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Lokesh vs.state

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SooperKanoon Citation : sooperkanoon.com/1223656

Court : Delhi

Decided On : Jun-07-2019

Appellant : Lokesh

Respondent : State

Advocate for Def. : Mr. G.M. Farooqui

Advocate for Pet/Ap. : Mr. Aditya Vikram

Judgement :

$~ * + % 1. IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 487/2016 LOKESH STATE Through: Mr. Aditya Vikram, Adv. ..... Appellant versus ..... Respondent Through: Mr. G.M. Farooqui, APP for State with SI Anita Kumar, PS Delhi Cantt. CORAM: HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT
7h June, 2019 The appellant Lokesh stands convicted, by judgment dated 29th May, 2015, passed by the learned Additional Sessions Judge (hereinafter referred to as the learned ASJ) under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) and Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as the IPC), and sentenced, vide the consequential order, dated 4th June, 2015, to suffer rigourous imprisonment for 10 years along with fine of 7500/-, with default sentence of 6 months simple imprisonment, for the offence under Section 6 of the POCSO Act.

CRL.A. 487/2016 Page 1 of 54 2. The case, as set out by the prosecution, may be adumbrated thus.

3. On 28th December, 2013, the complainant Guddi, arrived at the Police Station, with her daughter, the prosecutrix, about 4 years of age, and tendered her statement, on the basis whereof prosecution was lodged against the present appellant. According to the said statement, (i) on 5th November, 2013, at about 2 p.m., Guddi, along with the prosecutrix and her 9-year-old son, had gone to the Rama Market, Munirka, to meet the appellant, who worked at a cycle shop, the occasion being that of Bhai Duj, (ii) after performing the ceremony, the appellant told her that his mother had invited them to his house, (iii) she, i.e. Guddi, along with her son, proceeded to the house of the appellant, at Kakrola Vihar, where he resided with his mother, (iv) the appellant, however, reached his house, accompanied by the prosecutrix only at about 10 p.m., (v) as the prosecutrix appeared distressed, she asked her what had happened, whereupon the prosecutrix informed her that the appellant had taken her to a jungle, removed her clothes, inserted something in her vagina (referred to, by her, as susu which, in the context, may be taken to be a euphemism for genitals) and, thereafter, inserted his susu in her anus, (vi) the prosecutrix further disclosed, to her mother, that, as the act had caused her severe pain, she started crying, whereupon the appellant beat her and threatened to kill her mother and brother, if she were to disclose, to her mother what had happened, and (vii) on removing the underwear of the prosecutrix, she found bloodstains in her pelvic region, which was also swollen. She further stated that, as she was CRL.A. 487/2016 Page 2 of 54 apprehensive, she did not disclose what had happened to anybody and got her daughter, i.e. the prosecutrix, treated privately; however, when she did not recover, and the pain continued, she informed her relatives, who encouraged her to report the matter to the Police.

4. On the aforesaid complaint of Guddi, a First Information Report (FIR) was registered, under Section 376 of the IPC and Sections 4, 5(m) and 6 of the POCSO Act.

5. Investigations were carried out by Sub- Inspector (SI) Dhara Mishra, who also got the medical examination of the prosecutrix conducted at the Safdarjung Hospital (hereinafter referred to as the Hospital), and obtained her exhibits. The appellant was arrested, and he, allegedly, pointed out the scene of incident, near the Underpass, from where he had proceeded on his cycle, carrying the prosecutrix. Site plan was prepared at his instance, and the medical examination of the appellant was also done at the Hospital.

6. The prosecutrix was, thereafter, produced before the Child Welfare Committee (CWC), where she was counselled. Her age verification was undertaken and the relevant documents were verified, by which her date of birth was asserted as 11th April, 2009.

7. The exhibits were sent to the Forensic Science Laboratory (FSL). CRL.A. 487/2016 Page 3 of 54 8. Consequent to completion of investigation, chargesheet was filed, by the I/O, in the Court, on 17th January, 2014, under Sections 376, 506 IPC and Sections 4, 5(m) and 6 of the POCSO Act. Charge was framed, against the appellant, under the said provisions, on 25th April, 2014. The appellant pleaded not guilty and sought trial. Evidence 9. thus: The prosecution examined 10 witnesses, who may be grouped (i) PW-2 was the prosecutrix herself. (ii) PW-6 (Guddi), PW-8 Const. Narender Kumar and PW-9 W/SI Dhara Mishra (the IO) were the witnesses to the incident, and consequent investigations. (iii) PW-1 Dr. Rajnish Kaushik, PW-4 Dr. Upasana Verma, and PW-5 Dr. Mohd. Shadab Raheel were the hospital witnesses. (iv) PW-7 Const. Rajesh Dhaka testified regarding being handed over the sealed exhibits and PW-10 Naresh Kumar, Senior Scientific Officer in the FSL, testified regarding the examination, and the report, thereof. (v) PW-3 Mukesh Kumar testified regarding the date of birth of the prosecutrix. CRL.A. 487/2016 Page 4 of 54 10. Of necessity, the prime evidence, in this case, was the statement of the prosecutrix (PW-2) herself. During the recording of her statement, it was ensured that the appellant was not visible to her, though she was visible to the appellant through a one-sided mirror screen. Certain preliminary questions were put, by the learned ASJ, to the prosecutrix, to ensure her capability to testify. The evidence records that the prosecutrix stated that she was about 4 years of age and had never been to school, that she resided, with her mother and

her brother at Rithala, that she had come to the court, that day, by Metro, to tell, that she was telling the truth, that her mother had told her that she was being taken to court, and that she was aware that one should always speak the truth, though she did not respond, when questioned as to what would happen if one did not tell the truth. On being asked what her mother had told, she responded mummy ne kaha jo mama ne kaha woh bataeo (my mother told me to tell what my uncle had told me). On being asked to do so, the prosecutrix also wrote her name, correctly, on a piece of paper.

11. The learned ASJ has specifically recorded the satisfaction, regarding the capacity, to testify, of the prosecutrix and her competence to give rational answers, if put to her in Hindi. In view of her tender age, the statement of the prosecutrix was recorded without oath.

12. The examination-in-chief of the prosecutrix, as conducted by learned Additional Public Prosecutor (APP), may be reproduced, in full, thus: CRL.A. 487/2016 Page 5 of 54 Q. What you used to call Lokesh?. Ans. Mama Q. Where accused used to reside?. Ans. Munirka. Q. Did you go to Munirka along with your mother?. Ans. Yes. Q. Why you went to Munirka?. Ans. Mummy tika lagane gayee thee. (Mummy had gone to apply tika.) Q. At which shop accused used to work?. Ans. Cycle ki. (Of the cycle.) Q. Where you went thereafter?. Ans. Mama ke ghar. (To Mamas house.) Q. How you went to Mama ke ghar?. Ans. Mujhe cycle pe bitha kar le gaye. (He seated me on the cycle and took me.) Q. Where you sat on the cycle front or back?. Ans. Aage mama seat par baithay thay. (In front Mama was seated on the seat.) Q. Where mama took you thereafter?. Ans. Jungle me. (To the jungle.) Q. What he did with you?. CRL.A. 487/2016 Page 6 of 54 Then what happened?. Ans. Jahan se susu karte hai us se kuch kiya tha mere jahan se laterin karte hai. (He did something, using his penis, with my anus.) Q. What happened thereafter?. Ans. Tail dala. (He put oil.) Q. Did Mama say anything?. Ans. Haan. Mama ne bola mummy se mat batana. (Yes. Mama told me not to tell Mummy.) Q. Ans. Mama apne ghar le aaye. Ek neeche ghar hai ek uppar aur mujhe neche leta diya bed me. (Mama brought me to his house. One house is the ground floor and the other upstairs. He made me lie down on the bed.) Q. Did you tell your mother about it?. Ans. No.Q. Did you come earlier also to court?. Ans.

Yes. Q. Did you tell all these facts to an aunty?. Ans. Yes. Q. Did you put your thumb impression on a paper?. (Witness has been shown the said thumb impression on the statement u/s 164 Cr.P.C. which has been taken out after opening a sealed envelope sealed with the seal of GM.) Ans. Haan. (Yes.) CRL.A. 487/2016 Page 7 of 54 At this stage, the appellant, who was concealed, thus far, behind the screen, was made to come out. The prosecutrix correctly identified him as Mama Lokesh. Statement of prosecutrix under Section 164, Cr. P.C.:

13. Before recording the statement of the prosecutrix, under Section 164, Cr. P.C., during investigation on 02nd January, 2014, the learned ASJ asserted her competence to testify, by posing her a few questions, to which she responded. The said questions, and the answers thereto, as tendered by the prosecutrix, may be reproduced thus: How old are you?. Q No.1 What is your name?. Ans. My name is _____. Q No.2 Ans. I am 4 years old. Q. No.3 Do you go to school?. Ans. No.My mother teaches me at home. Q. No.4 What does your mother do?. Ans. My mother is a housewife. Q. No.5 Will you tell the truth?. Ans. I will tell the truth. CRL.A. 487/2016 Page 8 of 54 The statement of the prosecutrix, recorded under Section 164, Cr. P.C., which was exhibited as Ex. PW-2/A, may be translated thus: Q. Tell us, child, what have you to say?. Ans. Lokesh mama took me to the jungle. He removed my underwear and did something with me. I suffered a lot of pain. I cried. Mama told me not to tell anything to anyone. If I told my mother, he would severely beat me. I am still suffering pain in my anal region (referred to, in the statement, as latrine wali jagah). It subsides when my mother gives me medicine. Evidence of witnesses to the incident and subsequent investigatioin 14. Testifying as PW-6, Guddi, the mother of the prosecutrix, deposed that, on 5th November, 2013, she had reached the shop, where the appellant worked, at about 3 p.m., as it was Bhai Duj, and she regarded the appellant as her brother. She stated that the appellant reached the shop at about 4 p.m. and that, after performing the ceremony, the appellant invited all of them to his house. She proceeded to the appellants house by bus, whereas the appellant made her daughter, i.e. the prosecutrix, sit on his cycle, stating that he would reach his house with her. She further testified that when the appellant did not reach his house with her daughter, despite considerable time having passed, and her having visited the bus stand three or four times, without being able to obtain

any information regarding the appellant, or her daughter, she called the appellants father, who consoled her and asked her to wait. Ultimately, the appellant reached his house, with her daughter, at about 10 to 10:30 p.m., by which time she had made two more calls to the appellants CRL.A. 487/2016 Page 9 of 54 father. On enquiry, the appellant informed her that her daughter, i.e. the prosecutrix, was suffering from cold, and that he had covered her with his shirt. The appellant, thereafter, made her daughter lie on the bed. She was unconscious at the time. She further testified that, when her daughter regained consciousness, she started crying and again became unconscious. When she regained consciousness the second time, she stated that she was having abdominal pain, and wanted to visit the toilet. PW-6 further stated that, in the toilet, she noticed a cut mark in the anal region of the prosecutrix, who was shivering. She further deposed that her daughter, i.e. the prosecutrix, told her that the appellant had taken her to a jungle, where he removed her undergarments and inserted his private part in her anal and genital regions, after gagging her with a cloth, so that she could not scream. Thereupon, she deposed, she removed her daughters clothes and noticed injury marks, including two or three cut marks on her anus. She further testified that, at about 12:30 p.m., the appellants mother and, a short while later, his father, returned home, and the appellants father took her daughter, i.e. the prosecutrix, to a private doctor. He returned, a short while later, and told her that he had the prosecutrix examined and that nothing had happened.

15. PW-6 further deposed that she returned, to her home, the next day, accompanied by the appellants mother, who stayed with her for about eight days, during which period she resisted the attempts of PW-6 to have the prosecutrix taken to a Government hospital for treatment. She deposed that the appellants mother did not permit anyone to meet them, either. Ultimately, four-five days after she had CRL.A. 487/2016 Page 10 of 54 returned to her home, certain relatives of PW-6 visited her, and she unburdened herself to them. On their advice, she went to PS Delhi Cantt, where she narrated the entire episode to the Police, who recorded her statement (Ex. PW-6/A). Thereafter, the Police took the prosecutrix for her medical examination at the Safdarjung Hospital and, thereafter, produced before the learned Magistrate, where her statement was recorded. She further deposed that the appellant (who was present in the court) was arrested, about five

days later, vide Arrest Memo Ex. PW-6/B.

16. In cross-examination, PW-6 stated that, when she had reached the appellants house, on 5th November, 2013, she had found the house locked. She reiterated the contents of her deposition in examination-in-chief, and was confronted, several times, with the fact that many of the details, contained therein, were not present in the statement, recorded from her by the Police under Section 161 of the Cr.P.C. The learned ASJ observed, however, that, in her statement under Section 161, Cr. P.C., PW-6 had stated that she had removed her daughters clothes, and found blood marks and swelling on her hip. She denied the allegation that she had got a false case registered against the appellant as she owed 10,000/- to him, which she had refused to return.

17. W/SI Dhara Mishra, of the Crime Against Women (CAW) Cell, who was the main Police witness in the case, deposed as PW-9. She testified to recording the statement of PW-6 Guddi, on 28th December, 2013, and to preparing the Rukka, which she handed over, to the Duty CRL.A. 487/2016 Page 11 of 54 Officer for registration of FIR. She deposed that, thereafter, she had the prosecutrix medically examined at the Safdarjung Hospital. The exhibits handed over by the doctors at the Hospital were converted into pullandas and taken into possession, by her, vide Seizure Memo Ex. PW-9/A. She testified that Lokesh was arrested, vide Arrest Memo Ex. PW-6/B, and personally searched vide Personal Search Memo Ex. PW-9/B. She also deposed to recording the disclosure statement of the appellant (Ex. PW-9/C), and stated that the appellant led them to the place of incident, near the Underpass from Dwarka to the Airport, where she prepared site plan Ex. PW-9/D and Pointing Out Memo Ex. PW-9/E. She further deposed that, thereafter, the appellant was medically examined at the Safdarjung Hospital, and produced before the Duty Magistrate, who remanded him to Judicial Custody. The prosecutrix was produced before the Child Welfare Committee (CWC), who handed her custody over to her mother (PW- 6). She further confirmed having obtained the documents regarding the age of the prosecutrix, according to which the date of birth of the prosecutrix was 11th April, 2009, and also confirmed that the statement of the prosecutrix was recorded, by the learned Metropolitan Magistrate (hereinafter referred to as the learned MM) under Section 164, Cr. P.C.

On her application, the Potency Test of the appellant was conducted at the RML Hospital. She confirmed having taken into possession the sealed exhibits, handed over by the doctors, vide Seizure Memo Ex. PW-7/A. After completion of investigation, she filed the chargesheet in the case.

18. PW-9 was not cross-examined, despite grant of opportunity. CRL.A. 487/2016 Page 12 of 54 19. PW-8 HC Narender Kumar supported the testimony of the I/O (PW-9), by deposing, during trial, that, at about 1:20 a.m. on 28th December, 2013, he received a Rukka from PW-9 W/SI Dhara Mishra, on the basis whereof he lodged FIR No.5
(Ex. PW-8/A), invoking Section 376 of the IPC and Sections 4, 5 of the POCSO Act, as well as to endorsing the Rukka (Ex. PW-8/B). He also confirmed having handed over the copy of the FIR and the original Rukka to HC Rajbir, for being handed over to W/SI Dhara Mishra. Hospital Witnesses 20. Dr. Upasana Verma, Senior Resident, Department of Obstetrics and Gynaecology, Safdarjung Hospital, testifying as PW-4, deposed that, at 3 a.m. on 28th December, 2013, the prosecutrix was brought, by Const. Nirmal, for medical examination, which was conducted vide MLC Ex. PW-4/A and OPD reference card Ex. PW-4/B. She further stated that PW-6 Guddi, the mother of the prosecutrix, accompanied her. The signature of PW-6 Guddi and the right thumb impression of the prosecutrix were obtained on the MLC. She also confirmed having collected the nail scrapping, vagina culture, blood samples, vagina secretion, rectal swab, urine and oxalate blood vial of the prosecutrix and having sealed them in separate pullandas, with the seal of the Hospital, whereafter she referred the prosecutrix to the paediatric department for further management. She was not cross-examined, despite grant of opportunity. CRL.A. 487/2016 Page 13 of 54 MLC of prosecutrix (Ex. PW-4/A):

21. The MLC of the prosecutrix, as prepared by PW-4 Dr. Upasana Verma, read thus: 4 years old girl, named ___, d/o Mukesh, brought to GRR by Lady Const. Nirma 2300/SW accompanied by her mother Guddi at 3:00 a.m. on 28/
with history of intercourse rectally. According to mother, 24-year-old, Lokesh, had done rectal intercourse with her daughter on 5/
night near Dwarka underpass at some forest. Following the act, the girl was

brought to home around 10 p.m. on 5/
in unconscious state and had loose motions and pain at rectal site and bleeding at rectal site. After that, she took various treatment from medical stores but not relieved. Her mother is giving history that girl daily wakes up at night and complains pain in rectal region and shouts. No H/O earlier illness. O/E: GC fair, conscious. L/E: No injury mark around external genitalia. Slight pigmentation present in perianal region. P/A soft, non-tender. Afebrile. PR86- BP:

1. br>P-/I-/PE- Chest, CVS - NAD22 PW-1 Dr. Rajnish Kaushik and PW-5 Dr. Mohd. Shadab Raheel deposed, during trial, with respect to the medical examination of the accused Lokesh. CRL.A. 487/2016 Page 14 of 54 23. PW-1 Dr. Rajnish Kaushik, of RML Hospital, deposed that the appellant had been brought to the Hospital, by HC Omprakash, for DNA analysis of his blood sample, and that the blood sample of the appellant was taken, sealed with the seal CMO RML Hospital and handed over to HC Omprakash. The MLC of the appellant was exhibited as Ex. PW-1/A. PW-1 was not cross-examined, despite grant of opportunity.

24. PW-5 Dr. Mohd. Shadab Raheel, Senior Resident in Forensic Medicine at the Safdarjung Hospital, deposed that, on 28th December, 2013, at about 11 a.m., the appellant had been brought to the hospital by SI G. R. Meena, and that, on examining the appellant, he had opined that there was nothing to suggest that the appellant was not capable of performing sexual intercourse. His comment, to the said effect, on the MLC of the appellant, was exhibited as Ex. PW-5/A. He was not cross-examined, despite grant of opportunity. Forensic witnesses 25. PW-7, Const. Rajesh Dhaka, who was, at the relevant time, posted at PS. Delhi Cantt, confirmed, in his testimony during trial, having taken the appellant (who was present in Court and whom he correctly identified) to the RML Hospital on 14th January, 2014, where his blood sample was taken and two packets, containing the said blood sample, sealed with the Hospital seal, were handed over, by him, to SI Bharat Bhushan, who seized the said exhibits vide Ex. CRL.A. 487/2016 Page 15 of 54 PW-7/A. The suggestions, to the contrary, made to him, were denied, by him, in cross-examination.

26. PW-10 Naresh Kumar, Senior Scientific Officer in the FSL, proved, in his testimony during trial, the Examination Report of the FSL, which was prepared, signed and issued by him, and which was, accordingly, exhibited as Ex. PW-10/A.

27. The FSL report (Ex. PW-10/A) certified that, except for the blood samples themselves, no blood was detected on any of the exhibits, and that no semen was, either, detected on any of the exhibits. As such, no DNA examination was conducted, either. The FSL report, therefore, remained totally inconclusive.

28. The learned ASJ recorded, on 7th November, 2014, the statement of learned Counsel appearing for the appellant, in which he admitted the MLC of the appellant (Ex. P-1) as well as the proceedings under Section 164, Cr. P.C., along with the statement of the prosecutrix (Ex. PW-2/A), all of which was exhibited as Ex. P-2, accordingly. Other witnesses 29. The only other witness was PW-3 Mukesh Kumar, Record Clerk in the office of the Registrar, Births and Deaths, who proved the photo copy of the birth reporting form of the prosecutrix (Ex. PW- 3/A), according to which her date of birth was 11th April, 2009. The CRL.A. 487/2016 Page 16 of 54 original copy of the birth certificate, issued and verified from the office of the Registrar of Births and Deaths on 16th January, 2014, was exhibited as Ex. PW-3/B. He was not cross-examined, despite grant of opportunity. Statement of appellant under Section 313, Cr. P.C.

30. The statement of the appellant Lokesh, under Section 313, Cr. P.C., was recorded on 27th March, 2015. The appellant admitted the fact that, on 5th November, 2013, PW-6 Guddi had visited his shop, for Bhai Duj, along with her children, including the prosecutrix, who addressed him as Mama. He, however, denied the allegation that he had invited PW-6 Guddi to his house, though she desired to proceed to the native village, or that he asked Guddi to proceed to his house with her son, ensuring that her daughter, i.e. the prosecutrix would follow. Rather, he stated that he had asked Guddi to proceed to his house by bus, along with the children, but that the prosecutrix insisted on going with him, whereupon Guddi herself asked him to bring the prosecutrix with him on his cycle. He denied knowledge about the fact that his house was locked when PW-6 Guddi reached there with her son, or that, as he was getting delayed, Guddi had called his father,

who assured her and requested to wait. He admitted the fact that he had reached his house with the prosecutrix at night, though he professed ignorance regarding the actual time when he reached the house. He reiterated that he had covered the prosecutrix with his sweater and tied her to himself, but stated that he had done so she was sleeping and would have fallen off the cycle. He denied the allegation that the prosecutrix was sick or unconscious, but admitted CRL.A. 487/2016 Page 17 of 54 that he had made her lie on the bed, at which time she was unconscious. He also admitted the fact that, after some time, the prosecutrix awoke and started crying loudly, and was unresponsive when PW-6 Guddi asked her what had happened, whereafter she again became unconscious, but asserted that the prosecutrix had awoken from sleep, and not from any state of unconsciousness. He denied the allegation that the prosecutrix had, later, requested for being taken to the toilet, where her mother had noticed injuries on her anus. He denied the allegation that the prosecutrix recited, to her mother, the entire incident, as well as all the allegations against him, stated to be contained therein. He admitted the fact that his father, after returning, had taken the prosecutrix for examination to a private doctor, but professed ignorance regarding his father having returned and assured Guddi that there was nothing to worry. He asserted that, next morning, Guddi and his family members belabour him and threatened to call the police, whereupon he stated that he had done nothing wrong. Regarding all other incidents, the appellant professed ignorance, and alleged that Guddi used to come to his place of work regularly and had demanded, from him, 40,000/-, whereafter she made a false complaint against him. He denied the allegation that he had led the Police to the scene of incident, where PW-9 W/SI Dhara Mishra prepared site plan Ex. PW-9/D and Pointing Out memo Ex. PW-9/D. He asserted that the witnesses, who deposed against him, were false and interested. He stated that he did not desire to lead any defence evidence, and insisted that he had been falsely implicated in the case, and was innocent. CRL.A. 487/2016 Page 18 of 54 The impugned judgment 31. The learned ASJ has, vide the impugned judgment dated 29th May, 2015, convicted the appellant under Section 6 of the POCSO Act and Section 376 of the IPC. In so doing, she has reasoned thus: (i) Though learned counsel for the appellant had sought to demonstrate contradictions, between the statement of PW-6 Guddi, as recorded under Section 161, Cr. P.C. (Ex. PW-6/A),

and her testimony during trial, there was no such contradiction. PW-6 had, in her testimony in court, only explained her conduct during the period when she was waiting for the appellant at his house, and explained the events that transpired between 5th November, 2013 and 28th December, 2013, when she made the complaint to the Police. (ii) There was no significant cross-examination, by learned counsel for the appellant, of PW-6, regarding the actual incident. There was no explanation for the period between 5 p.m., when the appellant left the shop, carrying the prosecutrix on the cycle, and after 10 p.m., when he reached his house. A specific query, regarding this fact, was put to the appellant, during the recording of his statement under Section 313, Cr. P.C., but he remained noncommittal. CRL.A. 487/2016 Page 19 of 54 (iii) It was also not in dispute that the appellant had tied the prosecutrix, on his cycle, with his shirt, and that her condition was not good. (iv) The evidence of the prosecutrix, deposing as PW-2, completely incriminated the appellant. She has provided details of the manner in which she had been assaulted. Her testimony, during trial, and her statement under Section 164, Cr.P.C., were consistent, and corroborated each other. Moreover, the appellant had not questioned the credibility of the testimony of the prosecutrix, as PW-2. (v) Not much would be discerned from the medical examination of the prosecutrix, as it had taken place more than 4 months after the assault. (vi) The appellant was a family friend of the prosecutrix, and was regarded as a brother by her mother Guddi (PW-6). There was no reason for the prosecutrix, or her family, to falsely implicate the appellant. (vii) The unchallenged testimony of PW-2, which was fully corroborated with the testimony of PW-6, as well as the admissions made by the appellant in his statement under Section 313, Cr. P.C., established the case, against the appellant, of his having committed penetrative sexual assault upon the prosecutrix, was about 4 years of age. CRL.A. 487/2016 Page 20 of 54 (viii) However, as there was insufficient evidence regarding the appellant having beaten the prosecutrix, or threatened her, the offence, under Section 323, 506 IPC was not made out. Rival submissions 32. Mr. Aditya Vikram, learned counsel appearing for the appellant, advanced the following submissions, to attack the impugned judgment of the learned ASJ: (i) There was inordinate delay (53 days) in registering the FIR. This delay was fatal. Reliance was placed, for the said purpose, on the judgment in Jai Prakash Singh

v. State of Bihar, (2012) 4 SCC379 (ii) The MLC of the prosecutrix indicated that there was no injury mark found on her person, even around her anal area. This was impossible, had the appellant actually committed penetrative anal assault on the prosecutrix, given the fact that he was an adult and she was a 4-year-old child. (iii) The competence of the prosecutrix to testify before the learned ASJ was not established. The questions put to her, by the learned ASJ, to satisfy herself regarding the competence of the prosecutrix to testify, were simple questions, and insufficient to demonstrate testifying ability. CRL.A. 487/2016 Page 21 of 54 (iv) The appellant was not defended properly, as only two witnesses were cross examined, and the prosecutrix herself was not cross-examined. (v) In the course of her testimony during trial, the prosecutrix admitted that she had not informed her mother about the incident, after she returned to the appellants house. This was inherently unbelievable. (vi) The testimony of the prosecutrix had not been scrutinised with the requisite degree of care and circumspection, as was required to be accorded while dealing with evidence of child witnesses. Reliance was placed, for this purpose, on the judgments of the Supreme Court in State of U.P. v. Ashok Dixit, 2000 SCC (Cri) 579, State of Karnataka v. Shantappa Madivalappa Galapuji, (2009) 12 SCC731and Jai Prakash Singh v. State of Bihar, (2012) 4 SCC379 33. Written submissions were also filed by learned counsel appearing for the appellant, in which, additionally, the following contentions were advanced: (i) To a query, from the Court during the recording of her statement during trial, the prosecutrix answered that the appellant had brought her home, that one home was on the ground floor and one on the first floor, and that he made her lie down on the bed. PW-6 Guddi, on the other hand, deposed that, when the appellant reached home with the prosecutrix, the CRL.A. 487/2016 Page 22 of 54 prosecutrix was unconscious. This discrepancy was fatal to the evidence of the prosecutrix, given that she was a child of tender years and susceptible to tutoring. (ii) The testimony of PW-6, during trial, was unreliable, as there were several additions, therein, when compared to the statement, recorded from her under section 161, Cr. P.C. (iii) Though, according to the prosecution, the prosecutrix had been treated at a private hospital, for the injuries sustained by her at the time of commission of the alleged offence by the appellant, no report/document of any private hospital had been tendered in evidence, to prove the said allegation. (iv) The manner in which

the offence/assault had been perpetrated upon her, had not been clearly set out by the prosecutrix, either in her statement under Section 164, Cr. P.C. or in her evidence during trial. (v) In the absence of any proof of injury or penetration, the decision, of the learned ASJ, to convict the appellant for having committed penetrative sexual assault on the prosecutrix, could not sustain.

34. Arguing per contra, Mr. G.M. Farooqui, learned APP, would submit that no case, whatsoever, existed, for this court to interfere with the decision of the learned ASJ, as (i) the delay in lodging of FIR had been explained by PW-6 Guddi, whose statement, to the effect CRL.A. 487/2016 Page 23 of 54 that she had been getting the prosecutrix treated by private doctors for two months, was never questioned by the appellant, even by way of a suggestion that it was wrong, (ii) the absence of any injury on the prosecutrix was easily explained, as her medical examination was conducted after she had undergone two months treatment for the assault suffered by her, (iii) the capacity, of the prosecutrix, to testify, was established by the answers to the questions put to her by the learned ASJ, (iv) in any event, the statement, of the prosecutrix, under Section 164, Cr. P.C., was very short, as she was only asked what had happened, to which she responded satisfactorily, (v) there was no explanation for the whereabouts of the appellant between 5 p.m. and 10 p.m. on 5th November, 2013 and (vi) the learned ASJ had correctly appreciated the evidence on record, and arrived at findings which were only sustainable in law. Analysis and conclusion 35. The appellant stands convicted under Section 376, IPC (which deals with punishment for commission of the offence of rape) and Section 6 of the POCSO Act (which deals with punishment for the commission of the offence of aggravated penetrative sexual assault), though he has been sentenced only under the latter provision, as the minimum, and maximum, punishments prescribed under Section 6 of the POCSO Act, and Section 376 of the IPC are the same, i.e. 10 years rigourous imprisonment and imprisonment for life, respectively. The learned ASJ has held that, as she has awarded, CRL.A. 487/2016 Page 24 of 54 to the appellant, the minimum sentence which could be awarded under Section 6 of the POCSO Act, no separate sentence was being awarded under Section 376, IPC.

36. Section 5 of the POCSO Act defines aggravated penetrative sexual assault, whereas Section 375, IPC defines rape. The said provisions are, to all intents and purposes, similar. The conviction of the appellant is relatable to clause (m) of Section 5 of the POCSO Act, which deals with the mission of penetrative sexual assault on a child below 12 years. Cases which fall under Section 5 of the POCSO Act, which deals with aggravated penetrative sexual assault are treated as a class apart from cases which fall under Section 3 of the said statute, which deals with penetrative sexual assault. Certain aggravated cases of penetrative sexual assault have, by Section 5 of the POCSO Act, been categorized as aggravated penetrative sexual assault. In a similar vein, sub- section (1) of Section 375, IPC, deals with punishment for rape simplicitor, whereas certain aggravated cases of rape are separately dealt with, under sub- section (2) of Section 376. Given the age of the prosecutrix, either statute treats the case as aggravated. Where the child is below 12 years of age, clause (m) of Section 5 of the POCSO Act reads the case as one of aggravated penetrative sexual assault. In a similar vein, clause (i) of Section 376 (2) of the IPC prescribes higher punishments, where the rate is committed on a woman when she is under 16 years of age. Significantly, the age stipulation, in the said clause was enhanced by the substitution of the pre-existing Section 376, in the IPC, by Section 9 of the Criminal Law (Amendment) Act, 2013. Prior CRL.A. 487/2016 Page 25 of 54 to the said Amendment, aggravated cases of rape, as enumerated in sub-section (2) of Section 376 of the IPC included commission of rape on a woman when she is under 12 years of age. As such, the statutory position that obtains is that, prior to the substitution of Section 376 of the IPC by Section 9 of the Criminal Law (Amendment) Act, 2013, commission of aggravated penetrative sexual assault on a child below 12 years of age was punishable, under Section 6 of the POCSO Act, and Section 376 (2) of the IPC, with the same enhanced punishment, which could range from 10 years RI to life imprisonment. Consequent on the substitution of Section 376 of the IPC by Section 9 of the Criminal Law (Amendment) Act, 2013, however, while Section 6 of the POCSO Act continued to treat commission of penetrative sexual assault on a child below 12 years of age as aggravated penetrative sexual assault and punishable with enhanced punishment, for the purposes of section 376 of the IPC, the said enhanced punishment was imposable even where the child was between

12 and 16 years of age.

37. These statutory niceties, however, do not substantially impact the present case, as the charge against the appellant, if confirmed, would bring his case equally under clause (m) of Section 5 of the POCSO Act and clause (i) of Section 376 (2) of the IPC, and invites the same minimum and maximum punishments, i.e. 10 years RI and imprisonment for life, respectively. CRL.A. 487/2016 Page 26 of 54 38. The definition of penetrative sexual assault, as contained in Section 3 of the POCSO Act is identical to the definition of rape in Section 375 of the IPC. Section 3 of the POCSO Act reads thus: 3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or 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 he manipulates any part of the body of the (c) 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 he applies his mouth to the penis, vagina, (d) anus, urethra of the child or makes the child to do so to such person or any other person. Identically, Section 375 of the IPC defines rape, thus: 375. Rape. - A man is said to commit rape if he - (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or inserts, to any extent, any object or a part of (b) the body, not being the penis, into the vagina, the CRL.A. 487/2016 Page 27 of 54 urethra or anus of the woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the, vagina, anus, urethra of a woman or makes her to do so with him or any other person, her. 39. Discounting, for a moment, clause (d) of Section 3 of the POCSO Act, or Section 375 of the IPC - as the present case would not attract either of the said provisions - it is apparent that penetration is the sine qua non for applicability, either of Section 3 of the POCSO Act - and, consequently, of Section 5 of the said Act as well - or of Section 375 of the IPC. Sans penetration, the offence, even if committed, would only amount to

aggravated sexual assault, as defined in Section 9 of the POCSO Act, which would, in turn, be punishable under Section 10 of the said statute, with punishment which may range from 5 to 7 years imprisonment, of either description.

40. It has to be examined, therefore, whether the evidence available was sufficient to convict the appellant for having committed the offence of aggravated penetrative sexual assault, as defined in Section 5 of the POCSO Act. Needless to say, if the answer to this poser is in the affirmative, the appellant would, equally, be liable to be convicted under Section 375 of the IPC, for having committed rape. CRL.A. 487/2016 Page 28 of 54 41. In cases of sexual assault against children, the first, and most important, piece of evidence, is always the statement of the child prosecutrix herself/himself.

42. Evaluation of the evidence of child witnesses, especially where the child is the prosecutrix herself/himself, is always a tricky affair. Combating, and, at times, conflicting, considerations come into play in such cases. On the one hand, there exists a presumption that a child of tender years would not, ordinarily, lie. The applicability, or otherwise, of this presumption, would necessarily depend, to a large extent, on the age of the child. No dividing line can be drawn in such cases; however, one may reasonably presume that a child of the age of four, or thereabouts, would be of an age at which, to questions spontaneously put to the child, the answer would ordinarily be the truth. As against this, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily tutored. The possibility of a small child, whose cognitive and intellectual faculties are yet not fully developed, being compelled to testify in a particular manner, cannot be easily gainsaid. Even so, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value. CRL.A. 487/2016 Page 29 of 54 43. This Court has, in the not-too-distant past, had an occasion to examine the jurisprudential contours of appreciation of evidence of child witnesses, in its judgment in Sanjay Kumar Valmiki v. State, 2018 SCC Online Del 9304. The following passages, from the said judgment - which stands affirmed, by dismissal of SLP (Crl) No.3050/2019

preferred, thereagainst - may be reproduced: to 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 detre for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible 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. - shall be competent All persons to testify unless the Court considers that they are prevented the questions put to them, or from giving rational answers to those questions, by from understanding CRL.A. 487/2016 Page 30 of 54 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 ao Sakhare v. State of Maharashtra, (1997) 5 SCC341the Supreme Court explained: In Dattu RaMr. child witness. CRL.A. 487/2016 A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In Page 31 of 54 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. In Ranjeet Kumar Ram v. State of Bihar, 17. 2015 (6) Scale 529, it was observed: depend Evidence of the child witness and its credibility would 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. upon 18. In Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC565 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 CRL.A. 487/2016 Page 32 of 54 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 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. is an it (Emphasis supplied) 60. In Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC195 the Supreme Court held thus, with respect to the evidence of child witnesses: than of M.P., of (1992) 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 law. practical wisdom (See Prakash v. State 4 SCC, Baby of Kerala, 1993 Supp (3) SCC667 Raja Ram Yadav v. State of Bihar, (1996) 9 SCC287 Dattu RaMr. of Maharashtra, (1997) 5 SCC341 State of U.P. v. Ashok SCC and Suryanarayana v. State of Karnataka, (2001) 9 SCC129 Kandayanathil v. State Sakhare v. State ao Dixit, (2000) 3 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 CRL.A. 487/2016 Page 33 of 54 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 SCC177 (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 SCC300 In State of Madhya Pradesh v. Ramesh, (2011) 4 62. SCC786 the following principles, regarding assessment of the evidence of child witnesses, have been enunciated: 7. In Rameshwar v. State of Rajasthan, AIR 1952 SC54this 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 the court always competency fact unless in CRL.A. 487/2016 Page 34 of 54 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. In Mangoo v. State of M.P., AIR 1995 SC8 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 SCC177 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 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 always stand CRL.A. 487/2016 Page 35 of 54 and thus a child witness is an easy prey to tutoring 10. In Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC565 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 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. conclusion was 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 CRL.A. 487/2016 Page 36 of 54 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 of Maharashtra, (2009) 6 SCC712 Wahurwagh v. State 12. In State of U.P. v. Krishna Master, (2010) 12 SCC324 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 CRL.A. 487/2016 Page 37 of 54 witness. (vide Gagan Punjab, (2006) 13 SCC516) Kanojia v. State of In view of the above, the law on the issue 14. 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 greater circumspection because he 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. is susceptible carefully with (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: to testify, only where (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, 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. CRL.A. 487/2016 Page 38 of 54 (f) the witness fully understands (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 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 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 that children, especially of tender years, are open to influence extent mutually to an the fact CRL.A. 487/2016 Page 39 of 54 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. (vii) It 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. is always prudent to search 44. At the outset, one may note that there is no serious dispute, in the present case, regarding the age of the child prosecutrix, which stands established by the records from the office of the Registrar of Births and Deaths (Ex. PW-3/A and Ex. PW-3/B) as 4 to 4 years. Even otherwise, in the case of a child of such tender years, where it is apparent that the child is below 12 years of age, it would also be open to the Court, by a visual examination, to arrive at such a conclusion. There has, predictably, been no opposition, on the part of the appellant, to the

finding, of the learned ASJ, that the prosecutrix, in the present case, was around 4 years of age.

45. Adverting, now, to the evidence of the prosecutrix, I am unable to subscribe to the submission, of Mr. Aditya Vikram, to the effect that the capacity, of the prosecutrix, to testify, was not sufficiently determined. The law, as enunciated by the Supreme Court in this regard, proscribes this Court from interfering, on the aspect of capacity, or capability, of the child prosecutrix to testify, with the CRL.A. 487/2016 Page 40 of 54 exercise of discretion, by the learned Trial Court, save and except in rare cases, where it is apparent that the prosecutrix is not in a position to testify reliably. In the present case, the learned ASJ posed certain questions to the prosecutrix, which stand reproduced in para 13 supra, before recording her statement under Section 164 of the Cr. P.C.. A reading of the responses, of the prosecutrix, thereto, reveal that they were natural and spontaneous, as well as true. I find no reason, therefore, to differ with the finding, of the learned ASJ, that the prosecutrix, in the present case, was competent to testify.

46. In her statement, recorded under Section 164 Cr. P.C., the prosecutrix stated that the appellant had taken her to the jungle, where he removed her underwear and did something with her, which caused a lot of pain. She complained that the pain was continuing, in her anal region, till the date of recording of the statement. It would be seen that the assault had taken place, on the appellant, on 5th November, 2013, whereas her statement, under Section 164, Cr. P.C., was recorded on 2nd January, 2014. Almost two months had elapsed, between the date of commission of the assault and the date of recording of the statement under Section 164 Cr. P.C.. Clearly, therefore, if the prosecutrix was suffering pain, even after two months, the assault, on the prosecutrix, was undoubtedly severe in intensity.

47. In her testimony during trial, the prosecutrix deposed thus, to a query as to what the appellant had done with her: Jahan se susu karte hai us se kuch kiya tha mere jahan se laterin karte hain. CRL.A. 487/2016 Page 41 of 54 Given the age of the prosecutrix, this would loosely translate to testifying that the appellant had

established peno-anal contact with the prosecutrix. She went on to state that, after committing the act, the appellant applied oil.

48. PW-6 Guddi, in her testimony during trial, deposed, first, that, in the toilet, she had noticed cut marks around the anal area of her daughter, i.e. the prosecutrix, and that, on her carrying her as to what had happened, the prosecutrix informed her that the appellant had, in the jungle, taken off undergarments and, after gagging her with a cloth, put her (penis) private organ in her anus as well as on her urinating part. PW-6 went on to state that, on further examination, she noticed injury marks on the body of her daughter, along with two-three cut marks on her anus. The testimony of PW-6 Guddi remained unchallenged to the above effect, in cross examination.

49. Seen holistically, these testimonies, in my view, leave no manner of doubt that penetrative anal assault had been committed, by the appellant, on the prosecutrix. Apart from the fact that PW-6 Guddi had clearly testified that the prosecutrix had told her that the appellant had inserted his penis in her anus, there could be no other explanation for the injuries on the anal region of the prosecutrix, and the pain which she was suffering as many as two months after the incident had taken place. The MLC of the prosecutrix (Ex. PW-4/A) also indicates that her mother, i.e. Guddi had informed the doctor, at the Hospital, that, after she was brought home by the appellant, she was suffering CRL.A. 487/2016 Page 42 of 54 loose motion, pain at the rectal site and was bleeding rectally. The testimony of PW-6 Guddi during trial, therefore, was consistent with the version of the incident, as recited by her to the doctor at the Hospital. It is, therefore, inherently credible, and commands acceptance.

50. It is also trite that, in cases of sexual assault and rape, conviction can rest on the sole testimony of the prosecutrix. Several judicial pronouncements, on the issue, were digested, by the Supreme Court in paras 9 to 14 of the report in Vijay @ Chinee v. State of Madhya Pradesh, (2010) 8 SCC191 which may be reproduced thus: Sole evidence of prosecutrix 9. In State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC550this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim

of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para

16) in material particulars. She 16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is CRL.A. 487/2016 Page 43 of 54 lend assurance dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. 10. In State of U.P. v. Pappu, (2005) 3 SCC594this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with

the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para

12) CRL.A. 487/2016 Page 44 of 54 It corroboration is well settled 12. that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do. in an otherwise insignificant discrepancies 11. In State of Punjab v. Gurmit Singh, (1996) 2 SCC384 this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or the statement of a prosecutrix should not be a ground for throwing out reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 394-96 & 403, paras 8 &

21) there are compelling reasons 8. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising CRL.A. 487/2016 Page 45 of 54 any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix?. The prosecutrix had no control over the investigating agency and

the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. *** 21. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required CRL.A. 487/2016 Page 46 of 54 in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. (emphasis in original) it often distracts (sic destroys) 12. In State of Orissa v. Thakara Besra, (2002) 9 SCC86 this Court held that rape is not mere physical assault, rather the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In State of H.P. v. Raghubir Singh, (1993) 2 SCC622this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence

of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in Wahid Khan v. State of M.P. [(2010) 2 SCC9: (2010) 1 SCC (Cri) 1208]. placing reliance on an earlier judgment in Rameshwar v. State of Rajasthan, [AIR 1952 SC54:

1952. Cri LJ547.

14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix. credence and reliable, (Emphasis supplied) CRL.A. 487/2016 Page 47 of 54 51. Vijay @ Chinee (supra) was followed, by another Division Bench of the Supreme Court in State of Haryana v. Basti Ram, (2013) 4 SCC200 As in the present case, the prosecutrix, in that case, who was less than 16 years of age, alleged misbehaviour and, thereafter, rape, by her maternal uncle, intermittently over a period of time. The High Court acquitted the accused, finding the sole testimony of the prosecutrix to be insufficient to indict him. The Supreme Court was critical of the approach of the High Court, opining, thus, in paras 2 and 25 of the report: 2. In our opinion, the High Court committed an error of law in not considering the evidence put forward by the prosecutrix (who was less than 16 years when she was raped) and ignoring the settled position in law that if the sole testimony of the prosecutrix is credible, a conviction can be based thereon without the need for any further corroboration. ***** 25. The law on the issue whether a conviction can be based entirely on the statement of a rape victim has been settled by this Court in several decisions. A detailed discussion on this subject is to be found in Vijay v. State of M.P., (2010) 8 SCC191 After discussing the entire case law, this Court concluded in para 14 of the Report as follows: (SCC p.

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

the sole 52. Profitable reference may also be made to one of the most recent authorities on this point, State of Himachal Pradesh v. Sanjay CRL.A. 487/2016 Page 48 of 54 Kumar, (2017) 2 SCC51 There, too, a 9 year old girl was ravaged by her uncle. The Supreme Court took pointed note of this fact, at the very beginning of its reasoning in the judgment, in para 22 of the report, thus: Here is a case where charge of sexual assault on a girl aged nine years is levelled. More pertinently, this is to be seen in the context that the respondent, who is accused of the crime, is the uncle in relation. Entire matter has to be examined in this perspective taking into consideration the realities of life that prevail in Indian social milieu. 53. Para 31 of the report precisely sets out the legal position, regarding the admissibility, and acceptability, of the evidence of a victim of rape, and the advisability of seeking corroboration thereof, before seeking to base conviction, thereon, in the following words: 31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist testimony has to CRL.A. 487/2016 Page 49 of 54 it on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?. The of plea

no substance (See Bhupinder of H.P., (2003) 8 SCC551. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove. Sharma v. State about lack corroboration has (Emphasis supplied) 54. The legal position, therefore, is, quite unambiguous, that the evidence of the prosecutrix, in a case of rape, is ordinarily to be believed, and may form the sole basis for conviction, unless cogent reasons, for the court to be hesitant in believing the statement at its face value, and to seek corroboration thereof, exist.

55. In Moti Lal v. State of M.P., (2008) 11 SCC20 the Supreme Cour held thus: It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. (Emphasis supplied) CRL.A. 487/2016 Page 50 of 54 56. In a similar vein, it was held, in B. C. Deva @ Dyava v. State of Karnataka, (2007) 12 SCC122 as under: The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted. 57. The submission, of learned counsel for the appellant, that the case against his client stood vitiated on account of the delay in lodging the FIR, has only to be urged to be rejected. In cases of sexual assault, especially on minors, delay in lodging of FIR, it is well settled, is, ordinarily, not to be treated as fatal. The following passage, from Mohd Ali @ Guddu v. State of U.P., (2015) 7 SCC272 may be reproduced, in this regard: It is apt to mention here that in rape cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance. The authorities of this Court have granted adequate protection/allowance in that aspect regard being had to the trauma suffered, the agony and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a

conservative social milieu. Sometimes the fear of social stigma and on occasions the availability of medical treatment the psychological inner strength to undertake such a legal battle. But, a pregnant one, applying all these allowances, in this context, it is apt to refer to the pronouncement in Rajesh Patel v. State of Jharkhand [(2013) 3 SCC791: (2013) 2 SCC (Cri) 279]. wherein in the facts and to gain normalcy and above all CRL.A. 487/2016 Page 51 of 54 circumstances of the said case, delay of 11 days in lodging the FIR with the jurisdictional police was treated as fatal as the explanation offered was regarded as totally untenable. This Court did not accept the reasoning ascribed by the High Court in accepting the explanation as the same was fundamentally erroneous. (Emphasis supplied) 58. PW-6 Guddi, the mother of the prosecutrix as, in the present case, cited the trauma suffered by her daughter and by her, the medical treatment which was being administered to her daughter, as well as the efforts, of the parents of the appellant, in thwarting her attempt at obtaining assistance or notifying others about the incident, are factors which resulted in delay in lodging of the FIR. Her testimony, to the said extent, remained undisturbed in cross examination. Even otherwise, the MLC of the prosecutrix, too, records the fact that medical treatment had been administered to her. These factors, including the administration of medical treatment, have been held, by the Supreme Court, in the afore extracted passage from Mohd Ali (supra), to be sufficient to justify the delay in lodging of the FIR, in a case of sexual assault. The delay, in the present case, is, moreover, not so unconscionable, as to vitiate the prosecution, or the consequent conviction and sentencing of the appellant.

59. I am also entirely in agreement with the finding, of the learned ASJ, that the appellant had failed to explain his absence from 5 p.m., when Guddi, along with her son, left him to reach his house with the prosecutrix, at 10 p.m., when he actually reached his house. The onus to explain this period was entirely on the appellant, by virtue of CRL.A. 487/2016 Page 52 of 54 Section 114 of the Indian Evidence Act, 1872, and the appellant has miserably failed to discharge it. I also endorse the finding, of the learned ASJ, that there was no reason for Guddi to wrongly implicate the appellant, especially as she regarded him as her brother. These findings, of the learned ASJ are also, to my mind, unexceptionable, and additionally serve to bring the guilt, for committing the offence, home to the

appellant.

60. In view of the above discussion, I am of the opinion that the impugned judgment of the learned ASJ, insofar as it convicts the appellant, under Section 6 of the POCSO Act, and Section 376 of the IPC, is unexceptionable, and does not call for any interference by this Court.

61. Perpetrators of sexual offences on innocent children are psychosocial deviants, who cannot lay any claim to leniency. It is in the order of nature, and is the sacred right of every living being to blossom from infancy, to childhood, to adolescence and, finally, to adulthood. This order of nature is thrown into violent disarray by the sexual predators of children. The innocence of the prosecutrix in the present case, who had barely savoured the first fragrance of childhood, let alone adolescence, was brutally plundered by the appellant, the deviancy of his act being augmented by the fact that he chose to sodomise her. The trauma that the prosecutrix is bound to suffer, on account of the appellant, is bound to be lifelong, and the learned ASJ errs, therefore, if at all, on the side of leniency, in the matter of awarding of sentence to the appellant. However, as the State CRL.A. 487/2016 Page 53 of 54 is not in appeal against the impugned judgment and order on sentence, I refrain from enhancing the sentence awarded. Conclusion 62. For the aforementioned reasons, the impugned appeal fails and is dismissed.

63. Trial Court record be returned forthwith. JUNE07 2019/HJ C. HARI SHANKAR, J CRL.A. 487/2016 Page 54 of 54

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