committing rape upon me for the first time.

I cannot read Hindi properly. I have not gone through my statement. Vol. Police mam had read over my statement to me in the morning when I came to the Court. It is correct that my father and accused were doing business of sale of plastic chairs. It is wrong to suggest that I am deposing falsely at the instance of my

father as there was some money transaction between my father and the accused in the said business.”

(v) PW-5 was Ms. Vandana, the learned MM who recorded the statement of ‘M’ under Section 164 of the Cr.P.C. She merely confirmed, during trial, the fact of recording of the said statement.

(vi) The evidence of PW-6 Gauri Shankar, the father of ‘M’, during trial, may be reproduced, *in extenso*, thus:

“On SA

I am working for selling of plastic chairs in the area of Begum Pur, Sultan Puri etc. About 7-8 months ago, I along with my wife went to market and when we came back we found our daughter i.e the prosecutrix aged about 17 years was weeping. My wife made enquiry from her about the reason of her weeping. On this the prosecutrix told to my wife that in the absence of all family members, accused Raghav who is real maternal uncle of prosecutrix used to tease her and had physical relation with her. I also came to know that accused had been doing this since last about 1 or 1 ½ years. After hearing this, I got annoyed and asked from accused Raghav who is brother in law and has been residing with us since last 3 years. On my asking accused admitted that he had done wrong act (rape) with the prosecutrix. I informed the police on the same day. Accused threatened my daughter to throw acid on her and also not let her to marry anywhere else. Police came and recorded statement of my daughter i.e the prosecutrix. Police thereafter took to my daughter to SGM hospital along with me as my wife was not well, where my daughter had refused for her internal examination. From the hospital we went to the PS where the case was registered against the accused. From the PS, I along with my daughter and the police officials went to H.No. C-26, Begum Vihar, where the accused was residing as tenant. The accused was

arrested by the police on the identification of my daughter as well as on my identification. My daughter had signed the arrest papers of accused. I had lodged police complaint against the accused with SHO PS Begum Pur on 10.07.13. At this stage, witness has identified the photocopy of his complaint from the judicial file and his signatures at point A. The photocopy of the said complaint is Ex.PW6/A. My statement was recorded by the IO. Accused Raghav is present in the Court today. Witnesses correctly identified the accused.

XXXXX By Ms. Sunita Tiwari, Amicus Curiae for accused

My statement was recorded at PS on 14.07.13. I had stated to the police in my statement that me and my wife had gone to market or that when we came back, we found our daughter weeping or that my wife had asked about the reason of weeping. Confronted with statement Ex.PW6/DA where it is not so recorded. I had stated to the police that I informed the police as soon as I came to know about the incident from my wife. Confronted with statement Ex.PW6/DA where it is not so recorded. Vol. Infact the police was informed on the next day.

On 13.07.13 we went to market at about 7.30 or 7.45 pm and returned back at about 8.45 pm. I have five children. The prosecutrix is my eldest child. All my four younger children are studying in school. My children were watching TV in other room when we went to market. I leave for my work at about 8.30 am and come back at about 5.00 pm. Accused Raghav was earlier working with me. Accused used to leave home before me and return back from his work after my return. I have never done work of sale of plastic chairs in partnership with the accused. Accused used to buy his own chairs for sale. However, earlier we went together for sale of chairs. We both used to go on bicycle to sell chairs. Accused used to have his own separate account of purchase and sale of chairs and had nothing to do with me regarding his business.

Court Q: Was there any occasion for quarrel between you and the accused since both of you were doing your independent business of sale of plastic chairs but were going for it together?

Ans: Yes. Accused used to instigate the customers not to buy chairs from me and told them that chairs I was selling were defective and overpriced.

Court Q: How many times did you have such quarrels?

Ans: 3-4 times.

Court Q: When was the last quarrel between you and accused and how much time prior to reporting of the matter to the police in the present case?

Ans: It was 8-9 months prior to registration of FIR in the present case.

It is wrong to suggest that I have tutored my daughter to file a false case against the accused as I wanted to settle score with him over a dispute regarding sale of plastic chairs. Vol. Accused had drawn a sketch of my daughter and threatened to throw acid on her face and had written so on the said sketch and also depicted her disfigured face in the sketch.

Court Q: Do you have said sketch with you?

Ans: I have brought that sketch with me. The same has been drawn by the accused and the threat written on it is also in the handwriting of the accused and he has also written his name on it.

The said sketch is taken on record exhibited as Ex.PX.

I had not given sketch Ex.PX to the police as it was recovered later on, after registration of the case, from the room of the accused when my wife had gone there. It was recovered after 3-4 days of the registration of the case. I had given photocopy of this sketch to the IO later on. It is wrong to suggest that no such sketch

was recovered from the room of the accused or that sketch Ex.PX is neither in the handwriting of the accused nor was drawn by him. It is wrong to suggest that due to this reason, IO had not made it part of the charge sheet. It is wrong to suggest that no written complaint was made by me to the police official on the relevant date and time. It is wrong to suggest that complaint is antedated and antetime. It is wrong to suggest that I am deposing falsely.”

(vii) PW-8 and PW-11 were Const. Azad and Const. Manju Singh, respectively. They merely deposed, during trial, regarding the receipt of the complaint from Gauri Shankar (PW-6), the recording of the statements of ‘M’, the apprehension and arrest of the appellant, the recording of his disclosure statement, and the fact of his having pointed out the room where he was alleged to have committed rape on ‘M’.

(viii) Dr. Manisha Gupta, who had prepared the MLC of ‘M’, deposed as PW-9. She testified that ‘M’ had told her that the sexual relationship between ‘M’ and the appellant was not with the consent of ‘M’ and confirmed that, on examination, her hymen was found torn. However, in cross-examination, she acknowledged that no injury was seen on any part of the body of ‘M’, including her private parts.

(ix) PW-10 was Dr. Brijesh Singh, CMO, Sanjay Gandhi Memorial Hospital, who had conducted the preliminary examination of ‘M’ and, later, prepared the MLC of the appellant. He confirmed, in his evidence, that no external injury

was visible on the appellant and that there was no mark of struggle found at the time of examination, either on the appellant or on 'M'. He confirmed that there was nothing to suggest that the appellant was unable to perform sexual intercourse.

4. Subsequent to recording of the above evidence of the prosecution witnesses, the statement of the appellant, under Section 313 of the Cr.P.C., was recorded on 27th January, 2014. As is usual in these cases, most of the statement was largely in the form of denial to the allegations put to him. The appellant denied the sketch (Ex. PX) and deposed that the words written, on the said sketch, in Hindi, were not in his handwriting, and that he was made to write his name, in English, on the page, by SI Manju Singh (PW-11) in the Police Station. He deposed that his room used to remain open and that he did not know what had been kept there during his absence. He further stated that he did not know how to sketch. He was asked to write words "*mera naam Raghav hai main Seema ka bhai hu*", in Hindi on a piece of paper, which was exhibited as Ex.PY. He denied having made any disclosure statement, or having pointed out the room where he was alleged to have committed rape on the appellant. He stated that the contents of his MLC were a matter of record. In fine, he insisted that the case against him was false and fabricated, and that he had been wrongly implicated therein. He stated that he did not desire to lead any defence evidence.

The Impugned Judgement

5. Consequent to trial, after hearing rival submissions of learned counsel, the learned ASJ has, *vide* the impugned judgement, dated 3rd March, 2014, convicted the appellant for commission of the offences contemplated by clauses (l) and (m) of the Section 5 of the POSCO Act, as well as Section 506 of the IPC. In so holding, the learned ASJ reasons thus:

(i) Rule 12 of the Juvenile Justice (Care and Protection of Child) Rules, 2007, (hereinafter referred to as “the JJ Rules”) which were held, by the Supreme Court, to apply in the matter of determination of the age of child in *Jarnail Singh vs State of Haryana, (2013) 7 SCC 363*, permitted the Court to treat the admission register of the school where the prosecutrix was first admitted as a evidence of her date of birth, as it could not be presumed that the parents would wrongly enter the date of birth in the said certificates. On the basis of the school certificate provided by the prosecution which was admissible in evidence under Section 32 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”) the date of birth of ‘M’ was established as 10th December, 1996.

(ii) The statements of ‘M’, under Section 164 of the Cr.P.C, and during trial, were consistent, regarding the narration of the facts of sexual harassment and sexual assault, penetrative as well as otherwise, committed on her, and were also corroborated by her MLC (Ex. PW-4/B), which found her

hymen to have been ruptured. The testimony of 'M' was also corroborated by that of her parents Seema (PW-3) and Gauri Shankar (PW-6).

(iii) Ex. PX also served to implicate the appellant. Seema (PW-3) had deposed, during trial, that the said sketch had been handed over, to her, by her son Bimal, who claimed to have found it in the room of the appellant. He identified the handwriting and the sketch to belong to the appellant. The learned ASJ also compared, herself, the handwriting of the appellant, as reflected in the word "*mera naam Raghav hai mai Seema ka bhai hu*" which he was made to write during the course of trial, with the writing contained in Ex. PX, and arrived at an opinion that the said handwritings were apparently identical. It was further observed that the appellant was left handed, and that the threats were written on the left side of the paper, and the disfiguration of the face of the girl shown on the paper was also from left to right. All these facts, put together, in the view of the learned ASJ, served to prove that the sketch, and the writing thereon, were made by the appellant.

(iv) The defence, of the appellant, that he had been falsely implicated in the case, as there were business disputes between Gauri Shankar and himself, was not proved by giving any specific incidents or leading any evidence in this regard. The said defence was liable, therefore, to be rejected.

(v) The delay in lodging of the FIR was, it was held, not to be fatal to the case of the prosecution in a case such as this.

(vi) As regards the further submissions, made before her, to the effect that there were other discrepancies in the evidence, the learned ASJ held that the said discrepancies, if any, could not assist the defence as the prosecution could sustain even on the sole testimony of the 'M'. Reliance was placed, for this purpose, on *State of Punjab vs Gurmeet Singh, AIR 1996 SC 1393*.

(vii) The absence of injuries on the person of 'M' was held to be insufficient to indicate consent on her part, to the acts, if any, committed by the appellant. Reliance was placed, for this purpose, on *Tek Bahadur vs State (Govt. of NCT of Delhi), 2013 AD (Crl) DHC 190*. Even otherwise, in view of the fact that, at the time of commencement of commission of the said acts, 'M' was only 14 years of age, (this observation does not appear to be correct) this submission, it was opined, was immaterial.

6. Having, on the basis of the above mentioned reasoning, convicted the appellant under Section 506 of the IPC and Section 6 of the POCSO Act, the learned ASJ, in her subsequent order dated 4th March, 2014, held that, in view of the fact that the appellant was found to have been sexually assaulting his niece, thereby compelling her to live in a state of fear, the protector, who had become the violator, stood *ipso facto* disentitled to any leniency or sympathy in the matter of sentence. Accordingly, the appellant was directed to suffer

imprisonment for life, for the offence under Section 6 of the POCSO Act, along with other sentences as already set out in para 1 (*supra*).

7. Following *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922 and *Laxmi Kant Pandey v. Union of India* (1984) 2 SCC 244, the learned ASJ further directed the State to grant compensation of Rs. 1 lakh to 'M'.

8. The appellant is in appeal before us.

Submissions before this Court

9. We have heard Mr. Abhishek Singh, learned counsel for the appellant and Ms. Asha Tiwari, learned APP for the State.

10. Written statements were also filed by the appellant, consequent to oral hearing.

11. The appellant also preferred CrI.M.A. 2645/2018 seeking to place additional documents on record, which was, dismissed by us, *vide* order dated 24th February, 2018, *vide* which judgement was also reserved in the present matter.

12. Mr. Abhishek Singh, learned Counsel appearing for the appellant, contends, before us, as under:

- (i) The entire allegation against his client was fabricated, arising out of the business rivalry between Gauri Shankar (PW-6) and his client, in which 'M' was used as a pawn.
- (ii) 'M' got married in 2014, which indicates that she had attained majority by that year. This fact went unnoticed by the learned ASJ.
- (iii) There was no basis for the presumption that 'M' was less than 18 years of age. No official record, regarding her date of birth, was forthcoming.
- (iv) All that was available was one handwritten certificate of the Principal and affidavits of Seema and Gauri Shankar (PW-3 and PW-6). The evidence of PW-3 Seema in cross examination also demolished the case, of the prosecution, that 'M' was less than 18 years of age.
- (v) As the age of 'M' was rendered doubtful, her consent became material, and the appellant was, therefore, entitled to the benefit of doubt, as the evidence indicated consent, on the part of 'M', to the overtures of the appellant.
- (vi) There was discrepancy regarding the place where the offence was committed. In the site plan prepared by PW-11 SI Manju Singh, the place of incident was denoted as H.No. 93, Begumpur, whereas, in other documents H.No. B-64, Begumpur was mentioned as house of 'M' where the acts were supposed to have been committed.
- (vii) The deposition of Seema (PW-3) was contradictory in terms, as, at one point, she alleged that the appellant used

to threaten 'M' when she went out to fetch water whereas, at another, she deposed that she used to fill water from the water motor on the ground floor.

- (viii) Similar contradiction was apparent in the testimony of Gauri Shankar (PW-6) as well, as, in his examination-in-chief, he stated that the Police was informed about the offence on the very day on which 'M' reiterated the events to her parents whereas, in cross-examination, he stated that the Police was informed on the next day.
- (ix) It was admitted, by PW-1 (Karan Singh) that the affidavit, submitted by Gauri Shankar (PW-6), at the time of securing admission of 'M' in school, was not attested by any Magistrate.
- (x) There were contradictions in the testimony of the prosecutrix 'M' as well, especially with regard to her recollection of her earlier statement, under Section 164 Cr.P.C.
- (xi) The deposition of Gauri Shankar (PW-6) revealed that there was rivalry between him and the appellant.
- (xii) The learned ASJ had erred in presuming that 'M' was 17 years of age. This was contrary to the deposition of Seema (PW-3), to the effect that her marriage had taken place 19 years earlier, and the prosecutrix had been born one year after marriage. This indicated that the prosecutrix was at least 18 years of age at the time of registration of FIR.

- (xiii) The manner in which the age of 'M', in the present case, had been determined by the learned ASJ was not in accordance with the guidelines contained in the judgement of the Supreme Court in ***Jarnail Singh (supra)***.
- (xiv) The mere fact that the hymen of 'M' was found, on medical examination, to be torn, was not conclusive evidence of rape having been committed on her. It was equally possible that the prosecutrix 'M' was habituated to sexual relations, especially in the light of the fact that she was unwilling to subject herself to medical examination.
- (xv) The sketch EX-PX had been planted in the room of the appellant.

Analysis

13. Various issues arise, for consideration, in the present case, which may be addressed, *seriatim*.

Statement of the prosecutrix 'M'

14. That conviction, for rape, can be sustained solely on the basis of the statement of the prosecutrix is, by now, almost axiomatic. Several judicial pronouncements, on the issue, were digested, by the Supreme Court in paragraphs 9 to 14 of the report in ***Vijay @ Chinee vs State of Madhya Pradesh, (2010) 8 SCC 191***, which may be reproduced thus:

“Sole evidence of prosecutrix

9. In State of Maharashtra v. Chandraprakash Kewalchand Jain,(1990) 1 SCC 550 this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, *her evidence need not be tested with the same amount of suspicion as that of an accomplice*. The Court observed as under: (SCC p. 559, para 16)

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

10. In *State of U.P. v. Pappu*, (2005) 3 SCC 594 this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. *It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12)*

“12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. *There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional.* However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.”

11. In *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, this Court held that in cases involving sexual harassment, molestation, etc. *the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration.* The court may look for some assurances of her statement to satisfy judicial conscience. *The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be*

even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 394-96 & 403, paras 8 & 21)

“8. ... The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. ... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. ...

21. ... 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.”

(emphasis in original)

12. In *State of Orissa v. Thakara Besra*, (2002) 9 SCC 86, this Court held that rape is not mere physical assault, rather it often distracts (*sic* destroys) the whole personality of the victim. *The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.*

13. In *State of H.P. v. Raghubir Singh*, (1993) 2 SCC 622 this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in *Wahid Khan v. State of M.P.* [(2010) 2 SCC 9 : (2010) 1 SCC (Cri) 1208] placing reliance on an earlier judgment in *Rameshwar v. State of Rajasthan* [AIR 1952 SC 54 : 1952 Cri LJ 547] .

14. *Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.”*

(Emphasis supplied)

15. *Vijay @ Chinee* (*supra*) was followed, by another 2-judge bench of the Supreme Court (speaking through Madan B. Lokur, J.),

in *State of Haryana vs Basti Ram*, (2013) 4 SCC 200. As in the present case, the prosecutrix, in that case, who was less than 16 years of age, alleged misbehaviour and, thereafter, rape, by her maternal uncle, intermittently over a period of time. The High Court acquitted the accused, finding the sole testimony of the prosecutrix to be insufficient to indict him. The Supreme Court was critical of the approach of the High Court, opining, thus, in paras 2 and 25 of the report:

“2. In our opinion, the High Court committed an error of law in not considering the evidence put forward by the prosecutrix (who was less than 16 years when she was raped) and ignoring the settled position in law that if the sole testimony of the prosecutrix is credible, a conviction can be based thereon without the need for any further corroboration.

25. The law on the issue whether a conviction can be based entirely on the statement of a rape victim has been settled by this Court in several decisions. A detailed discussion on this subject is to be found in *Vijay v. State of M.P.*, (2010) 8 SCC 191. After discussing the entire case law, this Court concluded in para 14 of the Report as follows: (SCC p. 198)

“14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.”

16. Profitable reference may also be made to one of the most recent authorities on the point, *State of Himachal Pradesh vs Sanjay Kumar*, (2017) 2 SCC 51. There, too, a 9 year old girl was ravaged by her uncle. The Supreme Court took pointed note of this fact, at the

very beginning of its reasoning in the judgement, in para 21 of the report, thus:

“Here is a case where charge of sexual assault on a girl aged nine years is levelled. More pertinently, this is to be seen in the context that the respondent, who is accused of the crime, is the uncle in relation. Entire matter has to be examined in this perspective taking into consideration the realities of life that prevail in Indian social milieu.”

17. Para 31 of the report precisely sets out the legal position, regarding the admissibility, and acceptability, of the evidence of a victim of rape, and the advisability of seeking corroboration thereof, before seeking to base conviction, thereon, in the following words:

“31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. *By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole.* Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. *If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or*

sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

(Emphasis supplied)

18. The legal position, therefore, is, quite unambiguously, that the evidence of the prosecutrix, in a case of rape, is ordinarily to be believed, and may form the sole basis for conviction, unless cogent reasons, for the court to be hesitant in believing the statement at its face value, and to seek corroboration thereof, exist.

Applicability of the POCSO Act

19. Section 3 of the POCSO Act stipulates that “it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.” In exercise of the power conferred by this provision, the POCSO Act was brought into force with effect from 14th November, 2012, *vide* SO 2705 (E), dated 9th November, 2012.

20. Article 20 of the Constitution of India postulates thus:

“20. Protection in respect of conviction for offences. -

(1) *No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might*

have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.”

(Emphasis supplied)

21. That a person cannot be convicted of an offence, which does not amount to a violation of the law in force at the time of commission of the act is, therefore, a constitutional command, mandating implicit obedience and compliance. Clearly, therefore, no person can be convicted, under the POCSO Act, for having committed an act which, at the time of its commission, was not an offence under the said Act – which would, needless to say, include acts committed prior to the coming into force of the POCSO Act, i.e. prior to 9th November, 2012. Retrospective application of criminal statutes is antithetical to Article 20 of the Constitution of India and is, consequently, unthinkable in law.

22. The applicability, or otherwise, to the present case, of the POCSO Act would, therefore, depend on whether the appellant could be said to have committed the offence as contemplated by the said Act on or after 9th November, 2012. If the answer to this question is in the affirmative, the POCSO Act would apply; equally, if the answer is in the negative, there could be no question of invoking the said Act, howsoever reprehensible the acts of the appellant may seem. Obnoxious as obnoxious though the offender may be, he cannot be punished for having committed an offence created by a statute, which

was not in existence at the time when the offence was alleged to have been committed.

23. The offences contemplated by the POCSO Act are “penetrative sexual assault” (covered by Section 3), “sexual assault” (covered by Section 7), “sexual harassment” (covered by Section 11), “use of child for pornographic purposes” (covered by Section 13) and abetment of any of the said offences (covered by Section 16). Needless to say, the present case cannot be concerned either with Section 13 or with Section 16 of the POCSO Act.

24. The POCSO Act also contemplates “aggravated penetrative sexual assault” and “aggravated sexual assault” as distinct offences, under Sections 5 and 9 thereof; however, these are essentially species of the genres-“penetrative sexual assault” and “sexual assault”, respectively, when committed by specific categories of persons, or in specific circumstances”.

25. “Penetrative sexual assault”, “sexual assault” and “sexual harassment” are defined, in Sections 3, 7 and 11 of the POCSO Act, thus:

“3. Penetrative sexual assault. – A person is said to commit “penetrative sexual assault” if –

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

7. Sexual Assault. – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

11. Sexual harassment. – A person is said to commit sexual harassment upon a child when such person with sexual intent, –

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object part of body shall be seen by the child; or
- (ii) makes a child expose his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form of media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives a gratification therefore.

Explanation. – Any question which involves “sexual intent” shall be a question of fact.”

26. It is also necessary to reproduce Section 29 of the POCSO Act, which gives the Act its “teeth”. The provision, the likes of which is not to be found in any other statute, reads as under:

“29. Presumption as to certain offences. – Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”

Section 29, plainly read, effectively stands the classical notion of “burden of proof” on its head. Given the rigour, and the reach, of the provision, it is immediately apparent that no person can be sought to be brought within the ambit of this Act, unless, clearly and unambiguously, he falls within it.

27. Inasmuch as the prosecutrix ‘M’ has clearly alleged sexual overtures, towards her, by the appellant, including inappropriate touching of her breast, etc., culminating in rape, stated to have been repeatedly committed, there can be no manner of doubt that the offences, as alleged, definitively attract the provisions of the POCSO Act, *subject, however*, to the caveat that the POCSO Act applies, in the first place, to the appellant, and the acts alleged to have been committed by him. This, given the rigour of Article 20(1) of the Constitution of India, would, in turn, depend essentially on whether the appellant was alleged to have committed the said acts on or after 9th November, 2012, or before the said date.

28. It is apparent, from a bare glance at the facts of the case, and the evidence available on record, that there is woefully little, on the basis

of which a definitive assessment of the date when the appellant is alleged to have inappropriately touched, or handled, the prosecutrix 'M', or to have committed penetrative sexual assault on her, could be made.

29. The only clue, to the time at or during which the appellant is alleged to have sexually assaulted 'M', is to be found in the deposition, under Section 164 of the Cr.P.C. and thereafter, during trial, of 'M' herself. In her statement under Section 164 of the Cr.P.C., recorded on 15th July, 2013, 'M' merely alleged that (i) the appellant "used to sexually harass" her, (ii) "one day", when there was nobody at home, the appellant, after tying her hands and mouth, committed "*galat kaam*" with her and (iii) since that day, whenever she was alone at home, the appellant did "*galat kaam*" with her till, two to three months prior to the recording of the statement, she told her mother everything. In her evidence during trial, on 13th January, 2014, 'M' testified that (i) the appellant started teasing her, pulling her neck and inappropriately touching her, "two years prior" to that date, (ii) the act of rape was committed, by the appellant, on her, "last year during winter days", and (iii) the appellant did the said act, with her, "many times whenever he found her alone in the house". Seema (PW-3), the mother of the prosecutrix, in her deposition during trial on 13th January, 2014, stated that the appellant had, six to seven months prior to that date, come to her, weeping, and recited the wrongdoings committed, with her, by the appellant. Besides these, there is no basis for us to be able to glean the period during which the appellant, allegedly, sexually abused 'M'. The MLC of 'M', needless to say, was

unable to opine that she had been subjected to sexual abuse during any particular period or periods in the past, confining itself to stating that her hymen was found to be torn.

30. We are of the clear opinion that, from such vague and indeterminate statements, it would be unjust to return any definitive judicial finding to the effect, that the appellant had committed offences, covered by the POCSO Act, on the prosecutrix ‘M’, on or after 9th November, 2012. The prosecutrix, in her statement under Section 164 of the Cr.P.C., merely alleged that the appellant “used to sexually harass her”, that “one day”, he committed “*galat kaam*” with her and that “since that day, he had been sexually harassing her. Later, improving on this testimony during trial, the prosecutrix deposed, on 13th January, 2014, that the appellant had started inappropriately touching her “two years prior” to that date, and that he had committed penetrative assault, on her, “last year during winter days”. Seema (PW-3), for her part, only localised the day when the prosecutrix ‘M’ came weeping to her and recited her plight. The only approximation – if it may be called one – to a specific day when the appellant allegedly assaulted the prosecutrix, may be said to be found in the use of the expression “last year during winter days”, by her. Given the fact that the prosecutrix was thus deposing on 13th January, 2014, it may be possible to infer that she was referring to some time during the early months of 2013. In criminal law, however, an eon spans the gap between “may” and “must”. The winter of 2013 would have started, normally, sometime in October, 2012 and, given the fact that the crucial date, to determine whether, or not, to subject the appellant to

the oppressive rigour of the POCSO Act, is 9th November, 2012, we are of the opinion that it would be hazardous, jurisprudentially, to decide this issue in the affirmative, merely on the basis of the usage, by the child prosecutrix ‘M’, of the words “last year during winter days”, especially as no such specific reference was contained in the statement made by her under Section 164 of the Cr.P.C. Equally, in the absence of even a vague approximation being available, of the subsequent occasions when, allegedly, the appellant committed rape on the prosecutrix, we are unwilling to hold that the POCSO Act applies to the present case, on the basis of the allegation, by ‘M’ that, after the first incident of rape, the appellant repeated the act on several occasions.

31. We are not satisfied with the manner in which investigations proceeded in this case. In view of the fact that the appellant had been charged under the POCSO Act, it was of the essence that the Police make every effort to fix the time, or the date, when the alleged acts of sexual oppression, by the appellant on the prosecutrix ‘M’, took place. The record, however, discloses that no effort was made, by the investigating agency, in that direction. We, adjudicating the *lis*, are necessarily bound by the statute, and the rigours thereof. We unhesitatingly disapprove the manner in which investigations proceeded in this matter.

32. We are, therefore, of the opinion that the evidence available in the present case is insufficient to bring it within the ambit of the POCSO Act, as there is no conclusive evidence to indicate that the sexual assault, or even rape, allegedly committed by the appellant on

the prosecutrix, was committed on or after 9th November, 2012. To the extent, therefore, the learned ASJ convicts the appellant under Section 6 of the POCSO Act, for having committed offences under clauses (l) and (m) [this appears to be an inadvertent typing error; it should be “(n)”] of Section 5 thereof, the impugned judgement dated 3rd March, 2014, and order on sentence, dated 4th March, 2014, cannot sustain.

The age of the prosecutrix ‘M’

33. One of the serious contentions, advanced by learned counsel for the appellant, both during hearing as well as in his written submissions, is regarding the alleged minority of the prosecutrix ‘M’. At first blush, there appears to be substance, in the contention, of learned counsel for the appellant, that there was no conclusive evidence, on the basis whereof it could be stated, with certainty, that, at the time of commission of the alleged sexual offences, against her, by the appellant, she was a minor. The learned ASJ has chosen to rely, for this purpose, on the date of birth entered in the admission form, while admitting the prosecutrix to school, i.e. 10th December, 1996. Though it is true that this date was entered, in the admission form of the prosecutrix, by her father Gauri Shankar (PW-6), at the time of admitting her in school, and that affidavits were also submitted, by Gauri Shankar, vouchsafing the said date, it is equally true that no documents, save and except for the said affidavits, indicating the date of birth of the prosecutrix ‘M’ to be 10th December, 1996, were submitted, by Gauri Shankar at the time, and that the affidavit itself was not attested by any Magistrate. Seema (PW-3), the mother of ‘M’,

for her part, first deposed, during trial, that ‘M’ was 18 years of age, and had been born one year after her marriage; immediately, thereafter, that she could not say how many years, prior to the date of her statement during trial, her marriage had taken place; immediately thereafter, that she was married about 19 years ago and, immediately thereafter, that she could not tell the date of birth of ‘M’. She further admitted that the date of birth of ‘M’ was not registered with any authority, and no birth certificate of ‘M’ was ever prepared. The testimony, during trial, of Gauri Shankar, deposing as PW-6, was, for its part, entirely silent regarding the age of the prosecutrix ‘M’. These facts, seen in juxtaposition, would seem, indeed, to suggest that the actual age of the prosecutrix could not be determined on the basis of the evidence available on record, or as it emerged during investigation or trial in the present case.

34. The better wisdom of the court below must, however, yield to the higher wisdom of the court above, and, by virtue of Article 141 of the Constitution of India, the scope for controversy on the above issue stands conclusively foreclosed, at least insofar as we are concerned, by the judgement of the Supreme Court (speaking through J. S. Khehar, J., as the Hon’ble Chief Justice then was) in ***Jarnail Singh vs State of Haryana, (2013) 7 SCC 263***. We may reproduce, to advantage, paras 22 and 23 of the report, thus:

“22. *On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the*

Juvenile Justice (Care and Protection of Children) Act, 2000.
Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of age.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, *prima facie* on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

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

(a)(i) the matriculation or equivalent certificates, if available; and *in the absence whereof*;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

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

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be,

record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

23. *Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a*

child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. *Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon.* Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

(Emphasis supplied)

Jarnail Singh (supra) has, it may be mentioned, been followed, by this Court, in ***State vs Charan Singh, MANU/DE/1263/2017*** and ***State vs Mohan, MANU/DE/1766/2017***.

35. Legislative edict, sanctified by judicial imprimatur, constrains us. The law, legislative as well as precedential, proscribes us from going behind the certificate issued by the school at the time of admission of the prosecutrix ‘M’, supported by the affidavits furnished by the father of the prosecutrix Gauri Shankar (PW-6). We may also note, in this regard, that the uncertainties, regarding the date

of birth and age of 'M', were expressed only by her mother Seema (PW-3) and not by her father Gauri Shankar (PW-6).

36. The decision, of the learned ASJ, to treat the date of birth of the prosecutrix 'M' as 10th December, 1996, based on the admission record maintained by the Nigam Pratibha Vidyalaya, as proved by its principal Karan Singh, deposing as PW-1 during trial, deserves, therefore, to be upheld.

37. But where does that lead us?

Section 376, IPC

38. Given that the POCSO Act does not apply, we would be required to examine whether the appellant merited conviction under Section 376 of the IPC, as he was charged under the said provision, though his conviction was only under Section 6 of the POCSO Act, apparently because of Section 42 of the said Act, which postulates that, "where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

39. The appellant was charged under Sections 376 and 506 of the IPC, and Section 6 of the POCSO Act. Having held that the POCSO Act would not apply, we proceed, therefore, to examine whether conviction, of the appellant, under Section 376 and 506 of the IPC, could sustain.

40. We have extracted, hereinabove, the statements of the prosecutrix 'M', under Section 164 of the Cr.P.C., as well as during trial, *in extenso*. The said statements, plainly read and on their face, appear spontaneous and untutored. The prosecutrix has set out, in explicit detail, the manner in which she was assaulted by the appellant, and, in the absence of any evidence indicating to the contrary, the deposition of the prosecutrix merits acceptance. There is no discrepancy or contradiction, worth the name, between her statement, under Section 164 of the Cr.P.C., and as recorded during trial, insofar as the commission of offence, on her, by the appellant, was concerned. It cannot be reasonably believed that, merely owing to some friction, in their business, between the father of the prosecutrix, Gauri Shankar and the appellant, the prosecutrix 'M' would concoct such a detailed description of the manner in which she was raped by the appellant. By the time she gave her statement, during trial, the prosecutrix was, apparently, an adult, and this lends additional credibility to her statement. The fact of initial repeated sexual assaults and, thereafter, rape on more than one occasion, having been committed by the appellant on 'M', therefore, stands, in our view, proved by the evidence on record, primarily in the form of the statement of the prosecutrix, both under Section 164 of the Cr.P.C., as well as during

trial. The prosecutrix has, in both the said depositions, consistently and clearly indicted the appellant of having, initially, made sexual overtures, amounting to harassment on several occasions, to her, and, thereafter, raped her, on repeated occasions. The prosecutrix's hymen being torn, and there being no evidence to indicate that she was habituated to sexual intercourse, we concur, with the learned ASJ, that the prosecutrix was, in fact, subjected to rape, by the appellant.

41. Learned counsel for the appellant has sought to advance a contention that the prosecutrix 'M' had consented to the advances of the appellant and that, therefore, it could not be alleged that the appellant had committed rape on the prosecutrix. This aspect becomes important, as the age of consent, for the purposes of Section 375 and 376 of the IPC was, till the substitution of Section 375 of the IPC, with effect from 3rd February, 2013, by Section 9 of the Criminal Law (Amendment) Act, 2013, sixteen, not eighteen. Suggestive though it may be, the evidence before us does not allow us to enter any positive finding, to the effect that a rape had been committed, by the appellant, on the prosecutrix 'M', after 3rd February, 2013. The present case has, therefore, to be tested on the touchstone of Section 375 of the IPC, as it stood prior to its amendment w.e.f. 3rd February, 2013.

42. At the time of the recording of the Section 164 statement of the appellant (15th July, 2013), the prosecutrix was 16 years and a little over 7 months in age. In the said statement, she only alleged that the appellant "often" used to harass her sexually, and that, "one day", he committed rape on her. These assertions, in our opinion, cannot, quite

obviously, maintain a conclusive finding that the appellant had committed rape, on the prosecutrix 'M' when she was less than 16 years of age. The deposition of the prosecutrix during trial, to which we have already alluded, in detail, earlier in the course of this judgement, is also unhelpful in fixing the time of commission, of rape, by the appellant on the prosecutrix, as prior to the date when she attained the age of 16. There is no provision, in the law as it exists, creating any presumption to the effect that, in a case such as this, the burden of proof would shift to the accused, to establish that, at the time of commission of the offence by him, the prosecutrix was above the age of 16. The basic principle, that the onus to prove the ingredients of the charge, under which the accused was being prosecuted, lay on the prosecution, would apply with full force; consequently, it would be for the prosecution to establish that the appellant committed rape, on the prosecutrix, before she attained the age of 16 – so as to avoid entering into consensual thickets. In the facts of the present case, and on the basis of the evidence available, we are convinced that it cannot be said, with any degree of certainty, that the appellant committed rape, on the prosecutrix, before she attained the age of 16, though it was, decidedly, before she attained the age of 18.

43. We do not feel, however, that the above finding can be of any assistance to the appellant in the present case, as, in our view, the appellant has been unable to prove consent, on the part of the prosecutrix 'M', to the sexual overtures made by him. In the matter of consent, there is a statutory provision, placing the initial burden on the

defence, to be found in Section 114A of the Evidence Act, which reads thus:

“114A. Presumption as to absence of consent in certain prosecutions for rape. – In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

44. Section 114A, on its terms, applies, with full force, to the present case. There is a specific assertion, by the prosecutrix, during the deposition in the course of trial, to the effect that the assaults, by the appellant on her, were not consensual. It is also so recorded in the MLC of the PX (Ex.PW-4/B), as vouchsafed by PW-9 Dr. Manisha Gupta, in her deposition during trial. That being so, Section 114A transferred the burden, to establish that the acts were consensual, on the accused. We are convinced that this burden has not been discharged, in any sense of the word, in the present case. *State of Himachal Pradesh vs Sanjay Kumar (supra)* impresses, on us, to bear in mind, in cases such as this, “the realities of life that prevail in Indian social milieu”. Such “realities of life”, in our view, militate against any presumption that, in the Indian rural context, a niece would consensually permit herself to be taken advantage of, sexually, by her maternal uncle. The burden, to prove consent, lies heavy on the shoulders of the defence in cases such as this, and is not easily discharged. In the present case, we are convinced that there is no credible evidence, on the basis whereof it can be concluded that the prosecutrix ‘M’ consented to the acts perpetrated on her by the

appellant. Rather, the fact that she went weeping to her mother, would militate against any such presumption. We, therefore, unhesitatingly reject the submission, made on behalf of the appellant by learned counsel appearing for him, that the prosecutrix 'M' was a consenting party, in the sexual relations that had developed between the appellant and her.

45. Rather, in our view, it is a clear case of, as the learned ASJ has pithily put it, the protector becoming the violator, which the criminal law of this country seriously frowns upon. Filial, and familial, relations, are sacrosanct in our social fabric. The maternal uncle is, in certain regions of the country, accorded even greater respect, and reverence, than the father, and in traditional households in states such as Kerala, children continue to grow, till date, under the care and custody of their maternal uncle. Lascivious predispositions, on the part of a maternal uncle towards his niece are, therefore, unthinkable and unpardonable in law.

46. We, therefore, unhesitatingly reject the submission, advanced by learned counsel appearing for the appellant, that the prosecutrix had consented to the acts perpetrated, on her, by the appellant. Resultantly, the charge of having committed the offence contemplated by Section 375 of the IPC, punishable under Section 376 thereof, is, in our view, brought home to the appellant, who becomes culpable thereunder.

Section 506, IPC

47. Section 506 of the IPC deals with “criminal intimidation”, and has, essentially, been invoked, in the present case, owing to the complaint, of the prosecutrix ‘M’, that the appellant used to threaten her that, in case she complained against him, he would throw acid on her and disfigure her face. The prosecution also relied, for the said purpose, on the sketch Ex. PX, supposedly drawn by the appellant and recovered from his room.

48. We may state, immediately, that we are not convinced about the sketch Ex. PX having been prepared by the appellant, or about the reliability, of the said exhibit, as evidence of the appellant having threatened the prosecutrix ‘M’. A variety of reasons propel us to say so. In the first place, the sketch was stated to have been recovered, from the room of the appellant, by Bimal, the brother of the prosecutrix; yet, for some inscrutable reason, Bimal was never arraigned as a witness in this case. The appellant, for his part, has, in his statement under Section 313 of the Cr.P.C., categorically denied the fact of such recovery, or of having ever prepared, or had anything to do with, the sketch Ex. PX. The only evidence, to indicate that the words, written alongside the said sketch, were so written by the appellant, is to be found in the form of the testimony, of Seema (PW-3), during trial, which is itself delightfully vague. In one breath, Seema deposes that she could identify the handwriting of the accused-appellant; that she was illiterate; that, nevertheless, she could identify his handwriting, as she had seen him writing; and that, however, she could not identify the handwriting of anyone else, including her

husband, daughter and son. There is no explanation, either, for the sketch having been retained by Gauri Shankar (PW-6), for two to three days, before submitting it to the Police authorities. No explanation, for the said delay, is forthcoming even in the deposition, during trial, of Gauri Shankar himself. The possibility of the sketch having been prepared during the said 2 days – which may have lent, to it, it's decidedly amateurish flavour – cannot be wished away. Though it is true that, in the impugned judgement, it is recorded that the learned ASJ who had earlier heard the matter, had got the appellant to write certain words, in vernacular, on a blank paper, and had, after comparing the said handwriting with the handwriting on Ex. PX, arrived at the opinion that they belonged to the same person, we are of the view that, given the critical nature of the said evidence, it is unsafe to base a conviction solely on the subjective opinion of the learned ASJ, untested by the evidence of any handwriting expert. We are also unable to appreciate the manner in which the learned ASJ donned the mantle, as it were, of a handwriting expert, or relating the slant, of the shading in the sketch, from left to right, and the fact that the writing was on the left side of the page, with the fact that the appellant was a left-hander, to conclude that the writing, on the page containing the sketch, was by the appellant. While it is true that the law allows the judge, adjudicating the *lis*, to compare the handwriting, in order to satisfy herself, or himself, regarding correlation, we are unaware of any graphological principle, to the effect that left-handed persons would write on the left side of the page, or would shade, or draw, from left to right. These deductions appear, on their face, to be no more than

the *ipse dixit* of the learned ASJ who had earlier adjudicated the matter.

49. We are unable, consequently, to sustain the finding, of the learned ASJ, that the sketch Ex. PX was prepared by the appellant, or that the words entered alongside it were entered by him; consequently, we cannot treat the said sketch as evidence to confirm, against the appellant, the charge under Section 506 of the IPC.

50. Having said that, we do have, with us, the statements of the prosecutrix 'M' herself, both under Section 164 of the Cr.P.C., as well as during trial, which are consistent regarding the allegation of threat having been held out, to her, by the appellant. The statements inspire confidence, especially as they are supported by the depositions of Seema (PW-3) and Gauri Shankar (PW-6). The delay, on the part of the prosecutrix 'M', in reporting the matter to her mother Seema, would also stand explained by the said threats.

51. While, for these reasons, we agree with the decision of the learned ASJ to convict the appellant under Section 506 of the IPC, we may note that this aspect has, by now, been rendered academic, as the appellant has already served out more than the sentence awarded, to him, by the learned ASJ, under Section 506 of the IPC, and there is no appeal, by the State, for enhancement thereof.

Delay in lodging FIR

52. The attempt, of learned counsel appearing for the appellant, to coax this court into granting, to his client, the benefit of doubt, on the ground of delay in reporting the matter, by the prosecutrix, to her mother and, consequently, delay in lodging FIR in the matter, has, obviously, to fail in a case such as this. We need only refer, in this connection, to the following passages, from the report in *State of Himachal Pradesh vs Sanjay Kumar (supra)*:

“23. As per the prosecutrix, she was called by the respondent to his room, which is on the first floor of the house. Unmindful of what could be the motive of an uncle to call her, she obliged as a dutiful child. However, according to the prosecution, the unfortunate incident happened. It happened with a nine-year-old child who was totally unaware of the catastrophe which had befallen her. Her mental faculties had not developed fully; she was in the age of innocence, unaware of the dreadful consequences. Further, at the time when she was being sexually assaulted, her mouth was gagged so that she was not able to scream and after the incident she was threatened not to disclose this incident to anybody. In fact, she kept mum out of this fear. It is quite understandable that a nine-year-old child, after undergoing traumatic experience and inflicted with threats, would be frozen with fear and she could not find voice to speak against her uncle. In cases of incestuous abuse, more often, silence is built into the abuse. Incident came to light and tragedy struck on the prosecutrix only when her mother noticed that she was continuously suffering from stomach ache and was, therefore, taken to a gynaecologist for her treatment. But for the above, matter may not have come to light. It is only after she was examined by Dr. Jasbir Kaur (PW 8), who had medically examined and formed the opinion that the prosecutrix had been sexually assaulted forcibly about 2-3 years ago, since her hymen was ruptured and her external and internal sphincters were also torn, that PW 1 queried the prosecutrix and she revealed the incident, hitherto hidden by her from the entire world out of fear, not only as a result of the threats extended by the respondent but for varied other reasons.

24. When the matter is examined in the aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly understandable. We would like to extract the following passage from the judgment of this Court in ***Tulshidas Kanolkar v. State of Goa*, (2003) 8 SCC 590** (SCC p. 592, para 5)

“5. We shall first deal with the question of delay. 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 the first information report cannot be used as a ritualistic formula for discarding the 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 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 the prosecution case.* As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle.”

25. In ***Karnel Singh v. State of M.P.*, (1995) 5 SCC 518**, this Court observed that: (SCC p. 522, para 7)

“7. ... The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police

is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false."

26. Likewise, in *State of Punjab v. Gurmit Singh, (1996) 2 SCC 384*, it was observed: (SCC p. 394, para 8)

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

27. Notwithstanding the fact that the trial court accepted the explanation for delay as satisfactory by giving detailed reasons, we are dismayed to find that the High Court has been swayed by this delay in reporting the matter with omnibus statement that it is not satisfactorily explained without even an iota of discussion on the explanation that was offered by the prosecution in the form of testimonies of PW 1 and PW 2.

29. Likewise, delay of three days in lodging the FIR by PW 1, after eliciting the information from her daughter PW 2, is inconsequential in the facts of this case. *It is not to be forgotten that the person accused by the prosecutrix was none else than her uncle. It is not easy to lodge a complaint of this nature exposing the prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonise other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW 1 to lodge a false complaint, putting her minor daughter of*

impressionable age to risks of serious kinds, as pointed out above.

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

(Emphasis supplied)

53. Applying the principles enunciated in the above extracted passages from *State of Himachal Pradesh vs Sanjay Kumar (supra)*, it is obvious that the delay, on the part of the prosecutrix ‘M’, in relating the horrors, to which her maternal uncle, i.e. the appellant, had subjected her, to her mother, cannot be regarded as so unnatural or unexplained, as to cast a cloud on her statements. The prosecutrix was, after all, a child, and the fear and paranoia, that the acts of her

maternal uncle, would have instilled in her, are unimaginable. We have, in an earlier decision, had occasion to opine that child rape is a crime *sui generis*, residing in a netherworld all its own. Correspondingly *sui generis*, we may state, would the psyche, of the child who is subjected to such assault, be, and it would be grossly unrealistic, nay absurd, to expect the victim of such an offence to promptly report it to the “higher authorities”, familial or official. If, therefore, the prosecutrix ‘M’ chose to suffer the ignominy, for long, before mustering up the courage to unburden herself to her mother, it can only be regarded as natural. It cannot, therefore, be even said, properly, that there *was* any delay, in the prosecutrix, in the present case, reporting the incident to her mother; even less would it be possible to hold that such delay was unnatural, or that it vitiated the testimony of the prosecutrix.

54. The recital of the facts in this case, as already provided hereinabove, reveals that there were marked inconsistencies at various points, especially in the testimony of Seema (PW-3). While, in an ordinary case, these inconsistencies may have been of significance, in assessing whether the offence had been brought home to the accused, we are not inclined to lend any credence to these inconsistencies, in the present case, as the offence stands proved, in our opinion, by the statement of the prosecutrix ‘M’. We do not find, on a thorough scanning of the evidence, any such material which could serve to discredit any of the allegations made by the prosecutrix against the appellant, either in her statement under Section 164 of the Cr.P.C., or in her evidence during trial. The prosecutrix deposed cogently,

confidently and consistently, and clearly asserted, in cross-examination, to the truth of her deposition. Her testimony, as noted hereinabove, commends, and commands, acceptance, and we are convinced that, on the basis thereof, the appellant stands clearly indicted for having committed rape on the prosecutrix.

Sentence

55. Apparently following the mandate of Section 42 of the POCSO Act, the learned ASJ confined her order to convicting the appellant for having committed offences under clauses (l) and (m) [*sic* (n)?] of the POCSO Act, though the appellant had been charged under Section 376 of the IPC, as well, the maximum punishment capable of being awarded under the former provision being higher than under the latter. We have already held, hereinabove, that the POCSO Act cannot apply in the present case. For the same reason, Section 376 (2) (f) would not apply as the said clause was introduced in the statute only w.e.f. 3rd February, 2013, and Section 376, as it stood prior to 3rd February, 2013, did not carve out rape by a relative as a special category. The appellant would, therefore, be liable to be punished under Section 376 (1) of the IPC, which reads as under:

376. Punishment for rape. - (1) Whoever, except in the cases provided for by sub-section (2) commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2)Whoever-

(a) being a police officer commits rape -

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1. - Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2. - "woman's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any

other name, which is established and maintained for the reception and care of women or children.

Explanation 3. – “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

56. Given the fact that the appellant has no criminal antecedents, and could neither be alleged to be insatiably habituated to carrying, or possessing any innate or inherent criminal proclivities, we feel that incarcerating the appellant for life would be disproportionate to the offence committed by him, reprehensible though it unquestionably is. We also take stock of the fact, in this connection, that the prosecutrix ‘M’ later married, and that there does not appear to be any evidence to indicate that the acts perpetrated on her by the appellant have scarred her permanently, physically or mentally. While we cannot gainsay the agony and trauma that the prosecutrix had to suffer, apparently for a long period of time, at the hands of the appellant, we do not feel that the present case is one which merits imposition of the maximum penalty imposable under Section 376 (1) of the IPC, i.e. imprisonment for life. A lesser punishment would, in our view, suffice.

57. At the same time, we cannot lose site of the fact that the appellant took unholy sexual advantage of his niece, qua whom he ought, practically, to have been a father figure. Though it may be fuelled by lust, rape, in the ultimate analysis, is a crime, not so much of passion, as of power. It is for this reason that the statute, too, and rightly so, post the 2013 amendment, treats rape, by a close relative

who, ordinarily, should be a protector rather than an oppressor, as a class apart.

58. We feel, therefore, that, while he may not deserve to be rigorously incarcerated for life, the appellant should suffer rigorous imprisonment for 10 years, as penance for the atrocities committed by him, on the prosecutrix ‘M’ under Section 376 (1) of the IPC.

Conclusion

59. Consequent on our above discussion, we dispose of the present appeal in the following terms:

- (i) The conviction of the appellant, under Section 6 of the POCSO Act, is set aside, along with the sentence of imprisonment for life, awarded to him by the learned ASJ for having committed the said offence.
- (ii) The appellant is convicted, instead, under Section 376(1), and Section 506, of the IPC.
- (iii) For the offence under Section 376(1) of the IPC, the appellant is sentenced to 10 years’ rigorous imprisonment. Needless to say, the appellant would be entitled to the benefit of the period of incarceration already undergone by him. The appellant is also sentenced to pay a fine of ₹ 10,000/–, to the prosecutrix, failing which he would have to suffer further sentence of one year’s simple imprisonment.

(iv) For the offence under Section 506 of the IPC, the sentence of 3 years' rigorous imprisonment, awarded by the learned ASJ, is maintained, as also the direction that the sentences under Sections 376 and 506 of the IPC shall run concurrently.

(v) The appellant shall be entitled to the benefit of Section 428, Cr.P.C.

(vi) The compensation, awarded by the learned ASJ to the prosecutrix 'M', is maintained, and the State is directed to disburse the said amount, to the prosecutrix, forthwith, if not already paid.

60. Trial court record be sent back. Jail superintendent to be informed forthwith.

C.HARI SHANKAR
(JUDGE)

S. P. GARG
(JUDGE)

MAY 24, 2018
gayatri