

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 19.03.2019
Judgment Pronounced On: 30.05.2019

CRL.A.1013/2018

MAHABIR MEHTO

.... Appellant

versus

STATE

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Madhav Khurana and Ms. Trisha Mittal, Advocates

For the Respondent : Ms. Radhika Kolluru, APP with SI Sunder Singh, PS-Baba Haridas Nagar

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal instituted under the provision of section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') assails the judgment dated 27.04.2018 and the order on sentence dated 14.05.2018, rendered by the learned Additional Session Judge-01, Dwarka Courts, New Delhi, in Session Case No.440846/2016, title as '*State vs.*

Mahabir Mehto’, emanating from F.I.R No. 216/2013 (hereinafter referred to as the ‘subject FIR’) under sections 376/506 of the Indian Penal Code, 1860 (hereinafter referred to as ‘IPC’) and under sections 6/10 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as ‘POCSO’), registered at Police Station-Baba Haridas Nagar.

2. By the way of the impugned judgment dated 27.04.2018, Mahabir Mehto (hereinafter referred to as ‘the appellant’) has been convicted for the commission of offences punishable under the provisions of section 506 (Part I) IPC and sections 6/5 POCSO. By way of the impugned order on sentence dated 14.05.2018, the appellant has been sentenced to undergo imprisonment for life, along with fine Rs.15,000/-, for the offence punishable under section 6 read with section 5(n) of POSCO. In default of the payment of fine, the appellant has been sentenced to undergo simple imprisonment for three months. Further, for the offence punishable under the provision of section 506(Part I), IPC, the appellant has been sentenced to undergo rigorous imprisonment of two years, along with fine of Rs.5,000/-. In default of payment of fine, to further undergo simple imprisonment for one month. All the sentences have been directed to run concurrently.

3. The gravamen of the charge, for which the appellant has been convicted, is for having committed penetrative sexual assault on his

daughter, the prosecutrix, a girl aged about 15 years, at the time of commission of the offence.

4. The facts, as elaborated by the trial court are extracted in extenso, as follows: -

- “2. Law was set into motion against the accused on the basis of a complainant lodged by his sister on 04.09.2013. In her complaint, the complainant stated that on 02.09.2013, the accused had come to stay with her along with his family consisting of his wife, elder daughter (i.e. the prosecutrix) aged 16 years, younger daughter aged 4 years and son aged 8 years. She alleged that on 03.09.2013, when the prosecutrix was doing household chores, she noticed an unusual bulge in her belly. Upon being inquired, the prosecutrix revealed to her that the accused had been establishing physical relations with her for the last one year by threatening her and that as a result thereof, she had become pregnant. When the complainant confronted the accused about the same, he fled away from the house with his younger daughter. On the basis of the above complaint, FIR under Sections 376/506 IPC was registered against the accused. The prosecutrix was medically examined on the same day. She was found to be having pregnancy of 28 weeks. Her statement under Section 164 Cr.P.C. was recorded on 07.09.2013. In her statement, she supported the contents of FIR and disclosed that she had told about the acts of the accused to her mother but she did not do anything as she was of unsound mind. During the course of investigation, Sections 6 and 10 POCSO Act were added. The accused was arrested on 15.09.2013. After completion of the investigation, the charge sheet was filed.
3. It is a matter of record that the prosecutrix gave birth to a male child and that the said child had been given in adoption by the orphanage Sewabharti Matrichhaya.

4. On 08.01.2014, the charge for the commission of offence punishable under Section 6 read with Section 5(n) POCSO Act and Section 506 IPC was framed by the Ld. Predecessor against the accused to which he pleaded not guilty and claimed trial.”
5. By way of the order dated 08.01.2014, the charge for the commission of the offence punishable under Section 6 read with Section 5(n) POSCO and Section 506 (Part I) IPC was framed against the appellant, who pleaded not guilty and claimed trial.
6. The prosecution examined 14 witnesses in all to establish their case against the appellant.
7. The appellant in his statement under Section 313 of Cr.P.C., whilst denying the case of the prosecution, stated that he had been falsely implicated in the case and further stated that he reprimanded the prosecutrix for having an affair with a boy, living in the neighbourhood, the police at the instigation of the complainant, PW-2, who had grudge against him for refusing to give her a share in his ancestral property, foisted the false case against him.
8. The first issue that warranted adjudication at the trial, was the determination of the age of the prosecutrix, at the time of the commission of the offence.

9. The trial court having considered the evidence on record, found as follows: -

“10.1 In the absence of any document issued by any authority regarding the age of the prosecutrix, the prosecution has relied upon the bone age report dated 09.03.2018 (Ex.PW14/A) given by the Medical Board, DDU Hospital on the examination of the prosecutrix. As per the said report, the bone age of the prosecutrix was opined about 20-30 years. In order to prove the said report, the prosecution has examined Dr. L.R. Richhele, the Chairperson of the Medical Board, as PW14. In his testimony, he deposed as under:

“... After detailed examination of the child victim, the age of the child was determined between 20 to 30 years. In the present case, Ischian Tuberosity was found fused, which occurs after the completion of 20 years and therefore, the board had opined that the age of the victim to be more than 20 years on the day of the examination. Since, the sacrum was not found to be fused, which occurs after the completion of 30 years, the age of the victim was opined to be between 20 to 30 years. Between 20 to 30 years, no significant changes occur in the bone ossification and thus the exact age in between the said group, cannot be opined.

The detailed report is Ex.PW14/A, which bears my signature at point A....”

In his cross-examination, PW14 expressed his inability to state the exact age of the prosecutrix at the time of her examination and stated that he could neither admit nor deny the suggestion that the prosecutrix was 26 years of age at the time of her examination.

10.2 The counsel for the accused contended that since the exact assessment of the age of the prosecutrix could not be made by the Medical Board, the prosecution has failed to prove that the prosecutrix was below the age of 18 years at the time of commission of the alleged offence and therefore, the provisions of the POCSO Act would not apply in the present case.

10.3 Under the POCSO Act, there is no provision prescribing the manner in which the inquiry regarding the determination of the age of victim is to be conducted. In the landmark case of **Jarnail Singh v. State of Haryana, (2013) 7 SCC 263**, it has been categorically held by the Hon'ble Apex Court that there is hardly any difference in so far as the issue of minority between a child in conflict with law and a child who is a victim of crime is concerned and therefore, it would be just and appropriate to apply Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short, JJ Rules, 2007) to determine the age of the prosecutrix as well. Sub-rule (3) of Rule 12 of the JJ Rules, 2007, which prescribes the manner of conducting the age determination inquiry, is reproduced as under: -

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

- | | | | |
|-----|--|----|----|
| (1) | xx | xx | xx |
| (2) | xx | xx | xx |
| (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.”

Rule 12(3) of the JJ Rules, 2007 lays down the manner of determining the age of a child conclusively. Under the said provision, the age of a child is ascertained by adopting the first available basis, out of a number of options postulated therein. An option expressed in a preceding clause has overriding effect over an option expressed in the subsequent clause. The highest rated option available determines the age of a minor conclusively. If the matriculation or equivalent certificates of the child is available, no other evidence can be relied upon. Only in the absence of such certificates, as entry of date of birth in the record of the school first attended by the child is to be relied upon. When no such entry is available, then the reliance can be placed on a birth certificate issued by a corporation or municipal authority or panchayat. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of the age of the child on the basis of medical opinion.

10.4 While considering the scope and nature of the inquiry contemplated under Rule 12 of the JJ Rules, 2007, the Hon’ble Supreme Court has observed in **Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750**, that the expressions ‘prima facie’, ‘on the basis of physical appearance’ or ‘documents, if available’ used in Rule 12 re-emphasize the fact that what is contemplated is only an inquiry following the procedure laid down under the said rule and not an investigation or trial under the Cr.P.C. It was held that while conducting an inquiry, a hyper-technical approach should not be adopted and if the assessment of age could not

be done, the benefit would go to the child considering his/her age on lower side within the margin of one year. Paragraph No.34 of the above judgment, which is relevant, is reproduced as under:

“34. “Age determination inquiry” contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and, in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above-mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.”

10.5 Applying the principles laid down in the above judgments to the facts of the present case, wherein the bone age of the prosecutrix has been opined about 20-30 years by the Medical Board, the age of the prosecutrix has to be taken on the lower side i.e. 20 years as on the date of her medical examination conducted on 09.03.2018. Since the offence is alleged to have been committed for one year prior to the lodging of complaint dated 04.09.2013, the age of the prosecutrix at the relevant time comes to about 15 years. Hence, the prosecutrix was a child within the meaning of Section 2(d) of the POCSO Act at the time of commission of the offence.

10.6 The determination of the age of the prosecutrix as above is also strengthened from the other material on record. The complainant in her complaint dated 04.09.2013 had specified the age of the prosecutrix as 16 years. In the MLC

of the prosecutrix, which was prepared on the same day, her age was also mentioned as 16 years. The statement of the prosecutrix under Section 164 Cr.P.C. was recorded on 07.09.2013, wherein she stated her age as 15 years. The prosecutrix and the complainant have been examined by the prosecution as PW1 and PW2 respectively. **In the cross-examination of none of them, the accused had disputed the age of minority of the prosecutrix. Even in his statement under Section 313 Cr.P.C. recorded on 22.03.2017, the accused did not plead that the prosecutrix was not a child at the relevant time.** It is a matter of record that at the stage of final arguments, an application for conducting the ossification test of the prosecutrix was preferred by the prosecution, which was allowed on 05.03.2018 and that pursuant thereto, the report dated 09.03.2018 (Ex.PW14/A) of the Medical Board pertaining to the bone age of the prosecutrix was filed. It was only during the cross-examination of PW14 Dr. L.R. Richhele, who was examined by the prosecution to prove the report Ex.PW14/A, that the accused for the first time disputed that the prosecutrix was a child at the relevant time by putting a suggestion to the effect that she was 26 years old at the time of her examination by the Medical Board. Being the father of the prosecutrix, her age was within the special knowledge of the accused. **The very fact that the accused neither disputed the age of the prosecutrix during the course of entire trial nor produced any material to dislodge the case of the prosecution that the prosecutrix was a minor at the relevant time goes to show that the challenge to the age of the prosecutrix at the belated stage was nothing but an afterthought with a view to avoid the rigour of the POCSO Act and take advantage of the wide range of the bone age (i.e. 20-30 years) of the prosecutrix opined by the Medical Board.**

10.7 Considering the above, the contention of the defence counsel that the provisions of the POCSO Act would not apply to the present case is found to be devoid of any substance.”

10. The above findings arrived at by the trial court, have not been assailed before us on behalf of the appellant. Therefore, we have no hesitation in

finding ourselves in agreement with the trial court, when it returned finding to the effect that the prosecutrix was a minor at the time of the commission of the offence.

11. The trial court, thereafter, proceeded to appreciate and evaluate the testimony of the prosecutrix, which constituted the foundation of the prosecution's case.

12. The trial court, upon careful consideration of the evidence on record and in particular the testimony of the prosecutrix, returned a finding that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt for the commission of the offence punishable under Section 6 read with Section 5 of the POCSO, predicated on the reasoning elaborated as under:-

“12. Admittedly, the accused is the father of the prosecutrix. It is also not in dispute that at the relevant time, the prosecutrix along with her mother and younger siblings was residing with the accused. As per the MLC dated 04.09.2013 of the prosecutrix, which has been proved by PW-5 Dr. Sidhi Sainik as Ex.PW5/A, she was having the pregnancy of 28 weeks at the time of her medical examination. Now the question which requires to be adjudicated is whether the accused was responsible for the penetrative sexual assault on the prosecutrix.

12.1 The prosecutrix is the sole witness of the commission of the act of penetrative sexual assault on her. In her testimony recorded on 19.02.2014, the prosecutrix (PW1) deposed that she along with her parents and two siblings used to reside in a rented accommodation; that

the accused used to work as a mason and that her mother is not mentally sound and is deaf and dumb; that about one year ago, when she was sleeping, the accused tried to force himself upon her; and that she pushed him and went to her mother but the accused came there and after extending threat to kill her, he committed rape on her. She further deposed that after the said incident, the accused used to commit rape on her on every day and that when the landlord came to know about the same, he got the house vacated. The prosecutrix also deposed that they shifted to the house of her paternal aunt (bua) i.e. the complainant and that when her aunt saw her condition, she suspected that some wrong act had been committed with her and took her to RTRM Hospital, where the doctor told that she was having pregnancy of seven months. She further deposed that when her aunt confronted the accused with the same, he denied that he was responsible for it and went away to Bihar alongwith his younger daughter and that thereafter, her aunt made complaint to the police.

12.2 The prosecutrix was cross-examined by the accused. In her cross-examination, she admitted that she did not know the dates or months when the accused committed rape on her and that the complainant had visited her house on several occasions but she did not disclose about the acts of the accused to her during the said visits. However, she denied the suggestions that she was having friendly relations with a boy, who got her pregnant and that when the accused came to know about the same, he had scolded her and for the said reason, she had named him as the accused.

12.3 The counsel for the accused argued that the failure of the prosecutrix to state the specific dates and months of her alleged sexual assault make her testimony doubtful. He contended that since the prosecutrix also did not disclose to the complainant about the alleged acts of the accused during her visits to their house, the allegations against the accused appear to be an afterthought and no reliance can be placed on the same.

- 12.4 The above contentions of the defence counsel are without merits. The prosecutrix is an uneducated girl belonging to the poor strata of the society. In her deposition, she categorically stated that she was being subjected to penetrative sexual assault by the accused on regular basis for a period of about one year. Considering the said assertion of the prosecutrix and taking note of her socio-economic background, the failure to disclose the specific dates on which she was subjected to penetrative sexual assault by the accused is of no significance. As far as the failure of the prosecutrix to reveal about the acts of the accused to the complainant prior to 03.09.2013 is concerned, one can not lose sight of the fact that at that time, the prosecutrix was residing with the accused in the tenanted premises and that the accused, being the father and the sole bread earner, was in a position of dominance and command over her. In such a scenario, especially when she did not get any support from her mother, the possibility that she could not muster courage to disclose about the acts of the accused to the complainant, who is the sister of the accused, can not be ruled out. In fact, it can be seen from the deposition of the prosecutrix (PW1) that on 03.09.2013 also, she had revealed about the acts of the accused to the complainant only when the complainant had become suspicious and asked her about her physical condition. Since the prosecutrix was having a pregnancy of about seven months at that time and her pregnancy must have started showing, she had no option but to confide in the complainant. Considering the facts and circumstances, the conduct of the prosecutrix appears to be quite natural.
- 12.5 The counsel for the accused further contended that the uncorroborated testimony of the prosecutrix can not form the basis for holding the accused guilty. He argued that during the relevant time, the mother of the prosecutrix was also residing in the same house and therefore, she would have been the best witness to throw light on the allegations against the accused. He submitted that the prosecution not only failed to examine her as a witness in support of its case but also

did not produce on record any document to show that she was of unsound mind. The counsel for the accused argued that the failure of the prosecution to examine the mother of the prosecutrix is fatal to its case.

- 12.6 It is now a settled legal proposition that a finding of guilt in a case of sexual assault can be based on the uncorroborated evidence of the prosecutrix provided it inspires confidence of the Court and is found to be reliable. The very nature of the offence makes it difficult to get direct corroborating evidence. No rule of law or of practice requires corroboration of the testimony of the prosecutrix before it can be accepted and acted upon. In **Gugan vs. State (Govt. of NCT of Delhi), 2018 (1) RCR (Criminal) 31**, it has been held by the Hon'ble Delhi High Court that in a case of rape where the offender is none else but the father, the version of the prosecutrix can be accepted without any corroboration. In the case on hand, the version of the prosecutrix that the accused had committed penetrative sexual assault on her has remained consistent throughout. In her statement under Section 164 Cr.P.C. (Ex.PW1/A) as well as in her deposition in the Court, the prosecutrix has testified against the accused. There is no discrepancy or contradiction in her above statements. The accused has failed to dent the testimony of the prosecutrix or extract anything therefrom. In view of the impeccable and unshattered testimony of the prosecutrix, there appears to be no necessity to look for the corroboration thereof. Even otherwise, the prosecutrix has specifically deposed that her mother is not mentally sound. The above deposition of the prosecutrix has not been controverted by the accused during the course of her cross-examination despite the presence of her mother in the house and could repeatedly do so lends credence to the version of the prosecutrix. In such circumstances, the prosecution would not have achieved anything by examining the mother of the prosecutrix. Infact, had the mother of the prosecutrix been of sound mind, the accused would have certainly examined her in his defence to dislodge the allegations of sexual assault made against him.

- 12.7 The accused has put forth the defence that the prosecutrix was having an affair with a boy living in the neighbourhood, who got her pregnant, and that when the reprimanded her, she falsely implicated him in the present case. The above defence of the accused is completely vacuous in as much as neither the identity of the said boy has been disclosed nor any material has been produced on record to substantiate the same. The accused not only failed to examine his wife from whom he allegedly acquired the knowledge of the said affair of the prosecutrix but also did not lodge any complaint against the said boy for violating the prosecutrix. Infact, the conduct of the accused in fleeing away from the house of the complainant upon being confronted by the complainant regarding the pregnancy of the prosecutrix points towards the guilt of the accused.
- 12.8 Besides the prosecutrix, the prosecution has examined her paternal aunt (bua) i.e. the complainant as PW2. In her deposition, the complainant has supported the version of the prosecutrix. She has deposed that after the accused had shifted with his family to her house, she noticed the condition of her niece i.e. the prosecutrix and that upon being asked, the prosecutrix started weeping and disclosed that the accused had committed rape on her on several occasions. She further deposed that she took the prosecutrix to the police station and lodged the complaint against the accused and that after the confirmation of the pregnancy of the prosecutrix, when the police visited her house in search of the accused, he had already fled away.
- 12.9 The accused tried to impeach the testimony of the complainant on the ground that she held a grudge against him as he had refused to give share to her in the ancestral property. Though the complainant admitted in her cross-examination that her father owned some property in the native village, which has yet not been divided, however, she denied that she had demanded any share in the property from the father or that due to the opposition of the accused to her demand, she had a grudge against him. In order to

prove his above defence, the accused could have easily examined his father after he had been dropped from the array of witnesses by the prosecution. The failure of the accused to examine his father to prove the alleged demand of share in the property by the complainant goes to show that the said defence was frivolous and concocted. The very fact that after being asked to vacate the tenanted house by the landlord, the accused alongwith his family took shelter in the house of the complainant brings the falsity of his above defence to the fore.

12.10 The counsel for the accused has lastly argued that since the DNA test report of the baby of the prosecutrix could not be procured, it has not been conclusively proved that the accused had impregnated the prosecutrix and therefore, the benefit of doubt should be given to the accused. The above argument is devoid of any merit. A perusal of the record show that though the blood sample of the baby of the prosecutrix had been sent to the FSL for ascertaining the paternity, however, the test could not be conducted as the sample was found to be putrefied. In the meantime, the baby of the prosecutrix was given in adoption by the orphanage and therefore, the fresh blood sample of the baby could not be obtained. The above lapse on the part of the investigating agency can not wipe off the reliable and trustworthy testimony of the prosecutrix, which has been duly corroborated by the deposition of the complainant.”

13. Lastly, qua the charge for the offence punishable under Section 506 IPC, the trial court held that, the prosecutrix had categorically deposed that, upon her objections to the acts of the appellant, the latter had threatened her with death, thereby causing real alarm to her; and was, therefore, liable to be convicted for the offence punishable under Section 506 (Part-I) IPC, as well.

14. There can be no manner of doubt that conviction for committing aggravated penetrative sexual assault can be sustained on the sole testimony of the prosecutrix. [Ref: CRL.A.1119/2014 titled as Boby vs. State (NCT of Delhi, decided by this Court on 14.07.2016, Vishnu (alias) Undrya vs. State of Maharashtra reported as (2006) 1 SCC 283 and State of M.P. vs. Dayal Sahu, reported as (2005) 8 SCC 122)].

15. The Hon'ble Supreme Court of India in State of Himachal Pradesh vs. Asha Ram, reported as 2006 SCC (Cri) 296 held as follows: -

“5.It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

16. In Sadashiv Ramrao Hadbe v. State of Maharashtra, reported as 2006 (10) SCC 92, the Hon'ble Supreme Court of India reiterated that the

sole testimony of the prosecutrix could be relied upon if it inspires the confidence of the Court:

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the Court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Court shall not act on the solitary evidence of the prosecutrix. The Courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

17. In this behalf, learned counsel appearing on behalf of the appellant would urge that, the testimony of the prosecutrix, is riddled with contradictions and discrepancies, when appreciated in conjunction with the testimony of her Bua, PW-2. It was, therefore, argued that the testimony of the prosecutrix was neither creditworthy nor of the sterling quality, necessary to sustain the conviction of the appellant.

18. In order to buttress this contention, learned counsel for the appellant, invited our attention to the testimony of the prosecutrix, wherein she had stated that the landlord of the premises, where they were residing, was aware of the commission of the offence, by the appellant upon his own daughter and had consequently, asked them to vacate his property; and that the prosecution had failed to examine the landlord, the person who first

came to know about the commission of the offence; thereby failing to provide requisite corroboration to the testimony of the prosecutrix.

19. It was further urged on behalf of the appellant that, there was a major contradiction between the testimony of the prosecutrix and her Bua PW-2, inasmuch as, although the latter deposed that, she did not visit her brother, the appellant's house, on the contrary the prosecutrix testified that PW-2 used to visit them.

20. Lastly, our attention was invited to a decision of this Court in **Dinesh Yadav vs. State (NCT of Delhi)**, CRL.A.677/2011 decided on 21.07.2015, reported as **2015 SCC Online Del 10585** to urge that, the appellant, as the father of the prosecutrix, could not have committed such a heinous offence upon her.

21. On the other hand, learned Additional Public Prosecutor would urge that the contradictions, if any, emerging from the testimonies of the prosecutrix and PW-2 were minor and inconsequential and that, the law enunciated qua the conviction of an accused for an offence of aggravated penetrative sexual assault, on the basis of the sole testimony of the prosecutrix, is fairly well settled. Reliance was placed in this behalf upon the judgement namely **Gugan v. State (Govt of NCT of Delhi)** reported as ,

2018 (1) RCR (Criminal) 31, wherein it was held by a Single Judge of this

Court as follows:-

“10. The appellant/accused in his statement under Section 313 Cr.P.C. has denied the prosecution evidence in simplicitor and has not led any evidence in his defence. The only suggestion given to PW-1 and PW-5 for his false implication is that the prosecutrix used to spend more time with PW-1, her neighbour and this was to the annoyance of the appellant.

11. The appellant does not dispute that his wife had expired and the prosecutrix was 16-17 years old at that time.

12. Proximity with a neighbour and that too a female could not be a reason for him to feel annoyed. The prosecutrix, PW-5 has admitted that after having dinner, she used to have a stroll in the gali with Poonam Aunty (PW-1) and she used to come late by 11.00 or 11.30 pm for which her parents used to scold her but that itself could not be a motive for her to implicate her own father in a serious offence of rape. This is a case where the appellant/father has been named to be a person who has committed rape on his own daughter, who was staying with him. After the death of the mother, the prosecutrix had no support system except her father and she would not blame her own father for committing rape on her.

13. While dealing with the case of the rape wherein the offender is none else but the father, the version of the prosecutrix can be accepted without any corroboration. In the statement of the prosecutrix there are no material contradictions except about the date or the month. This Court cannot ignore that she is illiterate and put her thumb impression on the complaint as well as on FIR. She being an illiterate person may not be able to give specific date and time or the month or the year.

14. From the evidence coming on record, it is established that PW-5, 'A' was subjected to rape by the appellant. The medical evidence corroborated the testimony of the prosecutrix to the extent that her hymen was found ruptured. Minor contradictions or discrepancy appearing in her statement as pointed out by learned counsel for the appellant cannot be treated a ground for disregarding otherwise reliable

testimony which proved the prosecution case beyond reasonable doubt.

15. In the case reported as Madan Gopal Kakkad vs. Naval Dubey, (1992) 3 SCC 204, it was observed that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

16. In view of the above discussion, the impugned judgment does not suffer from any illegality. The appeal has no merit and the same is hereby dismissed.”

22. In order to conclusively determine, whether the testimony of the prosecutrix is creditworthy and reliable, it would be necessary to appreciate her statement under Section 164 Cr.P.C. dated 07.09.2013 made before the competent Magistrate, as well her testimony before the trial court.

23. In her statement under Section 164 Cr.P.C. dated 07.09.2013, the prosecutrix stated as follows: -

“Statement of Km. Pooja D/o Mahavir Mehto R/o House No.28, Surekpur Road, Gopal Nagar, Najafgarh, Delhi, aged 16 years:

मैं Distt. Muzaffarnagar, Bihar की रहने वाली हूँ। करीब 6-7 साल पहले मैं पूरे परिवार के साथ दिल्ली आ गयी थी। मेरे पापा चिनाई का काम करते हैं और मम्मी का दिमाग काम है। वो थोड़ी पागल है। दिल्ली में हम नजफगढ़ में रहते थे। करीब एक साल पहले की बात है। जब मैं रात में सो रही थी तो मेरे पापा महावीर महतो मेरे ऊपर आकर लेट गए और मेरी सलवार खोलने लगे। मैंने उन्हें धक्का मारा और मम्मी के पास जाकर सो गयी। मम्मी को

बताया, पर मेरी माँ पागल हैं, इसलिए उसने कुछ नहीं किया। अगली रात को फिर जब मैं सो रही थी तो उन्होंने मेरा मुँह बंद कर दिया और मेरी सलवार खोल दी और मेरे ऊपर चढ़कर करने लग गए। पापा ने अपने कपड़े उतार दिए और अपना सू - सू करने वाला मेरे अंदर डाल दिया। मुझे धमकी भी दी कि अगर किसी को बताएगी तो तुझे मार दूंगा। पापा रोज़ मेरे साथ rape करते थे और मुझे कोई बचाता भी नहीं था। मेरी माँ को पता था पर उसने कुछ नहीं किया। 6-7 महीने पहले मुझे महीना आना बंद हो गया था। जब हमारे मकान मालिक को 2/9/13 को इस बारे में पता चला तो उसने हमसे घर खाली करवा लिया। फिर हम बुआ सुनैना के घर आ गए। मैं जब काम कर रही थी तो बुआ ने मेरा पेट देख कर मुझसे पूछा कि पेट कैसे बड़ा हुआ और मेरे साथ कौन सोया था। तो मैंने अपने बुआ को साड़ी बात बताई। जब बुआ ने मेरे पापा से इस बारे में पूछा तो मेरे पापा मेरी 4 साल की छोटी बहन को लेकर वहां से भाग गए।“

24. In her testimony recorded on 19.02.2014, the prosecutrix deposed as under: -

“ 19.02.2014

(In Camera Proceedings)

PW-1, Child Victim, aged 16 years (cited at serial no.1 in the list of the witnesses)

On SA

..... XXX...

About one year back one day an altercation had taken place between my father and my grandfather. Thereafter, we vacate the said house and shifted to another house in Najafgarh, which had three rooms. However, we ever staying in a simple room. One day, when I was sleeping, my father came upon me. I pushed him and thereafter, I went to my mother, however, the accused also came there and again he came upon me. When I objected to it, the accused extended threat saying that he would kill me and he committed rape upon me forcibly. After that, my father used to commit rape upon me every day. When our landlord came to know this fact, he instructed us to vacate the house and thereafter, we vacated the said house. Thereafter, we shifted to the house of our Bua (Aunty), who was also residing near Om Dairy at Najafgarh. On seeing my condition, my Bua (Aunty) suspected that some wrong act was committed with me and thereafter, my Bua(Aunty) took me to RTRM Hospital, Jaffarpur for my medical examination. After my medical examination, the doctor told us that

I was having pregnancy of seven months. Thereafter, my Bua (Aunty) made inquiry from my father, who denied the same and thereafter, my father along with my younger sister went away to Bihar. Thereafter, my Bua made a call at no. 100. The police officer called me in the Police Station Baba Haridas Nagar. I along with my Bua went to PS Baba Haridas Nagar and my Bua made a complaint to the police officer. Thereafter, the police officer took me to RTRM Hospital. After medical examination, the police official brought me back to the Police Station and from there, I was taken to Nirmal Chhaya.

On 07.09.2013, the police officials took me to Dwarka Courts from Nirmal Chhaya and my statement was recorded there by the Ld.MM

At this stage, one envelop with the seal of MG is taken out from judicial file. After breaking the seal, proceeding u/s 164 Cr.P.C is taken out. Same is shown to the child victim. Child victim correctly identified her thumb mark on her statement at point A, B, C & D and proceeding U/s 164 Cr.P.C is now Ex.PW1/A.

After recording my statement, I was taken back to Nirmal Chhaya, where I remained for about four months and I delivered a male baby in Deen Dayal Hospital on 30.12.2013.

At this stage the child victim has been asked to identify the accused, who did wrong act with her (The accused is standing behind a curtain and is unable to see the child victim and he has been further asked to close his eyes. However, child victim has been asked to identify the accused from the parting between the curtain)

After seeing the accused through the parting between the curtain, child victim was correctly identified the accused present behind the curtain as her father, who had committed rape upon her and had been made her pregnant.

XXXXX By Sh. L.G.Gautam , Ld Counsel for accused

It is correct that I do not know the dates or day or month, when incident happened, it is wrong to suggest that I was having friendly relations with a boy and that the said boy got me pregnant and this fact came in the knowledge of my father, who scolded me or that due to this reason I named my father as a culprit. It is further wrong to suggest that no offence has been committed by my father with me at any point of time. It is correct that my bua used to visit my house several times. I never told her during those visits the above facts, which I deposed today before this Hon'ble Court. My grandfather used to reside with my uncle, Raju. My grandfather is having properties in village and the same is not yet divided

between his children. I am not aware if my Bua is also having share in the said property. I am also not aware whether Bua was also asking for her share in the said property. I am also not aware whether my father was against the demand of my Bua of getting share from ancestral property. It is wrong to suggest that due to above reason, my bua instigated me to implicate my father in false case of that I have deposed falsely. It is wrong to suggest that accused never pregnant me and the child does not belong to the accused.”

25. Although the sole testimony of the prosecutrix, as aforesaid, is sufficient by itself to sustain the conviction of the appellant, subject to it being reliable and having ring of truth in it, in view of the asseverations on behalf of the appellant that, contradictions arise from a conjoint reading and the appellant’s statement that he was falsely implicated for denying PW-2, a share in their ancestral property; it is considered appropriate and necessary to peruse and appreciate the testimony of PW-2, the Bua of the prosecutrix, The testimony of PW-2 is as follows: -

“19.02.2014

(In Camera Proceeding)

PW2, Bua (Aunty) of the child victim (mentioned at serial no.2 in the list of witnesses).

On SA

I along with my family is staying at Gopal Nagar, Najafgarh for the last 8 years as tenant. My brother accused Mahabir Mehto was also residing in the same vicinity along with his family. My brother accused Mahabir Mehto used to work as labour. In the month of July, 2013, on day my brother accused Mahabir Mehto come to my house and he requested me to arrange a room in the same house but initially, I did not allow my brother to stay there as a tenant as my brother accused Mahabir Mehto used to take liquor daily and my husband also used to take liquor daily. When my brother insisted me to arrange a room in our house, thereafter, I

allowed him to stay there along with his family. Thereafter, in the month of October, 2013, accused Mahabir Mehto shifted in my house with his family. One day, I noticed the condition of my niece, child victim and on that day, I did not ask anything from her. I also used to work as labourer and I used to leave my house in the morning and return back in the evening. On that day after returning my house, in the evening, I enquired my niece, child victim about her condition, however, on that day, my niece started weeping and disclosed that her father committed rape upon her on several occasions. Thereafter, I along with my niece child victim went to PS Baba Haridas Nagar and made complaint against the accused, which is Ex.PW2/A bearing my thumb impression at pt A. From there, police official took my niece child victim to RTRM Hospital and I also accompanied her to the hospital, where she was medically examined and the doctor declared that my niece child victim is pregnant. From the hospital, we along with police official returned back to Baba Haridas Nagar Police Station and my niece child victim was shifted to Nirmal Chhaya. On the same day, when police official visited our house, in search of accused Mahabir Mehto, he had already left our house.

I am aware of the fact that my niece child victim delivered male baby in DDU Hospital. Today, accused Mahabir Mehto is present in the court(the witness has correctly identified the accused)

XXXXX By Sh. L.S. Gautam, Ld. Counsel for accused.

My father is having some property in his native place. Till date the said property is not divided among his children. I am not interested in my share in the property of my father. It is wrong to suggest that I demanded my share from my father and the accused strongly opposed the same. It is further wrong to suggest that due to opposition by my brother, i.e Accused. I had grudge against him. I never visited the house of the accused and since then, year back, quarrel/fight took place between me and accused and since then, I was not having visiting terms with the accused. It is wrong to suggest that child victim did not disclose anything against the accused or that the accused was not responsible for her condition or that she was having relation with one boy and accused opposed the same and scolded the child victim and this fact came in my knowledge or that I instigated the child victim to name the accused as culprit or that I implicated the accused in false case or that I am deposing falsely. I went to the locality of the accused, where he was residing to enquire about the truth and to know the real person, who was responsible for the condition of child victim. It is wrong to suggest that I have deposed falsely.

26. We have heard learned counsel appearing on behalf of the parties and given our anxious consideration to the entire evidence on record. In our view in the present proceedings, it has been established beyond reasonable doubt that: -

- a) The age of the prosecutrix—which was germane to the issue of the culpability for the offence for which the appellant was charged—was 15 years at the time of the commission of the offence. Hence, the prosecutrix was a child, within the meaning of the definition in relation thereto, as provided under the provisions of Section 2(d) of POCSO, at the time of commission of the offence.

Our finding, in this regard, in addition to the evidence on record, including the ossification test conducted on the prosecutrix, is strengthened by the circumstance that, the appellant did not, at any stage of trial or before us in the present appeal, dispute that the prosecutrix was not a child at the relevant time.

- b) The prosecutrix was 28 weeks pregnant at the time of her MLC Ex.PW5/A, dated 04.09.2013.

- c) The version of the prosecutrix that, the appellant had committed penetrative sexual assault on her, has remained constant throughout. A plain reading of her statement recorded under Section 164 Cr.P.C., Ex.PW1/A, as well as, her deposition in Court, leaves no manner of doubt, about the guilt of the appellant, qua the commission of the offence. There is no discrepancy or contradiction in her statements, which have remained consistent, impeccable and un-shattered, despite sustained cross-examination.

In addition, the conduct of the appellant in fleeing away from their accommodation, upon being confronted by the complainant PW-2, regarding the pregnancy of the prosecutrix, lends incontrovertible support in establishing the guilt of the appellant.

- d) The defence of the accused to the effect that the prosecutrix; was having an affair with a boy living in the neighbourhood, who impregnated her, and is being falsely implicated in the present case, upon reprimanding the prosecutrix for the same; is completely untenable and vacuous, inasmuch as, neither the

identity of the boy has been disclosed at any stage nor has any material been produced on the record to substantiate the defence.

- e) The submission of the appellant that, he was falsely implicated by his sister PW-2 , since he refused to give her a share in the ancestral property, fails to impeach the latter's testimony, for the reason that, neither did the appellant examine his father, to substantiate his defence, nor did he produce any other cogent material in this behalf.
- f) Lastly, the asseverations made on behalf of the appellant that; owing to the circumstance that the DNA test report of the baby delivered by the prosecutrix could not be procured, the prosecution has failed to conclusively prove their case; is devoid of merit for the reason that, although the blood sample of the baby had been sent to FSL for ascertaining the paternity, no result could be obtained since the same was found to be putrefied. In the meantime, the baby born to the prosecutrix had been given in adoption and it was not considered advisable

or necessary in the interest of the child, to obtain fresh blood sample.

27. The above lapse on the part of the investigating agency does not have the effect of effacing the otherwise reliable and trustworthy testimony of the prosecutrix, which has been duly corroborated by the deposition of the complainant PW-2. [Ref: *State vs. Rahul*, Crl. A. 496/2015, decided on **23.04.2019**]

28. In view of the foregoing, we are of the view that the testimony of the prosecutrix, which has remained un-shattered and uncontroverted despite sustained cross-examination, is creditworthy and reliable and has ring of truth in it; and further, although there is no gainsaying the legal position that her testimony by itself is sufficient to establish the case of the prosecution, in the present case, the prosecutrix's testimony is materially corroborated by the other evidence on record. We have, therefore, no hesitation in saying that the cogent and clear evidence on record, leads to but one inescapable conclusion, that of the guilt of the appellant.

29. We are further of the view that the reliance placed by the appellant on the decision in *Dinesh Yadav (supra)* to urge that the appellant, as the father of the prosecutrix could not committed such a heinous offence of rape upon

his own daughter, is misplaced and mis-conceived, in view of the clear and unequivocal evidence on record, in the present case.

30. In view of the foregoing, we find ourselves in agreement with the findings returned by the trial court, which in our considered view, do not warrant any interference or modification. Therefore, the judgment and order of sentence dated 27.04.2018 and 14.05.2018 respectively, are upheld and the present appeal is accordingly dismissed. However, there shall be no order as to costs.

31. The Trial Court Record be sent back forthwith.

32. A copy of this judgment be communicated to the appellant through the Superintendent, Tihar Jail and also be sent for updation of the records.

SIDDHARTH MRIDUL, J.

MANOJ KUMAR OHRI, J.

MAY 30, 2019

dn/ad