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

\+ CRL.A. 888/2017

PREM BAHADUR @ BHOJ BAHADUR ..... Appellant
Through: Mr. S.B. Dandapani, Adv.

versus

STATE ..... Respondent
Through: Mr. G.M. Farooqui, APP for State with SI Narander Pal Singh, PS GTB Enclave

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**
22.07.2019

1. The appellant Prem Bahadur @ Bhoj Bahadur stands convicted, by judgment dated 29th July, 2017, passed by the learned Additional Sessions Judge (hereinafter referred to as "the learned ASJ") of having committed the offences punishable under Sections 363, 366, 376(2)(i) and 506 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC") and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act"). Resultantly, *vide* order dated 31st July, 2017, he also stands sentenced to (i) 10 years' rigorous imprisonment (RI), for the offences punishable under Section 366, IPC, with fine of Rs. 15,000/- and default sentence of 3 months simple imprisonment (SI), (ii) 10 years' RI for the offence punishable under Section 376(2)(i) of the IPC, along with fine of Rs. 15,000/-, and default sentence of 3 months

simple imprisonment (SI), (iii) 3 years' RI for the offence punishable under Section 506 IPC, with fine of Rs. 3,000/- and default sentence of 1 month SI. The sentences have been directed to run concurrently and the benefit of Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") stand extended to the appellant. The victim was also entitled to compensation to the tune of Rs.5,00,000/- (Rupees Five Lakh only).

2. The learned ASJ has found that the appellant had enticed the prosecutrix (who shall remain unnamed) from the custody of her mother on the pretext of buying clothes for her and had taken her, with him, to a house at Village Bishad, Pithoragarh, Uttarakhand, where he had repeatedly raped her, also threatening to eliminate her, were she to disclose the incident to anyone. As such, the learned ASJ has held the offence of "aggravated penetrative sexual assault" as defined in Section 5 of the POCSO Act, to have been brought home to the appellant and has, therefore, returned the impugned findings of conviction and sentence.

3. One may directly proceed to the evidence, in order to gauge the sustainability of the impugned judgment and order on sentence.

Evidence

4. The prosecution led the evidence of twenty-three witnesses, whereas the appellant did not choose to lead evidence of any defence witness. The twenty-three prosecution witnesses (hereinafter referred

to as "PWs") may conveniently be sub-divided into the following five categories:

(i) Witnesses to the incident, i.e.
   (a) PW-1 (the prosecutrix),
   (b) PW-2 Meena (the mother of the prosecutrix),
   (c) PW-4 Amrit Bahadur (the uncle of the prosecutrix),
   (d) PW-5 Ramu Ram (the owner of the house where the prosecutrix was allegedly subjected to rape by the appellant),
   (e) PW-6 Rajender Prasad (the *gram pahri* of village Bishad, Pithoragarh) and
   (f) PW-7 SI Narender Giri,

(ii) Police witnesses, i.e.
   (a) PW-8 Woman Constable (W/Const.) Prakash,
   (b) PW-12 Head Const (HC) Shobhender Pal,
   (c) PW-19 W/SI Pooja,
   (d) PW-20 SI Vinit Kumar and
   (e) PW-23 SI Vinita,

(iii) Hospital witnesses, i.e.
   (a) PW-13 Dr. Rainy Pangtey (who testified as to the medical examination of the prosecutrix),
   (b) PW-16 Dr. B.S. Yadav (who testified as to the medical examination of the appellant) and
   (c) PW-21, Dr. Parmeshwar Ram (who testified as to the medical examination of the appellant),

(iv) the learned Metropolitan Magistrate Muneesh Garg (who had recorded the statement of the prosecutrix under Section 164 Cr.P.C.), who testified as PW-22, and

(v) witnesses as to the age of the prosecutrix, i.e.

(a) PW-3 Raj Kumari (Principal of the School), and

(b) PW-18 Dr. N.S. Gunjial (radiologist).

5. Brief reference, to the evidence of the witnesses may now be made.

Witnesses to the incident

The prosecutrix

6. The evidence of the prosecutrix was recorded on 12th August, 2013. The learned ASJ recorded the age of the prosecutrix as "about nine years". Certain questions were put to the prosecutrix, in order to estimate her capacity and competence to testify. After being satisfied in this regard, the statement of the prosecutrix was recorded.

7. The prosecutrix deposed that, on 14th February, 2013, while she was playing with her friends, the appellant asked her to accompany him, stating that he would purchase clothes for her, and took her, with him, to Anand Vihar in a taxi, where he took her, further, to village Bishad, Pithoragarh, where she was kept confined in a house belonging to PW-5 Ramu Ram. She further deposed that the appellant

told PW-5 that she was his daughter. Having thus confined her in the house of Ramu Ram, the prosecutrix alleged that the appellant subjected her, at night, to repeated rape, after removing her clothes as well as his, covering her mouth with his hand so that she could not raise an alarm. The exact words of the prosecutrix, regarding the act committed with her, merits reproduction thus:

> "The accused Prem Bahadur told Ramu that I was daughter of accused. The accused Prem Bahadur had kept me in a room below the house of Ramu uncle. Accused used to do 'ganda kam' with me. The witness has been asked to explain 'ganda kam', The accused used to put his male part used for urination called susu in my part used for susu. Accused used to remove my garments and also used to remove his own clothes. I was kept there for two months"

8. The prosecutrix further deposed that the appellant used to threaten to kill her, were she to disclose, to anyone, what was transpiring with her, and that she was, thereby, frightened into silence. However, she stated, one day, finding no one present, she fled, and was noticed by one aunty. The said aunty informed the appellant, who followed her. She further deposed that she called her brother using the telephone of the owner of the house, who intimated the Police.

9. The prosecutrix identified the appellant in court and also identified and proved the statement, dated 25th March, 2013 recorded from her under Section 164 Cr.P.C., which was, therefore, exhibited as Ex. PW-1/A.

10. In cross-examination, the prosecutrix deposed that the house, in which she was confined, had three rooms and that, in the second and third room cows, buffaloes and goats were kept. She denied a suggestion, put to her, that the appellant owed money to her mother and that she had, therefore, falsely implicated the appellant.

11. Deposing as PW-2, Meena, the mother of the prosecutrix also testified, that on 14th February, 2013, the prosecutrix, while playing outside her house, had gone missing, and that the appellant who used to stay next door, was also missing. She, however, stated the age of her daughter, i.e. the prosecutrix at the time, to be 13 years. She further deposed that, after being unable to locate her daughter for ten days, she filed a complaint in P.S. GTB. Enclave.

12. She further testified that, on 21st March, 2013, i.e. a month and seven days after her daughter had gone missing, her son Vikas informed her that he had received a phone call from the prosecutrix, informing him that she was at PS Pithoragarh, and that he had intimated the said fact to the police authorities who, along with her brother-in-law Amrit Bahadur (PW-4), reached PS Pithoragarh the very next day, where they found the prosecutrix in a house where she had been provided sanctuary by the police. The providing of such sanctuary was also testified by PW-17 Bhagirathi, the owner of the house in question. PW-2 further testified that, on seeing her, the prosecutrix started weeping and informed her that the appellant, on the pretext of buying clothes for her, had taken her with him, and had

brought her to Pithoragarh where he confined her in a house and subjected her to regular sexual assault.

13. In cross-examination, PW-2 denied any financial dealing with the appellant or that a false case has been registered against the appellant for this reason.

14. Amrit Bahadur, deposing as PW-4, the brother-in-law of PW-2 Meena and uncle of the prosecutrix, confirmed having accompanied PW-2 Meena and the police officials to Pithoragarh on 22nd March, 2013, where they found the prosecutrix, who, on being asked, stated that she had been enticed away by the appellant on the pretext of purchasing clothes, and that the appellant had taken her to his village where he used to beat her regularly. He further deposed that they had been informed, by the police, that the appellant had had "illicit relations with the prosecutrix many times". He also confirmed that the appellant had been medically examined in the local Hospital at Pithoragarh. On a specific query, PW-4 confirmed that the prosecutrix had informed that the appellant had told the villagers that the prosecutrix was his niece, and had also alleged that the appellant had "made illicit relations with her without her consent many times". Nothing substantial resulted from the cross-examination of PW-4.

15. PW-5 Ramu Ram testified, during trial, that in the Hindu month of Magh (roughly corresponding to January), in 2013, the appellant had come to his house with the prosecutrix, who was about 10-11 years of age, and had stated that he was his niece. He further testified

that he had provided, to the appellant, the room, lying vacant in his brother's house, where the prosecutrix remained alone while the appellant went for work. He also deposed that the prosecutrix did not correspond with them frequently and that he had subsequently come to know that the prosecutrix had been brought to the village by the appellant, from Delhi. Nothing substantial resulted from his cross-examination.

16. PW-6, Rajender Prasad, who was working as *Gram Pahri* at Village Patti, Supauli, District Pithoragarh, deposed that, at 01:30 to 2:00 PM on 23rd March, 2013, while returning from Supauli, he saw the prosecutrix, who was fleeing, crying that she was being chased by the appellant. He deposed that, on being asked, the prosecutrix revealed her name and informed that she had been brought, from Delhi, to Pithoragarh, by the appellant. He further deposed that the appellant attempted to snatch the prosecutrix from his custody, whereupon he informed his area Patwari Sub-Inspector Narender Giri (PW-7), who reached the spot with three to four other persons, and questioned the appellant, who disclosed his name as Prem Bahadur. He further testified that PW-7 SI Narender Giri detained the appellant for breach of peace. He identified the appellant, who was present in court. Nothing substantial resulted from his cross-examination.

17. Revenue Sub-Inspector Narender Giri, deposing as PW-7, supported the above testimony of PW-6 Rajender Prasad, by testifying that, on 21st March, 2013, on being contacted, telephonically, by PW-6, he had reached the spot, where he found the prosecutrix and the

appellant, who had been apprehended by PW-6 with the help of other villagers. He further deposed that, on enquiry, the prosecutrix disclosed her name and stated her age to be 11 years, and that the prosecutrix had alleged that the appellant had, after inducing her, enticed her away from Delhi. In view of the offensive attitude of the appellant, PW-7 booked him under Sections 107/151 of the Cr.P.C., for committing breach of peace, and arrested him. He further testified that he contacted Vikas, the brother of the prosecutrix, on his telephone number being disclosed by the prosecutrix. He also confirmed that, on instructions from the police, he ensured that the prosecutrix remained in the safe custody of PW-17 (Bhagirathi), till they arrived the next day, and took him with them. He further deposed that the Arrest Memo of the appellant (Ex.PW-7/A) was prepared by the Delhi Police, who also prepared the personal search memo (Ex. PW-7/B) and recorded the disclosure statement of the appellant (Ex. PW-7/C). He further confirmed that the prosecutrix, as well as the appellant, had been medically examined. He identified the appellant in court. Nothing substantial resulted from his cross-examination.

Police witnesses

18. W/Const. Prakash, deposing as PW-8, testified, during trial, that, on 22nd March, 2013, she had joined the investigation of the present case with SI Vinit Kumar (PW-20) and that, accompanied by PW-20, HC Shobhender Pal (PW-12) and Meena (PW-2), they had proceeded to Pithoragarh on the said day, where they met Revenue SI Narender Giri (PW-7), who produced the prosecutrix "aged about 7

years", before them. She further stated that the I/O SI Vinit Kumar (PW-20) recorded the statement of the prosecutrix under Section 161 Cr.P.C. and took, into custody, the appellant, who was subsequently arrested *vide* Arrest Memo Ex. PW-7/A. She correctly identified the appellant in court. Nothing substantial emerged from her cross-examination.

19. HC Shobhender Pal deposed as PW-12 and testified that, on 22nd March, 2013, he joined the investigation in the present case, with the I/O SI Vinit Kumar (PW-20), W/Const. Prakash (PW-8), as well as Meena (PW-2), the mother of the prosecutrix, and the aunt of the prosecutrix. He further stated that, accompanied by the mother and aunt of the prosecutrix, they had proceeded to Pithoragarh, where they reached at 10:00 AM on 23rd March, 2013. He further confirmed that SI Narender Giri (PW-7) had met them at Pithoragarh and had produced, before the I/O Vinit Kumar (PW-20), the prosecutrix, who was interrogated by him and was taken to the Hospital for her medical examination. He also confirmed the taking into custody, and subsequent arrest, of the appellant, by the I/O Vinit Kumar (PW-20), as well as his interrogation and the recording of his disclosure statement (Ex. PW-7/C). He further deposed that the appellant had taken them to the house where he confined the prosecutrix, regarding which Pointing Out Memo (Ex. PW-12/A) was prepared.

20. In cross-examination, he testified that the custody of the accused had been taken over by the I/O pursuant to the orders passed

by the Sub-Divisional Magistrate (SDM). Nothing further emerged from the cross-examination of PW-12.

21. PW-19 W/SI Pooja merely confirmed having received the statement of the prosecutrix, under Section 164, Cr.P.C., recorded on 25th March, 2013, and having sent the exhibits of the case, on 28th March, 2013, to the Forensic Science Laboratory (FSL), for examination. The I/O SI Vinit Kumar, deposing as PW-20, testified that, on 23rd February, 2013, PW-2 (Meena) had arrived at PS GTB Enclave and recorded her statement regarding the prosecutrix, aged about seven years, having been missing since 14th February, 2013, whereupon he prepared *rukka* (Ex. PW-20/A), on the basis whereof First Information Report (FIR) was registered. He further confirmed that, on 22nd March, 2013, he received information from SI Narender Giri (PW-7), to the effect that the prosecutrix was with them and that they had apprehended the appellant as well. The information was recorded in the *roznamcha* and conveyed to the SHO, whereafter he, along with HC Shobhender Pal (PW-12), W/Const. Prakash (PW-8), Meena (PW-2) and Amrit Bahadur (PW-4) proceeded to Pithoragarh, where they reached on 23rd March, 2013. At Pithoragarh, they met SI Narender Giri (PW-7), who produced the prosecutrix, and that, after recording her statement under Section 161, Cr.P.C., he proceeded, with W/Const. Prakash (PW-8) to the hospital where the prosecutrix was medically examined. He further testified that he was informed, by SI Narender Giri (PW-7), that the appellant had been arrested under Sections 107/151 Cr.P.C. and was, in that context, produced before the court of the learned SDM, Pithoragarh, who released the appellant on

personal bond, whereafter PW-20 arrested the appellant *vide* Arrest Memo (Ex.PW-7/A) and recorded his disclosure statement (Ex. PW-7/C). The medical examination of the appellant was, thereafter, conducted, and Pointing Out Memo, of the place where the appellant had confined the prosecutrix (Ex.PW-12/A) was prepared. He also confirmed having seized the date of birth record of the prosecutrix (PW-3/A), from M.C. Primary School, Dilshad Garden, according to which her date of birth was 7th February, 2006. He correctly identified the appellant in court. Nothing substantial emanated from his cross-examination.

22. PW-23 SI Vinita confirmed in her deposition, during trial, having had the medical examination of the appellant conducted on 28th May, 2013, *vide* MLC report (Ex. PW-21/A). She identified the appellant in court.

Hospital witnesses

23. Of the hospital witnesses, the evidence of Dr. Rainy Pangtey (PW-13) pertained to the medical examination of the prosecutrix, whereas Dr. B.S. Yadav (PW-16) and Dr. Parmeshwar Ram (PW-21) deposed with respect to the medical examination of the appellant.

24. Dr. Rainy Pangtey (PW-13) confirmed that, on 23rd March, 2013, when she was posted as Lady Medical Officer at Mahila Chikatsalya, Pithoragarh, the prosecutrix, about seven years of age, had been brought to the hospital by W/Const. Prakash (PW-8) with an

alleged history of kidnapping and sexual assault. She deposed that there was no fresh injury on the body of the prosecutrix though there was some redness in her perineal region. She further testified that there was slight swelling, redness and infection on the *labia majora* of the prosecutrix and that her hymen was found slightly torn. She proved the MLC of the prosecutrix (Ex.PW-13/A). Paras 11 and 12 of the said MLC alone are significant and may be reproduced, therefore, *in extenso*, as under:

> "**11. Examination for injuries**
>
> (Look for Bruises, Systemic Physical torture injuries, Nail abrasions, Teeth bite marks, Cuts, lacerations, head injury, any other injury.)
>
> Injury State Size Colour Swelling Simple/ Grievous
>
> 1. No Injury in any Part of the body
>
> 2. Expect redness in the perineal region.
>
> **12. Local examination of genital parts:**
>
> A. Pubic hair combing - not present
>
> B. External Genitalia
>
> i. Labia Mijora Any swelling, tears, edematous, bruises or abrasion:- slight swelling
>
> ii. Labia Minora Scratch, bruising, finger nail, marks tear, infection….red, infected
>
> iii. Fourchette Bleeding tear :- No

iv. Vulva Any injury, bleeding, discharge:- No

v. Perineum Redness (+)

C. Hymen-intact/Torn Slight torn (part pret)

Injury-fresh/oedema/congestion/ tenderness: tenderness

D. Vagina & Cervix (Any bleeding/ tear/discharge/oedema/tenderness)*

Injury-fresh/oedema/congestion/ tenderness: Redness

Sd./-
23/03/2013
Lady Medical Officer
District Mahila Chikatsalya
Pithoragarh

*P/v examination only if medically indicated. Digitally done, with admitting little finger

E. Anus (encircle the relevant) Nil

Bleeding/tear/discharge/oedemat/tenderness."

25. The testimony of Dr. B. S. Yadav (PW-16) and Dr. Parmeshwar Ram (PW-21), who testified with respect to the medical examination of the appellant, are not of any serious significance, except for the fact that they deposed that the appellant was capable of sexual intercourse and had suffered certain injuries.

Evidence of the learned MM

26. The learned Metropolitan Magistrate (hereinafter referred to as "the learned MM") Muneesh Garg, deposing as PW-22, confirmed having recorded the statement of the prosecutrix under Section 164 of the Cr.P.C..

Witnesses regarding the age of the prosecutrix

27. Smt. Raj Kumari, Principal of M.C. School, deposing as PW-3, confirmed having brought, with her, the original school record of the prosecutrix, according to which she was born on 7th February, 2006. She proved the admission form of the prosecutrix as Ex.PW-3/B, and the certificate issued at the time of the admission as Ex.PW-3/A. In cross-examination she admitted having mentioned the date of birth of the prosecutrix in the record, on the basis of the unattested affidavit given by PW-2, i.e. the mother of the prosecutrix. She, however, denied that the date of birth of the prosecutrix, as entered in the application form, was not correct.

28. Dr. N. S. Gunjial (PW-18), Senior Radiologist in the District Hospital, Pithoragarh, testified, during trial, that, on the basis of the X-ray of the prosecutrix, taken on 23rd Mach, 2013, he opined that the prosecutrix was between five and ten years of age, and also proved his report (Ex.PW-18/A), given in that regard.

29. After recording the statements of the above-mentioned prosecution witnesses, the statement of the appellant was recorded under Section 313 Cr.P.C. on 25th May, 2017. The appellant denied

having enticed the prosecutrix from Delhi on the pretext of purchasing clothes for her, or having taken her with him to the house of Ramu Ram (PW-5). He also denied having confined her in the said premises and having subjected her to sexual assault. He also denied his disclosure statement. He insisted that he was innocent and had been wrongly implicated and stated that he did not wish to lead any defence evidence.

Other evidence

Statement of the prosecutrix under Section 164, Cr. P. C.

30. The statement of the prosecutrix was recorded under Section 164, Cr.P.C., on 25th March, 2013, after eliciting her response to certain queries, so as to assess her capacity and competence to justify. The age of the prosecutrix was recorded by the learned MM as "about 7 years". The prosecutrix deposed, in her statement, that, on 14th February, 2013, when she was playing outside her house, the appellant enticed her away, with him, on the pretext of finding her some work, and that, at about 5:00 PM on the same day, he took her, with him, by bus, to village Bishad, Pithoragarh, where he introduced her, to the residents of the village, as his daughter. She further stated that, out of fear, she did not disclose these facts to anyone.

31. She further alleged, in her statement, that the appellant used to commit sexual assault, on her, at night, after removing their clothes, as a result of which she suffered severe pain. Her descriptions of the acts

perpetrated on her by the appellant, as provided in the said statement, were in sync with her version in her testimony during trial. She further testified that, one day, she managed to escape from the house, where she disclosed to some villagers that she had been enticed away, from Delhi, by the appellant, who also used to beat her, whereupon the villagers apprehended the appellant, who was searching for her. She confirmed that the Police reached the area and, after taking the appellant away with them, asked an aunty to take custody of her.

Other exhibits/evidence

32. Ex. PW-3/A was the certificate, dated 23rd March, 2013, issued by the School, to the effect that the prosecutrix was a student of Class II in the School and that, from the record of the School, her date of birth was 7th February, 2006. The Admission Form of the prosecutrix, which also recorded the same date of birth, was also exhibited as Ex. PW-3/B.

33. The report, dated 6th April, 2016, of the FSL, which was exhibited as Ex.A-1, did not find any semen on any of the exhibits, except the semen sample of the appellant. As such, no DNA profiling was done, either. The FSL report is, therefore, of scant assistance in the present case.

The impugned judgment of learned ASJ

34. Having reconnoitered the evidence, the learned ASJ has, by the impugned judgment, proceeded to convict the appellant in the terms stated in para 1 (*supra*). He has, in so doing, ratiocinated thus:

(i) Addressing first, the issue of age of the prosecutrix, the learned ASJ has, while noting the fact that the age of the prosecutrix was variously mentioned in various documents, with her own testimony being to the effect that she was 9 years of age, her mother Meena (PW-2), having stated her age as 13 years, the School Certificate (PW-3/A) having borne her out to be about 7 years at the time of incident, and witnesses, who had interacted with her, having stated her to be 10 to 11 years of age, and Dr. N.S. Gunjial (PW-18) having opined that she was 5 to 10 years of age, observed that, except for mother of the prosecutrix, who had stated that she was 13 years of age, the consistent position, emerging from other evidence on record, was that she was between 5 and 10 years of age. Even so, giving the benefit of doubt, the learned ASJ has treated the prosecutrix to be 13 years of age.

(ii) Apropos the alleged inconsistency, in the evidence of the prosecutrix, regarding the manner in which she reached Pithoragarh, the learned ASJ notes that the evidence of the witnesses was consistent to the extent of the prosecutrix having been enticed away by the appellant to Pithoragarh, on the pretext of buying her clothes, and that she had been taken by taxi till

Anand Vihar and by bus, thereafter. In any event, notes the learned ASJ, there was no dispute about the fact that she had reached Pithoragarh, so that this aspect of the matter, lost its significance.

(iii) Apropos the actual incident, the learned ASJ notes that the victim was a child of 10 to 11 years of age, and came from a poor socio-economic background so that, having been taken by the appellant to Pithorgarh and confined in a house and subjected to repeated assault, she would, naturally, not be in a frame of mind in which she could complain or raise an alarm. The learned ASJ has relied on the testimony of the prosecutrix as sufficient to bear out the charge against the appellant. He has also, in this context, noticed that, though the FSL report was unhelpful, Dr. Rainy Pangtey (PW-13), who had examined her, confirmed that there was swelling, redness and infection on her *labia mijora* and partial hymen tear, as well as redness in the perineal region, which indicated "penetrative sexual assault" and rape. Relying on the testimony of the prosecutrix, the learned ASJ has found that the incident of rape was not an isolated one but that the prosecutrix had been subjected to repeated sexual assaults, thereby making out a case of commission of the offence of "aggravated penetrated sexual assault" as defined in Section 5 of the POCSO Act.

In view of these findings, the learned ASJ has convicted and sentenced the appellant, in the manner already set out in para 1 hereinabove.

Rival submissions

35. Mr. S.B. Dandapani, learned counsel arguing for the appellant, first drew attention to the MLC of the prosecutrix, which found no injury except redness in her perineal region, which according to him, could also be attributed to infection. He also pointed out that the report was to the effect the vagina admitted only to the tip of a little finger, which was inconsistent with the finding of "penetrative sexual assault", which was a *sine qua non* for conviction of the appellant under the POCSO Act. In this context, Mr. S.B. Dandapani also emphasized the fact that the FSL was also unable to detect any semen on any of the exhibits of the prosecutrix.

36. In the circumstances, he submitted that a case for conviction under Section 366 IPC may have been made out, but certainly not only for conviction under Section 376 IPC. He also sought to submit that the entire conviction was founded on the evidence of the prosecutrix, and that the said evidence, being an evidence of a child witness, was required to be treated with extreme caution.

37. In fine, Mr. Dandapani submitted that his client had already undergone 5.5 years of the sentence awarded by the learned ASJ.

38. Mr. G.M. Farooqui, learned APP, appearing for the State, basically reiterated the findings of the learned ASJ and sought to submit that the very finding of partial tearing of hymen of the

prosecutrix was sufficient to make out a case of sexual assault, so that the invocation against the appellant, of the provisions of the POCSO Act, was unexceptionable.

Analysis

39. Having examined the case in all its aspects and contours, and having addressed myself to the evidence on record and the submissions advanced by learned Counsel, I find no reason, whatsoever, to differ with the conclusion arrived at, by the learned ASJ.

40. Regarding the age of the prosecutrix, it is correct that the evidence of different witnesses, as orally tendered during trial or the documents exhibited by them, is not uniform. If one were, however, to discount the opinions, regarding the age of the prosecutrix, as tendered merely on a visual approximation, one is left only with (i) the oral testimony of PW-2 Meena, the mother of the prosecutrix, to the effect that the prosecutrix was 13 years of age on the date of incident, (ii) the school record of the prosecutrix, which, as per the testimony of PW-3 Raj Kumari, the School Principal, was based on the affidavit submitted by the mother of the prosecutrix at the time of securing admission for her, according to which she was born on 7th February, 2006, thereby rendering her 7 years of age at the time of incident, and (iii) the report of PW-18 Dr. N. S. Gunjial, Senior Radiologist (Ex. PW-18/A), according to which she was between 5 and 10 years of age on 23rd March, 2013 and, consequently, also on

the date of incident, which was approved by him in his testimony during trial, which the learned counsel appearing for the appellant did not choose the subject to cross-examination, despite grant of opportunity. Inasmuch as the evidence of Dr. Gunjial (PW-18) was based on medical opinion, and was not questioned by the appellant by cross-examining him, his opinion merits acceptance. The learned ASJ has, nevertheless, granted the benefit of doubt to the appellant in this regard, and has treated the prosecutrix was 13 years of age, based on the statement of her mother Meena (PW-2). Viewed any which way, the prosecutrix would, on the date of incident, be less than 18 years of age, thereby bringing her within the purview of the POCSO Act.

41. Adverting, now, to the commission of the actual offence itself, the learned ASJ has found the appellant guilty of having committed "aggravated penetrative sexual assault" on the prosecutrix. "Aggravated penetrative sexual assault" is defined in Section 5 of the POCSO Act as penetrative sexual assault on a child, which answers one or more of the descriptions enlisted in clauses (a) to (u) of the said Section. Clause (i), in Section 5, deals with commission of "penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child", clause (l) deals with commission of "penetrative sexual assault on the child more than once or repeatedly" and clause (m) deals with commission of "penetrative sexual assault on a child below 12 years".

42. "Penetrative sexual assault" is defined, in Section 3 of the POCSO Act the following manner:

> "**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 make the child to do so with him or any other person; or
>
> (b) he inserts, to any extent, any object or a 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."

Penile penetration, *to any extent*, therefore, is sufficient to answer the description of "penetrative sexual assault", as contained in Section 3 of the POCSO Act. This single factor, even by itself, is sufficient to discountenance the reliance, of Mr. Dandapani, on the MLC of the prosecutrix, and the opinion, therein, that the hymen of the prosecutrix was only "slightly torn". Penile penetration, even without reaching the hymen, would be sufficient to answer the definition of "penetrative sexual assault", as contained in Section 3 of the POCSO Act and, consequently, even if the hymen were intact, that would not belie the allegation of penetrative sexual assault having been committed by the accused. That apart, in the present case the hymen of the prosecutrix

was not intact, but was found "slightly torn" and, in a child, any aberration of the hymen can legitimately give rise to an inference of penetrative sexual assault having taken place. One may also refer, in this context, to the judgment of the Supreme Court in ***Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635***, which clearly holds that injury, or rupturing of the hymen, are not necessary concomitants to commission of penetrative sexual assault.

43. In the present case, the prosecutrix has, consistently, testified, firstly under Section 164 of the Cr.P.C. and, later, during trial, that the appellant had inserted his penis into her vagina, without her consent. This testimony would, therefore, be more than sufficient to bring home, to the appellant, the offence of having committed "penetrative sexual assault" on the prosecutrix.

44. The submission, of Mr. Dandapani, that, as there were no injuries found on the prosecutrix, and her hymen was found only to be "slightly torn", the offence of committing penetrative sexual assault, or rape, could not be brought home to the appellant is, therefore, entirely devoid of merit and is accordingly rejected.

45. Mr. Dandapani has also sought to question the testimony of the prosecutrix on the ground that she was a child witness and her evidence was, therefore, liable to be treated with caution. This submission, too, is, in my view, devoid of substance. It is hardly necessary to recount, at this point of time, keeping in mind the development of the law over the years, the catena of authorities, the

Supreme Court, to the effect that the sole testimony of a prosecutrix is sufficient to convict an accused, provided the testimony is found to be reliable and trustworthy. The statements of the prosecutrix, under Section 164 of the Cr.P.C., as well as during trial, were cogent and consistent. They were also in sync with the version of the incident, as narrated, by the prosecutrix, to her mother (PW-2) and her uncle Amrit Bahadur (PW-4). The learned ASJ has proceeded to record the statement of the prosecutrix, on both occasions, only after putting leading questions to her, and assessing her capacity and competence to testify. On this aspect, in my view, the learned ASJ would be the best judge and, unless this Court were to find that the questions put by the learned ASJ were demonstrably insufficient as an index to gauge the capacity, of the prosecutrix, to testify, or there were other attendant circumstances which rendered her capacity and competence, to do so, suspicious, as, for example, the case of a prosecutrix of extremely tender age, or of unstable mental equilibrium, or where the questions put to the prosecutrix were unreasonably perfunctory in nature, this Court would be hesitant to unseat the view of the learned ASJ in that regard. That apart, a reading of the testimony of the prosecutrix, first under Section 164 of the Cr.P.C. and, thereafter, during trial, convinces this Court that she was a reliable witness, and entirely competent and capable to testify.

46. On the evidence of a child witness, and its value during trial, this Court has, in ***Sanjay Kumar Valmiki v. State, 2018 SCC Online Del 9304***, had occasion to observe thus:

"**57.** The child witness, like the child himself, has ever remained, criminologically speaking, a jurisprudential enigma. The judicial approach, to such evidence, has, at times, advocated wholesome acceptance of such evidence, subject to the usual precautions to be exercised while evaluating any other evidence; however, the more prevalent approach appears to prefer exercise of cautious consideration by the Court, while dealing with such evidence. The *raison d' etre* for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts have consistently held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence. As has been often emphasised by courts in this context, no express, or even implied, embargo, on a child being a witness, is to be found in Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under:

"**118. Who may testify. —**

All persons shall be competent to testify *unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years*, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

58. Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil

or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him, or from giving rational answers to such questions, by reason of his age. A duty is, therefore, cast, by the statute, on the judge faced with the responsibility of taking a decision on whether to allow, or disallow, the testimony of the child witness, to arrive at an informed decision as to whether the said evidence is vitiated on account of the child having failed to understand the questions put to him, or to provide rational responses thereto. If the answer, to these two queries, is in the negative, there is no justification, whatsoever, for discarding, or even disregarding, the evidence of the child witness.

59. This Court has, in a recent decision in ***Latif v. State, 2018 SCC OnLine Del 8832***, observed as under, with respect to the evidence of child witnesses:

> "**16.** At this stage, it is necessary to recapitulate the law regarding the appreciation of the evidence of the child witness. In ***Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341*** the Supreme Court explained:
>
> > "*A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof.* The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. *The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the*

witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

17. In ***Ranjeet Kumar Ram v. State of Bihar, 2015 (6) SCALE 529***, it was observed:

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. *Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."*

18. In ***Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC 565***, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. *Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be*

> *influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness*."'
>
> (Emphasis supplied)

60. In ***Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195***, the Supreme Court held thus, with respect to the evidence of child witnesses:

> "**22.** It is well settled that *the evidence of a child witness must find adequate corroboration, before it is relied upon* as the rule of corroboration is of practical wisdom than of law. (See ***Prakash v. State of M.P., (1992) 4 SCC 225, Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667, Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287, Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341, State of U.P. v. Ashok Dixit, (2000) 3 SCC 70*** and ***Suryanarayana v. State of Karnataka, (2001) 9 SCC 129***.
>
> 23. However, *it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.* (*vide* ***Panchhi v. State of U.P., (1998) 7 SCC 177***)
>
> (Emphasis Supplied)

61. One of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue

of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial Court itself, regarding the demeanour, carriage and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court would be loath to disregard the evidence of the child witness, where the Trial Court has found it to be credible, convincing and reliable. [Ref. ***Satish v. State of Haryana, (2018) 11 SCC 300***]

62. In ***State of Madhya Pradesh v. Ramesh, (2011) 4 SCC 786***, the following principles, regarding assessment of the evidence of child witnesses, have been enunciated:

> **"7.** In ***Rameshwar v. State of Rajasthan, AIR 1952 SC 54*** this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) *every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise.* The Court further held as under: (AIR p. 56, para 11)
>
> > "11. … *it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether*. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the

circumstances when there is no formal certificate."

8. In ***Mangoo v. State of M.P., AIR 1995 SC 959***, this Court while dealing with the evidence of a child witness observed that *there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.*

9. In ***Panchhi v. State of U.P., (1998) 7 SCC 177,*** this Court while placing reliance upon a large number of its earlier judgments observed that *the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that*

> *"the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring"*

10. In ***Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565***, this Court dealing with the child witness has observed as under: (SCC pp. 567-68, para 10)

> "10. '… 7. … *The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial*

> *Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous.* This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. *Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness*."

11. *The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.* (vide ***Himmat Sukhadeo Wahurwagh v. State of Maharashtra, (2009) 6 SCC 712***)

12. In ***State of U.P. v. Krishna Master, (2010) 12 SCC 324***, this Court held that *there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life.* The child may be able to recapitulate carefully and exactly when asked about the same in the future. *In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.*

13. *Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.* (vide ***Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516***.)

14. *In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater*

circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

(Emphasis supplied)

63. The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements:

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the

sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored. Twin, and to an extent mutually conflicting, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially of tender years, are open to influence and could possibly be tutored. On the other hand, the evidence of a competent child witness commands credibility, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vi) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the

> evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness."

47. ***Sanjay Kumar Valmiki (supra)*** stands affirmed by the Supreme Court, with the dismissal of the Appeal preferred thereagainst.

48. Applying the above principles with the present case, there is no reason, whatsoever, to doubt the correctness of the testimony of the prosecutrix, regarding the assault committed, on her, by the appellant. The evidence of other witnesses, too, supports the statement of the prosecutrix. Meena (PW-2) and Amrit Bahadur (PW-4), in their evidence during trial, consistently deposed that the prosecutrix was weeping when they found her, and narrated, to them, the details of the assault committed, on her person, by the appellant, including, in specific detail, the manner in which the offence of "penetrative sexual assault" was perpetrated on her. These versions corroborate each other. Further, Ramu Ram (PW-5) deposed that the appellant had misrepresented, to him, that the prosecutrix was his niece. Rajender Prasad (PW-6), the gram *pahri* of the village, in his testimony during trial, also deposed that the prosecutrix was crying when he found her, and was being chased by the appellant, who tried to snatch the prosecutrix from his grip. Owing to the offensive attitude of the appellant, the Revenue SI Narender Giri (PW-7) was, in fact, constrained to arrest him for committing breach of the peace, invoking Sections 107 and 151 of the Cr.P.C. SI Narender Giri, too, in his evidence, deposed that the prosecutrix had told him that she had been

induced away from Delhi, to Pithoragarh, by the appellant. These facts, too, cumulatively seen, bear out the reliability and truth of the deposition of the prosecutrix, firstly under Section 164 of the Cr.P.C. and later during trial.

49. No exception, whatsoever, can, therefore, be found, to the decision, of the learned ASJ, to convict the appellant for having committed the offence of "aggravated penetrative sexual assault", within the meaning of Section 5 of the POCSO Act.

50. The conviction of the appellant under Section 376(2) (i) of the IPC is, also, in my view, entirely sustainable. The said clause (as it then existed) deals with commission of rape on a woman when she is under 16 years of age. The assault committed by the appellant on the prosecutrix entirely answers the definition of "rape", as contained in clause (a) of Section 375 of the IPC, which is *in pari materia* and *in haec verba* with clause (a) of Section 3 of the POCSO Act, which already stands reproduced hereinabove. Penetration of the penis, to any extent, into the vagina, mouth, urethra or anus, of the prosecutrix, therefore, answers the definition of "rape", as contained in Section 375 of the IPC and, when committed on a child of less than 16 years of age, justifies invocation of clause (i) of Section 376(2). The learned ASJ has rightly relied on Section 42 of the POCSO Act, whereunder, "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 degree." As has been correctly observed by the learned ASJ, the punishment contemplated, for commission of "aggravated penetrative sexual assault", in Section 6 of the POCSO Act, is RI for not less than 10 years, but which may extend to imprisonment for life, along with fine. As against this, the punishment for rape, which falls within any of the clauses in Section 376(2) of the IPC, is RI for not less than 10 years, but which may extend to imprisonment for life, *which shall mean imprisonment for the remainder of that person's natural life*, along with fine. Though, in the context of the present case, the distinction in punishment, between Section 376(2) of the IPC and Section 6 of the POCSO Act, may be somewhat superficial, it remains a matter of fact that the punishment contemplated by Section 376(2) is, textually, more stringent than that contemplated by Section 6 of the POCSO Act. The learned ASJ has, therefore, correctly held that the offence perpetrated by the appellant on the prosecutrix in the present case, inasmuch as it falls both within clause (i) of Section 376 (2) of the IPC and Section 6 of the POCSO Act, merits punishment under the former provision.

51. Interestingly, in fact, a juxtaposed reading of clause (i) of Section 376(2) of the IPC and Sections 4 (which deals with the punishment for "penetrative sexual assault") and 6 (which deals with the punishment for "aggravated penetrative sexual assault") of the POCSO Act, in the backdrop of Section 42 of the latter statute, results in the position, in law, in which every case of penetrative sexual

assault, whether aggravated or not, on a child of less than 16 years of age, would invariably attract clause (i) of Section 376(2) of the IPC, and the applicability of Sections 4, or 6, of the POCSO Act would stand completely foreclosed.

52. In the facts of the present case, the conviction, of the appellant, by the learned ASJ, of having committed the offence under Section 366 of the IPC, which deals with kidnapping or abduction of any woman, in order that she may be forced or seduced to illicit intercourse, is also entirely sustainable in law, and calls for no interference.

53. On the aspect of sentence, the learned ASJ has, if anything, erred on the side of leniency. The appellant had enticed the prosecutrix, who was playing with her friends, away from their company, deprived her of the warm sanctuary of her parents and loved ones, and transported her to what may be only termed a veritable hell-hole, in a distant village, where she was confined, under threat of her life, in a desolate room, for over a month, and subjected to repeated acts of sexual assault. The acts of the appellant betoken complete disregard for the bodily, mental and psychological integrity of the prosecutrix, solely with a view to satisfy his unnatural sexual urges. The degree of damage to the child, in such cases, is physical and psychological in equal measure. It is impossible for a court, peopled, after all, by lay human beings, to even conceptualize, let alone visualize, what a child, such as the prosecutrix, must have undergone, every traumatic second of the span of her confinement.

54. Rape is, on every occasion and without exception, a crime of power, more than one of lust, and, when committed on a child, is a brute and unrelentingly savage expression thereof. No clemency or mercy, whatsoever, can be shown to the perpetrator of such an act, especially when the perpetration is in full possession of the senses and faculties of the perpetrator.

55. As already observed by me hereinabove, the learned ASJ has, if anything, been lenient, in sentencing the appellant only to 10 years' RI. There being no appeal, by the State, however, for enhancement of sentence, this Court is handicapped from opining further on that score.

Conclusion

56. No occasion, therefore, exists, for this Court to interfere with the impugned judgment, and order on sentence, passed by the learned ASJ, which are upheld in their entirety.

57. The appeal is accordingly dismissed.

58. Trial Court record be returned forthwith.

C. HARI SHANKAR, J

JULY 22, 2019
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